

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 883 JR]

BETWEEN

GOODWILL HOUSING CO-OPERATIVE SOCIETY LIMITED

APPLICANT

AND

KILDARE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 30th day of April, 2015.

Introduction

1. The applicant seeks an order of *certiorari* quashing the resolution and order of the respondent made on the 30th of September, 2013 extinguishing a public right of way between Moore Avenue and Millfield, Newbridge, County Kildare. This is the primary relief sought and although ancillary declarations are also claimed, they are in substance and effect the same.

Background Facts

2. The applicant is a company registered pursuant to the Industrial and Provident Societies Act 1893 to 1978 and its principle activity is the provision of social housing for rental to, *inter alia*, disabled tenants. The applicant owns a number of houses in a development known as Millfield in Newbridge.

3. The Moore Avenue development was constructed in the mid 1990s and adjoins Newbridge Town Centre, which can be accessed directly by a roadway through Moore Avenue. The Town Centre is to the North of Moore Avenue. About ten years later, Millfield was constructed to the South of Moore Avenue and at a further remove from the Town Centre. Moore Avenue and Millfield are connected by an approximately 40 metre long pedestrian path or walkway ("the walkway") by which pedestrians coming from Millfield can access the Town Centre. There is no vehicular access.

4. The walkway appears to have been constructed in or around 2005. On the 17th of December, 2012, the walkway appears to have been taken in charge along with the Moore Avenue housing estate by the respondent. It was thereby declared to be a public road subject to a public right of way although there is some dispute about this.

5. Local residents began to express concerns about anti-social activities occurring in and around the walkway and as a result, the respondent commenced the procedure required under s. 73 of the Roads Act 1993 to extinguish the public right of way.

6. On the 22nd of January, 2013, the respondent published an advertisement in a local newspaper outlining the proposal, giving information regarding the viewing of relevant drawings and invited the public to make written objections.

7. A significant number of written submissions were received by the respondent, including a detailed submission by Mr. Power, the applicant's secretary and deponent of the grounding affidavit. On the same day, the National Transport Agency also made a written submission to the respondent opposing the extinguishment of the public right of way over the walkway.

8. As a result of receiving a substantial number of submissions and observations from interested parties, the respondent decided to hold an oral hearing into the proposal pursuant to s. 73(1)(d) of the Act of 1993 and appointed Mr. Joe Gorman to conduct it. The oral hearing took place in Newbridge on the 31st of May, 2013, attended by a number of parties, including the applicant, who made further oral representations. In July, 2013, Mr. Gorman prepared a report on the oral hearing for the respondent and made his recommendation in the following terms:

"Having considered all matters raised in the representations however, none were sufficient to outweigh my conclusion that the walkway/right of way is substandard, unlit and backland and unsuitable at this location and should be extinguished."

9. Following the publication of Mr. Gorman's report, the applicant instructed its solicitors to write a further detailed letter of objection to the respondent, notwithstanding that the time for making such objection had expired prior to the publication of Mr. Gorman's report. The respondent's solicitors pointed to what they considered to be a number of errors in the report, including the fact that it made no reference to the submission of the National Transport Agency. They further criticised the report for a "blatant error in law" by Mr. Gorman in referring to the walkway as having been in existence for approximately six years and that it did not form part of the original planning permission for Moore Avenue. They made the point that rights of way are not established by planning permission and there was evidence that in fact a private right of way over the walkway existed since at least 1951. They concluded by saying that if the respondent extinguished the right of way, the applicant would seek to judicially review such decision.

10. Prior to voting on the proposal to extinguish the public right of way over the walkway, at its meeting on the 30th of September, 2013, the members of the respondent council were furnished with a copy of Mr. Gorman's report, together with a further summary of objections and representations received in relation to the proposal which appears to have been prepared by a council official. That summary included a reference to the 18 objections to the proposal by, *inter alia*, the applicant and the National Transport Agency.

11. The respondent's decision is recorded in the minutes of the meeting in the following terms:

"Proposed extinguishment of public right of way between Moore Avenue and Millfield, Newbridge, County Kildare.

The members considered report on the proposed extinguishment of public right of way between Moore Avenue and Millfield, Newbridge, dated 20th September 2013, which had been circulated. Mr. Michael O'Leary set out the salient points of the report including the submissions received, the recommendation from the Kildare Area Committee for the proposal and the recommendation to approve same subject to including a condition that the link road through Newbridge

industrial estate is satisfactorily completed before the extinguishment comes into effect.

