Neutral Citation Number [2009] IEHC 560

THE HIGH COURT

2007 389 JR

PATRICK O'CONNOR

AND

CATHAL O'CONNOR

APPLICANTS

AND

CORK CITY COUNCIL

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 17th day of December 2009.

1. Relief sought

1.1 In these proceedings, the applicant seeks leave to apply by way of judicial review for the following reliefs:-

> 1. A declaration that the decision of the respondent of 9th March, 2007, to initiate proceedings to take in charge roads, open spaces, car parks, sewers, water mains or drains at the lands known as Lindville, Blackrock Road, Cork is *ultra vires*, null and void and of no legal effect.
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> 2. An order of *certiorari* quashing the said decision of the respondent of 9th March, 2007.
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> 3. An order restraining further prosecution of the procedure to take in charge the roads, open spaces, car parks, sewers, water mains or drains pursuant to the said decision of 9th March, 2007.
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> 4. In the alternative, a stay on the proceedings relating to the said taking in charge of the roads, open spaces, car parks, sewers, water mains or drains pursuant to the said decision of 9th March, 2007, and/or a stay on the consideration of the submissions made in relation to the proposed taking in charge.

1.2 The parties have agreed that if the court is disposed to grant leave to apply for judicial review, it should then continue to determine the full judicial review in what has become known as a "*telescoped hearing*".

2. The facts

2.1 The first named applicant is the owner of lands at Lindville, Blackrock Road, Cork. The second named applicant is his son. The first named applicant is the principal shareholder and director of Croft Park Builders Limited. That company, the developer, applied for and was granted planning permission by the respondent on 23rd May, 1997, which was upheld on appeal to An Bord Pleanála, on 18th November, 1997, to build a housing estate comprising of 61 houses on the lands at Lindville, subject to seventeen conditions. The original grant of planning permission was subsequently varied by a decision of the respondent dated the 1st December, 1998. Condition 1 stated as follows:-

> *"1. The development shall be carried out in accordance with the house plans received by the planning authority on the 17th day of January, 1997 and the site layout plan received by the planning authority on the 24th day of April, 1997, except as may otherwise be required in order to comply with the following conditions.*
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> *Reason: In the interest of clarity."*

Another condition provided for the lodgement of a cash deposit or bond or other security with the respondent for the purpose of ensuring the completion of the development. That condition read as follows:-

> *"15. Prior to the commencement of the development, the developer shall lodge with Cork Corporation a cash deposit, a bond of an insurance company or other security to secure the provision and satisfactory completion and maintenance until taken in charge by the Corporation of roads, footpaths, water mains, drains, public open space and other services required in connection with the development, coupled with an agreement empowering the Corporation to apply such security or part thereof to the satisfactory completion or maintenance of any part of the development. The form and amount of the security shall be as agreed between the Corporation and the developer or, in default of agreement, shall be determined by An Bord Pleanála.*
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> *Reason: To ensure the satisfactory completion of the development."*

Two bonds were entered into by the developer. The first, entered into on 2nd June, 1998, expired on 31st July, 1999. The second was entered into on 15th May, 2000. The amount of the bond was IR£288,000. The respondent fixed this figure on the basis that it would cover any default on the part of the developer in respect of the completion of the development. As is clear from the above condition, the bond was supplemental to a planning agreement between the developer and the respondent. An agreement was entered into on 7th August, 1998, which provided that in the event of a failure on the part of the developer to install the necessary services, the respondent would be at liberty to do so and

could recover the costs from the developer or the surety.

2.2 Residential development was to take place in the southern two thirds of the site, with approximately one-third of the land, mainly in the northern section of the site, to comprise of open space. The developer built the houses and had carried out substantial works on the public services and roads, pursuant to the terms of the planning permission. However, the company then went into insolvent liquidation, a liquidator being appointed on 27th November, 2000. The respondent called in the bond on 15th January, 2002. Following the institution of High Court proceedings against the bond issuer, the respondent received the sum of €393,619, in full and final settlement of that claim on 22nd July, 2002.

