



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 184

[2015/65]

Ryan P.
Finlay Geoghegan J.
Hogan J.

BETWEEN

MAYO COUNTY COUNCIL

PLAINTIFF/RESPONDENT

AND

PETER McNICHOLAS

DEFENDANT/APPELLANT

JUDGMENT of the Court delivered by the President on 29th July 2015

1. This is an appeal by Mr. Peter McNicholas against interlocutory orders made by the High Court restraining him from (a) using an exit that he created onto the N5 Charlestown bypass; (b) interfering with bollards *in situ* preventing use of the exit; and (c) any further interference with the public road adjacent to his premises at Cuilmore, Swinford, County Mayo pending the plenary trial of the action. The question that arises on the appeal is whether Mayo County Council has made out a sufficient case to entitle it to an injunction.

2. The background to the case is that Mayo County Council carried out road improvement and construction works for the N5 Charlestown bypass between 2005 and 2007. Some of Mr McNicholas's land was the subject of a Compulsory Purchase Order, about which there is some dispute, but that is not the major issue between the parties. The plaintiff's home is located on a local road NM 734 which gave direct access to the N5 until the new road replaced it. The new bypass transected that road and blocked it off completely with a wall of approximately 2m height.

3. There has been an ongoing dispute between Mr. McNicholas and the Council about alternative access from his premises, which was the subject of separate High Court proceedings. In its judgment on 31st of July 2009, the Court refused declarations sought by Mr. McNicholas and his wife condemning the access that was provided for them *in lieu* of the old local road. That decision is under appeal.

Some time in 2010, Mr. McNicholas received information which led him to make enquiries about the status of the old road on which his dwellings located, namely, the NM 734. He discovered that it had been designated as a public road by resolution of the County Council on 19th September 1977. However, the County Council, in its CPO documentation in 2004, had treated it as a private right of way and not as a public way. It had not invoked and operated the statutory machinery that was required to extinguish a public road, but instead had used the procedure appropriate to a private right of way.

4. Among Mr. McNicholas's concerns is in regard to the status of the access road that the Council put in place notwithstanding his objections. The Council informed him that it was a public road which had not yet been taken in charge. Mr. McNicholas was not satisfied with that. He also maintained that the High Court had reached its decision on his case about the adequacy of the access on the basis of contradictory evidence given by the Council. In 2013, he engaged in correspondence with the Council about this matter and asserted that the original local road continued to exist in law as a public right of way, notwithstanding the construction of the Charlestown bypass. He claimed to be entitled to open a gap in the block wall that stopped up the old road. The Council for its part respondent through its solicitors threatening legal action including application for injunctive relief if he went through with his intention as declared.

5. On 19th December 2013, Mr. McNicholas knocked down and removed part of the wall to gain access along the old road and out onto the N5. He wrote to the Council's solicitors in January 2014, telling them what he had done. They responded, threatening proceedings unless he gave undertakings. The Council duly brought proceedings and applied to the High Court for the relief against which Mr. McNicholas now appeals.

The Issue

6. The issue on the appeal is whether the High Court was correct in granting an injunction restraining the defendant from interfering with the public road adjacent to his premises. The plaintiff must establish that there is a fair case to be tried, that the balance of convenience is in favour of an injunction and that damages would not be an adequate remedy: see *Campus Oil Ltd. v. Minister for Industry and Commerce (No. 2)* [1983] I.R. 82.

7. The essential question is whether the County Council has made out a sufficient case to entitle it to an injunction. There could be little argument about the other elements. The Council's affidavits point out the danger represented by an unauthorised opening onto a busy national primary route carried out by a private individual and without any official involvement. Mr. McNicholas disputes this, but a Court could not ignore the obvious safety issues that must inevitably arise.

Affidavits

8. In his affidavit of 25th March 2014, Mr. McNicholas argues that since no application to extinguish or abandon the public right of way over the local road had been made, the Council had a duty under s. 74 of the Roads Act 1993, to protect public rights of way and to remove the obstruction. He sought to establish linkage between the blocking up of the local road and an allegation that the Council had given evidence in the High Court in the declaratory proceedings that the access road was not a public road. This contention, if correct, would mean that Mr. McNicholas did not have available to him the use of any public road.