The members sought clarity on the proposal and referred to legal advice obtained by the council as to whether the members could condition the closure regarding the link road through the industrial estate. Mr. O'Leary clarified the position and stated that the proposed extinguishment process had been completed in accordance with the statutory requirements.

Resolved. On the proposal of Councillor Browne, seconded by Councillor Kennedy, and with 16 members voting in favour, that the proposed extinguishment of public right of way between Moore Avenue and Millfield, Newbridge, County Kildare, be approved."

12. The applicant was notified of the extinguishment of the public right of way by letter of the 21st of October, 2013 from the respondent.

The Proceedings

13. Leave to bring the within judicial review proceedings was granted by order of Peart J. made on the 25th of November, 2013. A further order was made on the 24th of February, 2014 giving liberty to the applicant to amend the statement of grounds to seek an order of *certiorari*. The grounds upon which relief is sought are set out in paragraph E of the statement of grounds and can be summarised in the following terms:

1. The order/resolution is *ultra vires* the respondent because it is an unwarranted infringement on private property rights, the walkway being privately owned by the developer, Barrack Construction Ltd., in receivership, and is held for the benefit of the owners and residents of Millfield.
2. The order/resolution contravenes the Newbridge Local Area Plan ("NLAP") 2003 that no public right of way would be extinguished.
3. The order/resolution constitutes a material contravention of the Kildare County Development Plan ("KCDP").
4. The works required to extinguish the right of way constitute development that materially contravenes the NLAP and KCDP and is *ultra vires*.
5. The information put before the members of the respondent omitted relevant and material information in two respects, (a) Mr. Gorman's report fails to refer to the sentence in the NLAP stating "no public rights of way will be extinguished" and (b) the report fails to mention the National Transport Agency objection.
6. The letter of notification of the resolution/order of the 21st of October, 2013 gave an inaccurate date and enlarged on the operative part of the order by purporting to give a time frame based on a conditional completion of an alternative right of way.
7. The resolution/order is vague and uncertain as to when it comes into effect insofar as it comes into effect on the occurrence of an event outside the control of the respondent, namely, the completion of a road through an adjoining industrial estate by a third party.
8. The respondent failed to publish the resolution/order in a local newspaper as required by s. 73 of the Roads Act 1993.

14. In its statement of opposition, the respondent pleads the following:

1. It denies that the applicant or Barrack Construction Ltd. have the alleged proprietary interest in the walkway.
2. The decision to extinguish the public right of way does not contravene the NLAP 2003, which refers to the preservation of "existing" pedestrian routes. Since Millfield and the walkway were not constructed until 2005, it was not an existing pedestrian route in 2003.
3. The decision does not contravene the KCDP.
4. The applicant has given no particulars of the plea that the works required to extinguish the right of way contravene the NLAP or KCDP and such contravention is denied.
5. The information laid before the members of the respondent did not omit any material or relevant information.
6. The applicant was properly notified of the decision and any error in the date of the decision recited in the respondent's letter of the 21st of October, 2013 did not prejudice the applicant.
7. The respondent denies that the extinguishment would come into effect on the occurrence of an event outside its control.
8. The respondent admits that it has not published the notice but is not obliged to do so until the right of way is actually extinguished, an event which has not yet occurred.

Submissions

15. Mr. Gibbons SC on behalf of the applicant referred to five planning permissions of relevance to the walkway, although two of these did not feature in the evidence. The applicant's written submissions also referred to events in relation to the planning permissions that did not appear to be supported by any evidence. It was submitted that the Moore Avenue permission was granted to a Mr. Byrne who developed that estate and provided an access to the Millfield lands originally forming part of the curtilage of Moorefield House, a further submission apparently unsupported by evidence. Objection was taken by the respondent to these submissions on that ground.

16. It was submitted that the walkway in question had not been constructed in accordance with the relevant planning permissions and thus could not have been taken in charge by the respondent.

17. The applicant disputed that the walkway was ever a public right of way as there was no evidence of its dedication to the public. It was submitted that it was only completed in 2009 when it became available for use by the Millfield residents as a right impertinent to their beneficial ownership of their property. The relevant planning permissions conferred such a right because they formed part of the title to the land and are expressly provided for by s. 39(1) of the Planning and Development Act 2000.

18. It was submitted that Mr. Gorman's report was flawed in that it failed to take account of relevant planning permissions which had a clear bearing on the existing rights of the applicant and others regarding the walkway.