2.3 Meanwhile, on 4th May, 2001, the respondent had instructed its consultant engineers, J.B. Barry & Partners, to put the works necessary to complete the development under the planning permission out to tender. Roberts Civil Engineering Limited, in conjunction with RMS Limited, secured the tender in respect of the services, though subsequently, the contract was assigned by the respondent to only RMS Limited, and began work on 3rd April, 2002. Defects were discovered in the works carried out by the developer and a decision was made to prioritise the completion of works on roads and services to the exclusion of the completion of the landscape works to ensure that the cost of completing the works did not go over budget. This is documented in the final account report of J.B. Barry & Partners into the completion of the works at para 1.4 as follows:-

> *"A significant amount of additional, unmeasured work had to be carried out as the works proceeded and the Contractor experienced some delay because of the poor workmanship and detailing of works previously carried out by the developer of the estate. To ensure that the final Contract Sum remained close to the agreed Contract Sum some elements of proposed work were not carried out, principally landscaping to the development. It was considered prudent to complete all roads and services infrastructure as a priority."*

In particular, defects were found in the foul sewer system. In addition, hazardous material, in the form of old cookers and fridges, together with builders' rubble, was also discovered on the north-eastern portion of the site. It is unknown who was responsible for the dumping of this material. J.B. Barry & Partners instructed RMS Limited not to remove the material but to cover it with 300mm of subsoil and 125mm of topsoil. This action resulted in the contours of the site, as per the planning permission, being altered.

2.4 A problem then arose, in that, the amount of the bond, did not cover the entirety of the works to be carried out. The shortfall paid by the respondent, in the amount of over €50, 000 was broken down as follows in para. 28 of the affidavit of Kevin Terry, Director of Services, Planning and Development of Cork City Council, sworn on 6th July, 2007:-

> *"28. Ultimately, upon completion of the works, the final account was agreed with RMS Limited at €403,685.89 (exclusive of VAT). This left a shortfall (the proceeds of the Bond being €393,619), amounting to €10,066.89, which was paid by the Council, which also paid fees in the sum of €41,087.87, inclusive of VAT, to J.B. Barry & Partners for all works carried out with the completion of the development at the Lindville Estate."*

2.5 The applicants make the case that the respondent did not complete the development in accordance with the terms of the planning permission. The respondent disputes this contention. The applicants point to the failure to complete the landscaping works, the failure to install traffic calming measures, the change in the contours on site and the change in the location and specifications of the drainage compound.

2.6 On 7th July, 2006, the respondent received a request from thirty-eight residents that the estate be taken in charge, in accordance with s. 180 of the Planning and Development Act 2000 ("the Act of 2000"), and s. 11(1) of the Roads Act 1993 ("the Act of 1993"), as part of the lands in the northern section of the development had been fenced off. On 20th October, 2006, a warning letter was served on the first named applicant in response to the residents' letter, indicating that the respondent had become aware that unauthorised use or development "may have been/is being/may be carried out" at Lindville, which did not comply with the Condition 1 in the planning permission, specifically, the landscaping of the lands, and advising it that the carrying out of unauthorised development constituted an offence under s. 151 of the Act of 2000. The first named applicant was invited to make submissions within four weeks.

2.7 Upon receipt of the residents' letter, the respondent considered it was required to initiate the taking in charge procedure. The applicants took exception to this, as the second named applicant, with the consent of the first named applicant, had submitted an application to vary the existing planning permission on 14th December, 2006, in respect of a portion of the lands and they were concerned that the taking in charge process would prejudice this application. The application had sought permission for, *inter alia*, the construction of five detached houses on part of the open space. The applicants' solicitors had written to the respondent objecting to it proposing to take the development in charge on 15th December, 2006. The respondent rejected the second named applicant's application on 14th February, 2007. The first named applicant appealed the respondent's decision on 7th March, 2007, and the second named applicant appealed the same decision on the following day.

2.8 On 9th March, 2007, the respondent published a notice of its intention to take in charge the roads, open spaces, car parks, sewers, water mains and drains at Lindville in the *'Irish Examiner'*. On 30th March, 2007, the applicants' solicitors advised the respondent in correspondence that there were two appeals before An Bord Pleanála, and that the initiation of the s. 180 procedure was premature in light of this. It requested the respondent to withdraw the notice of intention and to cease the procedure pending the outcome of the appeals.

2.9 The applicants make the case that the decision to initiate the taking in charge procedure is premature, that it constitutes an impermissible breach of their property rights and offends the principle of proportionality. They had also sought to argue that the decision of the respondent to initiate the procedure for the taking in charge of the lands amounted to an unlawful interference with the pending application and/or appeals to An Bord Pleanála, but this aspect of their case has not been pursued, given the decision of An Bord Pleanála to refuse their appeals for planning permission.

