THE HIGH COURT

JUDICIAL REVIEW

[2014 703 J.R.]

BETWEEN

JERRARD NESTOR

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

CLARENCE QUINN AND JOHN WALSHE

NOTICE PARTIES

JUDGMENT of Mr. Justice Noonan delivered on the 30th day of July, 2018

1. The applicant is the owner of property situated at 134 College Road, Galway City. The property consists of a three storey dwelling house together with three apartments to the rear. In 2013, the applicant applied to Galway City Council for planning permission to redevelop the property and to retain existing development. In a very brief summary, he proposed to convert the dwelling house into three new apartments and carry out alterations to the existing apartments with associated ancillary works. The application was approved by Galway City Council and against that approval the notice parties herein appealed to the respondent.

2. In its decision of the 3rd March, 2014, the respondent refused permission for the development for the following reasons and considerations stated in its decision:

> "1. Having regard to the nature of development in the area, it is considered that the proposed front (north) elevation would be discordant in relation to nearby and neighbouring structures by reason of excessive height and inappropriate scale, particularly of the staircase feature. Furthermore, it considered that the proposal to locate balconies on the side (eastern) elevation, together with the window features already located in this elevation, overlook the neighbouring property and compromise future development of that property. It is considered that the proposed development would, therefore, seriously injure the residential amenities of properties in the vicinity and would be contrary to the proper planning and sustainable development of the area.
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> 2. Having regard to the provision of private open space balconies at the side boundary overlooking a neighbouring property together with the narrow access arrangement serving six apartments, it is considered that the proposed development would constitute over development of the site, would therefore seriously injure the residential amenities of properties in the vicinity and would, therefore, be contrary to the proper planning and sustainable development of the area."

3. The applicant sought leave to apply for judicial review to this court (McDermott J.) on 24th November, 2014. On that date the matter was adjourned and *ex parte* application for leave came on for hearing before Humphreys J. on the 3rd December, 2014, when it was refused. The applicant appealed to the Court of Appeal against this refusal and by its order made on 11th April, 2016, the Court of Appeal substituted its order extending the time to apply for judicial review and granted leave to the applicant to do so.

4. The applicant, who is a litigant in person, in his statement of grounds dated 24th November, 2014, raises the following issues:

> 1. The respondent's inspector in her report on the application referred to the vehicular access to the rear car park as having a width of 1.3 metres when in fact it is at its narrowest 2.5 metres wide.
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> 2. The inspector referred to the development not meeting a minimum floor to ceiling height of 2.7 metres specified in the building guidelines which relate to new buildings and not existing buildings as is the case here. The inspector treated this requirement as being mandatory rather than a recommendation.
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> 3. The respondent should have issued a split decision granting the retention element.
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> 4. The respondent failed to have regard to Galway City Council's road section report which had no objection to the proposal.

5. In its statement of opposition, the respondent pleads that it is clear from the decision itself that it was not arrived at on the basis of vehicular access being 1.3 metres wide. It accepts that this is indeed an error but pleads that it is an obvious typographical error in circumstances where the actual width is approximately 2.3 metres. This is self-evident from the plans and from the fact that since the average car is 1.7 to 1.9 metres wide, to have 1.3 metres would provide no vehicular access rather than the "narrow" access referred to.

6. Further, the respondent denies that the floor to ceiling height and the guidelines in relation thereto had any bearing on the decision as is manifest from its terms. It further pleads that it is a matter for the Board to determine within its discretion whether a split decision is appropriate and decision to refuse related to the design of the site and not the issue regarding public roads.

7. In support of its opposition, an affidavit was sworn by Chris Clarke, the secretary of the respondent. Mr. Clarke agrees that the reference to the vehicular access being 1.3 metres wide is indeed incorrect but he believes this to have been a typographical error. He avers that from the drawings it can be determined that the width of the access is actually 2.3 metres. The Galway City Council planning report refers to a minimum of 2.1 metres and the applicant suggests that it is 2.5 metres but in any event, it is clear that the inspector's measurement is wrong.

8. Mr. Clarke points to the fact that the Board is an expert body and would not be misled by the erroneous measurement. In particular, he says that it is entirely obvious that the inspector was aware of the correct size because a 1.3 metre passage would not

accommodate even a standard domestic car which is 1.7 to 1.9 metres wide. The concern of the inspector was that the passageway was narrow but not that it was incapable of allowing a car to pass.

9. He disagrees with the applicant's assertion that the 2007 Building Guidelines with regard to floor to ceiling heights do not apply but in any event confirms that the respondent did not rely on any issue in this regard in reaching its decision. Finally, he notes that no evidence is advanced by the applicant in support of the roads issue nor is he aware of any rule of law which would require the Board to give a split decision.

10. None of these averments are contradicted by the applicant who swore a subsequent affidavit on the 29th January, 2018 exhibiting a report from Mr. Padraic Hession, consulting engineer, who was responsible for the original design of the development and the planning application. Mr. Hession's report covers a wide range of issues, the vast majority of which are entirely unrelated to the applicant's statement of grounds upon which the Court of Appeal granted leave to seek judicial review. To that extent, it is irrelevant to this application. Fundamentally therefore, the applicant's contention is that the respondent's decision was arrived at unlawfully by virtue of errors of fact, the first being that the width of the vehicular access was incorrect and the second that the Guidelines regarding floor to ceiling height applied.

11. The onus of proving that the decision was arrived at unlawfully rests at all times upon the applicant and it seems to me that the uncontroverted evidence in this case is that, first, the respondent was not in any way misled by the erroneous measurement and second that the decision was entirely unrelated to any issue regarding floor to ceiling height. As matters stand therefore, I cannot discern any evidential basis for the suggestion that factual errors were made by the respondent which vitiated its decision.

12. The hurdle to be crossed by any applicant seeking to judicially review the decision of a planning authority alleged to have based its decision on erroneous facts and thus acted irrationally, is a high one as explained in the seminal decision in *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 where Finlay C.J. said (at p. 72):

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

13. In my view, the applicant has fallen well short of establishing this criterion. There is no evidence before the court that the respondent arrived at its decision on the basis of either failing to take a relevant consideration into account or taking an irrelevant consideration into account.

14. The threshold to be crossed by an applicant was reiterated in this court (Charleton J.) in *Weston v. An Bord Pleanala* [2010] IEHC 255 where the court observed at para. 11:

> "11. The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere."

15. In summary therefore, the applicant has not discharged the burden of proving in the context of the erroneous measurement that the respondent took account of an erroneous fact or irrelevant consideration in reaching its determination. Similarly, there is no evidence that the issue of floor to ceiling height played any part in the decision of the respondent here again, the onus of proof is not discharged.

16. Finally, no legal authority has been advanced by the applicant for the proposition that there was an obligation upon the respondent to issue a split decision with regard to the retention aspect of the application, nor do I believe that there is such authority or obligation on the respondent. The applicant modified his argument in this regard at the trial into a submission that the respondent had failed to have regard to the fact that parts of the development were unauthorised and others were not because the inspector had not differentiated between the two. However, this is not the ground upon which leave was granted. The applicant clearly made the case that the respondent was obliged under its own Rules to issue a split decision, a contention from which he resiled at the hearing.

17. Finally, there is no evidence to support the proposition that the respondent failed to have regard to a relevant consideration being the local authority's road section report. Here again the applicant has fallen short of meeting the required standard. As counsel for the respondent pointed out, it is clearly referenced in the inspector's report at page seven as is the fact that the Council Roads section had no objection to the development.

18. For these reasons therefore, I must dismiss this application.