19. The applicant submitted further that the decision to extinguish was a clear breach of the NLAP 2003 and that "existing" pedestrian routes must be taken to mean a reference to those existing throughout the currency of the NLAP which may reasonably be described as a development plan. As such, the applicant relied on *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, where such plans were described by the Supreme Court as an environmental contract between the Planning Authority and the public. The failure of Mr. Gorman to refer to this specific provision in the NLAP was a further shortcoming in his report. By not giving effect to the NLAP provision regarding existing pedestrian routes, the respondent was in breach of ss. 15(1) and 178(1) of the Act of 2000. The NLAP and KCDP were to be interpreted by reference to the principles discussed in *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527. Mr. Gorman's report was criticised further in failing to mention the National Transport Agency's submission as well as the relevant NLAP provisions.

20. The applicant submitted that Mr. Gorman did not conduct a lawful oral hearing in accordance with the principles of constitutional and natural justice and he considered objections from An Garda Síochána made outside the period provided for in the published statutory notice.

21. The applicant also made submissions as per the statement of grounds with regard to inadequate notice of the decision, same being vague and uncertain as to when it comes into effect and finally a failure to publish the resolution/order in a local newspaper.

22. Mr. Aylmer SC, on behalf of the respondent submitted that many of the applicant's legal submissions related to matters in respect of which leave to seek judicial review had not been granted and should therefore be disregarded. He said there was no evidence that the applicant enjoyed any proprietary rights in relation to the walkway either by way of ownership of the soil or an easement appurtenant to the properties owned by it. The applicant relied on various permissions, several of which were not even canvassed in its own evidence, to suggest that this somehow conferred a right of way on it which had no legal basis. The respondent had fully complied with s. 73 of the Roads Act 1993 in every material respect.

23. He contended further that even if the applicant did have the benefit of a private right of way over the walkway, this was not a bar to the extinguishment of the public right of way.

24. The respondent submitted further that there was no material contravention of the NLAP 2003 in relation to existing pedestrian routes because the walkway did not exist at the time of adoption of the NLAP. There was no vagueness or uncertainty about the decision and in that respect the respondent relied on *McNulty v. Clare County Council* (Unreported, High Court, Charleton J., 28th July, 2011) in which Charleton J. commented that there was nothing wrong with the council in proposing to extinguish a public right of way making that contingent on a subsequent event occurring. It was further submitted that the criticism of the Gorman report was unwarranted in circumstances where it fairly and accurately summarised the submissions for and against extinguishment. Although it did not explicitly refer to the National Transport Agency's submission, the members of the respondent were made aware of it by the accompanying summary.

The Roads Act 1993

25. Insofar as relevant to these proceedings, s. 73 provides as follows:

73.—(1) Where a local authority proposes to extinguish a public right of way it shall—

(a) publish in one or more newspapers circulating in the area where the public right of way proposed to be extinguished 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 public right of way may be inspected and stating that objections or representations may be made in writing to the local authority in relation to such proposal before a specified date (which shall be not less than two weeks after the end of the period for inspection) and stating that persons making such objections or representations may make a request in writing to state their case at an oral hearing conducted by a person appointed by the local authority for that purpose,

(b) affix a copy of such notice in a prominent position at each end of the public right of way proposed to be extinguished and leave it in place for a period or periods which shall in aggregate be not less than fourteen days,

(c) consider any objections or representations made to it under paragraph (a) and not withdrawn,

(d) if it considers it appropriate, afford an opportunity to persons making objections or representations and who so request in writing to state their case at an oral hearing conducted by a person appointed by the local authority and consider the report and any recommendation of the person so appointed.

(2) (a) A local authority may make an order extinguishing the right of way specified in the notice published under subsection (1) (a), or part thereof.

(b) A local authority shall not make an order under paragraph (a) until it has complied with subsection (1)...

(4) (a) An order made under subsection (2) may—

(i) specify a date on which the extinguishment shall come into effect,

(ii) specify conditions (including conditions relating to the recovery of the costs referred to in subsection (12)) which shall be complied with before the extinguishment comes into effect.

(b) Where an order extinguishing a public right of way made by a local authority or an order approved by the

Minister with or without modifications or conditions does not specify when the extinguishment shall come into effect, the extinguishment shall come into effect—

(i) in the case of a local road, from the date on which the order is made by the local authority,...

(6) A local authority shall, without prejudice to any existing private right of way, ensure the carrying out of any works necessary—

(a) to effect the extinguishment of a public right of way under this section,...