3. The issues

3.1 Section 50A (3) of the Act of 2000, as inserted by s. 13 of the Planning and Development (Strategic Infrastructure)

Act 2006, provides that a court shall not grant leave to apply for judicial review unless it is satisfied, *inter alia*, that there are "*substantial grounds*" for contending that the decision or act at issue is invalid or ought to be quashed. Thus, the question for decision in these proceedings is whether the applicants have established substantial grounds for contending that the decision impugned should be quashed and if the court finds that there are substantial grounds, the court must then determine finally the issues raised in the judicial review.

3.2 The substantive issue that arises in this case is whether the decision to commence the s. 180 procedure was *ultra vires* by reason of the fact that the development had not been completed in accordance with the terms of the grant of planning permission.

4. The statutory provisions

4.1 Section 180 of the Act of 2000, provides for the taking in charge procedure. The relevant portion of that section states as follows:-

> *"180.—(1) Where a development for which permission is granted under section 34 or under Part IV of the Act of 1963 includes the construction of 2 or more houses and the provision of new roads, open spaces, car parks, sewers, water mains or drains, and the development has been completed to the satisfaction of the planning authority in accordance with the permission and any conditions to which the permission is subject, the authority shall, where requested by the person carrying out the development, or, subject to subsection (3), by the majority of the qualified electors who are owners or occupiers of the houses involved, as soon as may be, initiate the procedures under section 11 of the Roads Act, 1993 .*
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> *(2) (a) Notwithstanding subsection (1), where the development has not been completed to the satisfaction of the planning authority and enforcement proceedings have not been commenced by the planning authority within seven years beginning on the expiration, as respects the permission authorising the development, of the appropriate period, within the meaning of section 40 or the period as extended under section 42 , as the case may be, the authority shall, where requested by the majority of qualified electors who own or occupy the houses in question, comply with section 11 of the Roads Act, 1993 , except that subsection (1)(b)(ii) of that section shall be disregarded.*
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> *(b) In complying with paragraph (a), the authority may apply any security given under section 34 (4)(g) for the satisfactory completion of the development in question.*
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> …
>
> *(4) Where an order is made under section 11(1) of the Roads Act, 1993, in compliance with this section, the planning authority shall, in addition to the provisions of that section, take in charge any open spaces, car parks, sewers, water mains, or drains within the attendant grounds of the development.*
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> *…."*

4.2 Section 11 of the Roads Act 1993 provides:-

> *"11.—(1) (a) A road authority may, by order, declare any road over which a public right of way exists to be a public road, and every such road shall be deemed to be a public road and responsibility for its maintenance shall lie on the road authority.*
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> *(b) Where a road authority proposes to declare a road to be a public road it shall-*
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> *(i) satisfy itself that the road is of general public utility,*
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> *(ii) consider the financial implications for the authority of the proposed declaration,*
>
> *(iii) publish in one or more newspapers circulating in the area where the road which it is proposed to declare to be a public road is located a notice indicating the times at which, the period (which shall be not less than one month) during which and the place where a map showing such road may be inspected and stating that objections or representations may be made in writing to the road authority in relation to such declaration before a specified date (which shall be not less than two weeks after the end of the period for inspection),*
>
> *(iv) consider any objections or representations made to it under paragraph (iii) and not withdrawn.*
>
> *…. "*

5. Counsels' submissions

5.1 Mr. Galligan S.C., for the applicants, submitted that the decision to begin the taking in charge procedure was *ultra vires* the respondent, as the conditions required to be in place for the invocation of that procedure were not in place at the time the order on the part of the respondent was made. The appropriate test for assessing whether the conditions for the exercise of powers under s. 180(1) of the Act of 2000 existed, he submitted, was an objective one and was not referable to the test in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. He relied on the cases of *Kenny v. Dublin City Council* [2009] I.E.S.C. 19 (Unreported, Supreme Court, 5th March, 2009) and *Gregory v. Dun Laoghaire Rathdown County Council* (Unreported, Supreme Court, 28th July, 1997) and *O'Connor v. Dublin Corporation* (Unreported, High Court, O'Neill J., 3rd October, 2000) in this regard which supported the view, in his submission, that the issue of whether there had been compliance with a planning permission or not must be looked at objectively. He also relied on *Ashbourne Holdings Ltd. v.*

*An Bord Pleanál*a [2003] 2 I.R. 114, which was, he submitted, authority for the proposition that when a power was found to be *ultra vires* a planning authority that it was particularly important not to uphold them, in the exercise of the court's discretion so as to safeguard the integrity and transparency of the administration of the planning code. Mr. Galligan submitted that the terms of s. 180 of the Act of 2000, made it clear that the development must be substantially completed "*to the satisfaction of the planning authority*" and must also be "*in accordance with the permission and any conditions to which the permission is subject*." He pointed to four matters, as provided for in the planning permission, which remained at variance with it, namely, the landscaping, the contour levels, the drainage compound and the traffic calming measures.