9. Mr. McNicholas accepted that the Compulsory Purchase Order was confirmed on 10th November 2004, and that notice to treat was served on 31st January 2005, but "no Notice of Entry in accordance with section 80 of the Housing Act 1966 was served on my

family". The grounding affidavit of Mr. Glancy, for the County Council, however, exhibits a letter to precisely the opposite effect. It is dated 23rd May 2005 from Douglas Kelly & Son, Solicitors, Swinford and written on behalf of their clients, Peter and Nancy McNicholas, in relation to the N5 Charestown bypass scheme to Messrs. King & McEllin, Solicitors, Castlebar, whose clients are the County Council. The letter reads:-

"We confirm that we act for Peter McNicholas and Nancy M. McNicholas of Culmore, Swinford, and we note that you act for Mayo County Council.

Our clients note that An Bord Pleanála by order dated the 10th November 2004 confirmed the CPO and they also note that your clients have served notice to treat and notice of entry in respect of the property being acquired from them.

Our clients are not in any way disputing the order made by An Bord Pleanála and are not preventing your clients in any way from taking possession of the property to which you are legally entitled.

All our clients require is that your clients follow the recommendations as set out in the report of the Inspector which said report and recommendations were approved of by the Board and included in the order dated the 10th November 2004 and preserve the trees on the property being acquired from our clients.

There is nothing to prevent your clients abiding by the terms of the order and instructing their contractors in carrying out the work on their behalf to preserve as many of the trees as is possible to do so having regard to the said order.

You might please acknowledge receipt of this letter and confirm that the order in its entirety will be complied with and the trees preserved."

10. Mr. McNicholas maintains that the solicitors did not have authority to write on his behalf in this manner, but whatever he may seek to establish in the course of the plenary hearing in this case, at this interlocutory stage the Court has to accept this letter at face value.

11. Mr. Glancy refers to the issue of Mr. McNicholas's claim to entitlement to use the new access road and to a letter dated 5th December 2013, from the Council's solicitors advising Mr. McNicholas *"that the entire length of the road leading to his private access was a public road having regard to the provisions of S. 11(7) of the Roads Act 1993"*. Furthermore, although it is not mentioned in the letter, as Mr. Glancy acknowledges, he says that Mr. McNicholas is aware that *"the entire portion of the road is also vested in the public by virtue of the Compulsory Purchase Order of 2004, and quite apart from any statutory provision has been dedicated for public use"*.

12. It is apparent, therefore, that this dispute concerns the status of the access road and of Mr. McNicholas as user thereof. His contention is that, insofar as this road is not a public road, his access as of right on a public road has been removed by the blocking of the old local road.

Argument

13. Mr. McNicholas's position is that the Council was wrong in treating the road NM 734 as a private right of way and in purporting to extinguish it on that basis. They should have proceeded in accordance with the statutory method for extinguishing a public right of way under s. 83(1) of the Housing Act 1966. Since they did not do so, Mr. McNicholas was and is entitled to take action to assert his right to use the way. There cannot, accordingly, be an injunction because that would not recognise the continued existence of the public right of way.

14. The Council submitted the road development to An Bord Pleanála on 19th March 2004, pursuant to s. 51 of the Roads Act 1993. It also applied for confirmation of the Compulsory Purchase Order under the Third Schedule of the Housing Act 1966. These were authorised and the CPO entitled the County Council to extinguish the public rights of way therein listed but that did not include local road NM 734. Those matters are not in dispute.

15. In his written submissions, Mr. McNicholas also submits that the EIS submitted to the Bord envisaged direct access from Mr. McNicholas's property onto the N5, and that the modification of the scheme that arose out of the planning enquiry did not authorise the new access road that was created. These matters, however, were considered by the High Court and are not the subject of these proceedings. In the High Court judgment, McGovern J. preferred the evidence of Mr. Glancy on the legality of the accommodation road. Mr. McNicholas points out that the hearing proceeded on the basis that the local road was a private and not a public one, but he maintains that the Council knew at the time what the true position was.

16. The Council's written submissions refer, by way of background, to the dispute over access that led to the High Court proceedings that concluded with the judgment of McGovern J. in which the declarations sought by Mr. and Mrs. McNicholas were refused. On the specific question of the status of the access road now provided by the Council for Mr. McNicholas and his family, it is submitted that s. 11 (7) of the Roads Act 1993 supplies the answer in providing: –

"Any road constructed or otherwise provided by a road authority after the commencement of this section shall, unless otherwise decided by such road authority, be a public road and it shall not be necessary for the authority to make an order under subsection (1) in relation to any such road."