5.2 Mr. Collins S.C., for the respondent, submitted that s.180 of the Act of 2000, was remedial in nature and not punitive and that it did not interfere with the property rights of the applicants. He contended that it was not a matter for this court to determine whether the respondent's view on initiating the s. 180 procedure was correct, but rather, whether it was unreasonable in the O'Keefe sense. He sought to distinguish the cases of *O'Connor v. Dublin Corporation* (Unreported, High Court, O'Neill J., 3rd October, 2000), *Gregory v. Dun Laoghaire Rathdown County Council* (Unreported, Supreme Court, 28th July, 1997) and *Kenny v. Dublin City Council* [2009] I.E.S.C. 19 (Unreported, Supreme Court, 5th March, 2009), on the basis that the instant proceedings did not concern compliance with planning permission. Mr. Collins advocated a purposive construction of s. 180 of the Act of 2000. He observed that it was the respondent who would bear the burden of maintaining the works and as a result, it was appropriate that it should have a wide discretion in making the decision to take in charge. The applicants had not, in his submission, established any prejudice arising from the respondent's actions. Instead, he argued that the respondent would be there shoulder to shoulder with the applicants in the obligations and duties to maintain the lands.

5.3 Mr. Collins submitted that the terms of s. 180(2) of the Act of 2000, were helpful in reaching an understanding of s. 180(1). In his submission, the requirement in s. 180(1) that the development has been, "*completed to the satisfaction of the planning authority*" was inserted in ease of planning authorities and, as such, an authority could not be required to take an estate in charge unless it had been completed to a point which satisfied the requirements of the authority. In contrast, he noted that where the seven-year period in s. 180(2) had expired and no enforcement proceedings had been brought, a planning authority could be required to take a development in charge, regardless of its state of completion and regardless of the financial consequences. The unreality of these proceedings was apparent, in his submission, as the seven-year period in respect of which s. 180(2) would apply had just expired. He also relied on a decision of the Privy Council in *Ross-Clunis v. Papadopou*llos [1958] 2 All E.R. 23 which concerned the meaning of "*satisfy himself*".

5.4 As to the specific complaints the applicants made of non-completion of the works in accordance with the planning permission, it was submitted that there had been substantial compliance with the terms of the planning permission such that the respondent was entitled to form the view that the development had been completed to its satisfaction. Substantial compliance was sufficient, he argued, and this was clear from the decisions of *Monaghan UDC v. Alf-a-bet Promotions* [1980] I.L.R.M. 64, *Molloy v. Dublin County Council* [1990] 1 I.R. 90 and *Sweetman v. Shell E&P Ireland Ltd* [2007] 3 I.R. 13.

6. "Substantial grounds"

6.1 The complaint made by applicants is that there was no objective compliance with the planning permission in circumstances where their appeals to An Bord Pleanála for variance of that planning permission had failed. It was claimed that there were outstanding works and because of these, the respondent did not proceed correctly under s. 180(1) of the Act of 2000, as the development was not completed in accordance with planning permission. This, in my view, is an unusual complaint when one analyses how it affects the applicants. The burden of tending to and maintaining the areas taken in charge is removed from them and is assumed by the respondent. It would seem that the applicants would be in a better position if the lands were taken in charge. In addition, the invocation of the s. 180 procedure does not adversely affect the first named applicant's ownership of the lands.

6.2 The applicants point to the areas where the development was not completed, or is at variance with the planning permission, as granted. They contend that the works have significantly altered the contours on the land beyond and outside of the terms of the planning permission. They also say the waste material that was buried on site ought to have been removed and that covering over it was an unauthorised use. They point, too, to the plantation or landscaping envisaged in the planning permission that was not completed. They argue that the walls surrounding the drainage compound separate it from the surrounding properties and that it can only be accessed from the inside. In addition, they submit that traffic calming measures were not installed as *per* the original layout plans for the development.

6.3 The respondent says that s. 180 of the Act of 2000, is a remedial measure and that no liability is imposed on the applicants nor have they demonstrated any prejudice to their positions but will, in fact, benefit from the taking in charge procedure. They highlight that, insofar as the issue of liability for an owner or public space goes, that the applicants will enjoy the respondent's support in terms of a shared liability in respect of the obligation to maintain open spaces.