17. The Council describes the Compulsory Purchase procedure that it adopted for the construction of the bypass. It acknowledges that Schedule 2 Part (iii) "mistakenly classified the road 734 NM as a private right of way, pursuant to s. 83 (2) of the Housing Act 1966, and not to extinguish the road is a public right of way, pursuant to s. 83 (1) of the Housing Act 1966". Although that section was repealed by s. 4 and the First Schedule of the Roads Act 1993, the requirements were re-enacted in more elaborate detail in s. 73(1) of that Act so the point remains.

18. The Council does not actually proffer a specific legal mechanism whereby the public right of way in the local road came to be extinguished. In his oral argument, Mr. Butler S.C. for the Council, argued that by adopting the statutory procedure for approval of the road improvement project, and obtaining confirmation therefore, and of the CPO, the result was to authorise the steps that the Council subsequently took. He did not, however, offer any legal authority in support of the position that the procedures and events that took place could give rise to the implication of abandonment of the road or extinguishment of the public right of way. This is not to deny that the factual circumstances give rise to certain obvious practical and immediate concerns, not the least of which is public safety. Neither does it exclude abandonment or extinguishment by operation of law in accordance with common law principles. Hogan J. in his judgment refers to this issue.

19. The Council submits that any private right-of-way that Mr. McNicholas had was extinguished by operation of the CPO. Its contractors went into possession of the land compulsorily acquired and proceeded to construct the new road. In doing so, it proceeded on the basis of the consent given on behalf of Mr. and Mrs. McNicholas by their solicitors and Mr. McNicholas must be bound by the contents of that letter, certainly for the purpose of this application, whatever about any case that he might be able to make at full hearing. And the safety of the road must be a major concern for this Court.

Discussion

20. It is important to remember that the Council does not have to have a good case at this stage or to show that it has a winning hand, so to speak. It is sufficient to demonstrate a fair case. The question is whether there is a fair issue to be tried.

21. It is obvious that the balance of convenience lies in favour of granting an injunction and that damages are not an adequate remedy. Although, as mentioned above, there is no doubt about the urgency and immediacy of the question raised in the case, that is not in itself sufficient to give rise to a fair issue to be tried. Having said that, the fact that Mr. McNicholas has engaged in destruction of public property and created what must at least be considered a potentially serious hazard to motorists, is relevant to the consideration of a fair issue. The Court would be remiss to adopt a lofty, theoretical, consideration without reference to the dangers of unauthorised homemade access to a major road that does not have any of the signage and safety furniture that drivers would expect.

22. The N5 is a busy national highway. It is an offence to interfere with the road or any fence or wall forming part thereof under the Roads Act 1993 – see, in particular, s. 2 and s. 73(10). The Council also points to s. 151 of the Planning and Development Act 2000, which provides that a person who carries out unauthorised development is guilty of an offence. On any view, therefore, the actions of Mr. McNicholas must be taken very seriously.

23. The Council is in difficulties because it cannot prove extinguishment of the right-of-way by statutory means, nor has it demonstrated at this point how that could have come about by operation of law. On the other hand, if the road architecture remains as it is, the fact is that any public right-of-way will cease to exist at some point in time if it has not already occurred. The law cannot countenance the permanent existence of a theoretical right-of-way that is incapable of being enjoyed.

24. Mr. McNicholas does not claim a right that is personal and private to him over and above any other member of the public. Indeed, his own express consent to the works that the Council carried out would appear to debar him from asserting an individual claim sufficient at this stage to justify his actions in claimed restoration of a public right. The wall that Mr. McNicholas interfered with is the property of the Council.

25. In short, Mr. McNicholas's disputes with the Council should be resolved in the manner that he first adopted, namely, by litigation. He may or may not succeed in his appeal against the order of the High Court in his declaration proceedings, but the proper way to proceed, and the only legitimate way, is through the courts or by negotiation. There is nothing to stop Mr. McNicholas reaching agreement with the Council. It is unfortunate that much of this dispute may be traced back to his failure to agree with the Council on the access provision that was under negotiation but which he was unable to accept within the time constraints that applied.

26. It is clear, in my view, that the Council has established a fair case to be tried that Mr. McNicholas was not entitled to take the action he did in purported defence of a public right; to engage in unauthorised development; to breach the provisions of the Roads Act and to interfere with Council property or to create a serious potential public hazard in lawless pursuit of a private grievance.