6.4 Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at p.130, outlined the meaning of the "*substantial grounds*" requirement in the following terms:-

> *"What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."*

The Supreme Court endorsed the above statement in *Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, as did this court (McKechnie J.) in *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565. The question arises as to whether the arguments advanced by the applicants are reasonable, arguable and weighty.

7. Section 180 of the Act of 2000

7.1 Section 180 of the Act of 2000, properly construed, in my judgment requires a subjective test to be applied to the question of whether a development has been completed, "*to the satisfaction of the planning authority in accordance with the permission and any conditions to which the permission is subject*". Because the planning authority is undertaking a liability in the taking in charge of a development, it is clear that it must enjoy a wide discretion in circumstances where it will incur an onerous obligation. This can, and indeed, must include a discretion to take in charge a development which may have had an unfortunate history, such as occurred in the this case. The purpose of s. 180 (1) of the Act of 2000, differs markedly from provisions concerning compliance with and enforcement of conditions of a planning permission where objective construction of conditions is appropriate. The effect of taking in charge a development is that no other party is prejudiced other than the local authority. Accordingly, when assessing this question, it must be assessed by reference to the test in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. Finlay C.J. outlined the test as follows 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."*

7.2 Even if I am wrong, in this conclusion as to discretionary nature of s. 180, I am of the view that the outstanding works are of such a minimalist nature as not to be capable of affecting the validity of the decision to take the lands in charge, even if an objective test is applied to determine whether there has been compliance with the planning permission. Substantial compliance with the terms of the planning permission is what is required. The following passage from the judgment of Fennelly J. in *Kenny v. Dublin City Council* [2009] I.E.S.C. 19 (Unreported, Supreme Court, 5th March, 2009) is instructive in this regard:-

> *"18. There will inevitably be small departures from or even many of the plans and drawings in every development. There can be discrepancies between and within plans, drawings, specifications and measurements; there can be ambiguities and gaps. It seems improbable that any development is ever carried into effect in exact and literal compliance with the terms of the plans and drawings lodged. If there are material departures from the terms of a permission, there are enforcement procedures.*
>
> *19. However, planning laws are not intended to make life impossible for developers, for those executing works such as architects, engineers or contractors or for the planning authorities in supervising them. Nor are they there to encourage fine-tooth combing or nit-picking scrutiny of the works.*
>
> *…."*

7.3 Whilst there is an indication in the plans that some kind of traffic calming measure was to be undertaken, there is no evidence of a follow-up on the matter or any requirement for a specific type of measure to be installed. In these circumstances, it cannot be construed as an obligation of the planning permission. I am satisfied that it was well within the competence of the planning authority to reach the conclusion that there had been substantial compliance with the traffic calming measures envisaged given the layout of roads in the estate, which had a calming effect.

7.4 As to the drainage compound, its location changed from straddling between two houses to the garden of house number 37. The boundary walls of the compound were omitted by agreement with the respondent's Drainage Section and an access gate into the rear of number 37 was constructed, for which the respondent gained access. The mere fact that the access gate can only be opened from the inside of garden number 37 does not mean that there was no compliance with the planning permission. The change of the location of the compound constituted a minimal alteration from the scheme as set out in the layout plan and was a well within the sphere of substantial compliance with the terms of the planning permission.

7.5 As to the landscaping of the estate, the actions of a third party did not give rise to a breach of planning permission by the landowner. In order to remedy the situation and to complete the development, it was well within the competence of the planning authority to accept the method adopted to achieve compliance i.e. the introduction of subsoil and topsoil. In reality, the only deviation was the non-planting of shrubs and trees and this deviation was so minimal so as to be capable of being treated by the respondents as well within the scope of substantial compliance.

8. Conclusion

8.1 The applicants' grounds concerning the interpretation of s. 180 had the necessary weighty quality to be considered a substantial ground. Taken in combination with this, so also was the applicants' case in relation to the treatment of the open space. Their complaints about the traffic calming measures and the drainage compound do not, in my opinion, have that weighty character.

8.2 Thus, I would grant leave to the applicants to apply for judicial review, but I have come to the conclusion, as set out above, that I must reject the applicants' submission on the true construction of s. 180 and I also reject the applicants' complaints to the effect that there was not compliance with the planning permission, even if an objective test is applied to assess compliance. Accordingly, I must refuse the reliefs sought in this judicial review.