(7) A local authority shall, as soon as may be after the date on which a public right of way has been extinguished, publish notice of the extinguishment in the newspaper or newspapers in which notice of the proposed extinguishment was published under *subsection (1) (a)* and shall notify in writing any person who made written objections or representations to it in relation to such extinguishment."

Discussion

26. There is little doubt in my view that the applicant in its submissions seeks to advance a number of grounds in respect of which leave was not obtained from the court. Furthermore, its position has changed in a number of significant respects. Prior to the making of the respondent's decision under challenge, the applicant made submissions and observations on at least three occasions. First, it made a written submission on the 14th of March, 2013, secondly, it made submissions at the oral hearing on the 31st of May, 2013 and thirdly, it made further submissions through its solicitors on the 13th of September, 2013. At no time prior to the institution of these proceedings was it suggested that either the walkway was not a public right of way or it was not in fact taken in charge by the respondent. Mr. Power, in his written observations of the 14th of March, 2013, repeatedly referred to the existing public right of way. Similarly, his solicitors, on the 13th of September, 2013, said:

"The right of way at Moore Avenue is now a public right of way and thus it is the responsibility of the council to ensure it is lit and made safe."

27. In the same letter, the applicant's solicitors also say:

"Indeed the recent tarmacing of the right of way, required by Kildare County Council, is an acknowledgment that the right of way is a public right of way. I believe the work was required by the owner as part of taking in charge the right of way."

28. It is therefore surprising to find the following in the applicant's written submissions in these proceedings:

"It is not accepted that the walkway or pedestrian way from Moore Avenue to Millfield is a public right of way and there is no evidence of its dedication to the public by its then owner, Paddy Byrne."

29. The applicant also seeks to challenge that the walkway was taken in charge by the respondent despite the clear statement to the contrary in the letter from its solicitors previously referred to.

30. Quite apart from introducing new grounds, the applicant in its submissions makes an impermissible attempt to introduce facts in respect of various planning permissions and developments on foot thereof which is not the subject of any evidence before the court. This appears to be done for the purpose of demonstrating that various planning permissions have had the effect of in some way creating a right of way in favour of the grantees thereof over the walkway and by extension the applicant.

31. Reliance was placed in that regard by the applicant on s. 39(1) of the Planning and Development Act 2000, which provides that the grant for planning permission shall enure for the benefit of the land and all persons for the time being interested therein. The applicant argues that the planning permissions are part of its title as if that can in some sense confer a proprietary interest in the land at issue.

32. As the applicant's own solicitors stated in the letter of the 13th of September, 2013, rights of way are not established by planning permission. That is a correct statement of the law. A planning permission may authorise land to be used in a particular manner but cannot create an interest in land.

33. It seems to me that no evidence has been adduced by the applicant to demonstrate any proprietary interest in the walkway whether by way of ownership of the subsoil or easement. On the one hand, the applicant claims to have rights by virtue of its acquisition of the properties from Barrack Construction Ltd., whilst on the other hand claiming that the walkway was owned by Mr. Byrne.

34. In any event, all of this is in my view of limited relevance. If the applicant does have some proprietary interest in the walkway, that interest cannot be effected by the right of the public to pass and repass over the walkway nor can it be effected by the extinguishment of the public right of way by the respondent. Thus, if by the extinguishment of the public right of way, the respondent were to close off access to the walkway and exclude the applicant and its licensees from using it, the applicant would be perfectly entitled to seek the appropriate injunctive relief if it is in a position to establish its title. The practical consequence of that could be, for example, that if the respondent put a locked gate across the right of way, it might have to furnish a key to the respondent. However, none of that can form a basis for challenging the validity of the decision in issue here.

35. As already mentioned, many of the applicant's complaints herein are directed at Mr. Gorman's report. It is alleged that he failed to take account of relevant planning permissions, he failed to consider relevant parts of the NLAP 2003, he failed to refer to the submission of the National Transport Agency and he failed to conduct the oral hearing in accordance with natural and constitutional justice. Some of these points are made in the applicant's solicitor's letter of the 13th of September, 2013, which is in essence a detailed critique of Mr. Gorman's report. To the extent that the same arguments are repeated in these proceedings, they appear to me to amount to a collateral attack on Mr. Gorman's report in circumstances where he is not a party to these proceedings. It may be of significance that by the time the applicant sought the leave of the court to bring these judicial review proceedings on the 25th of November, 2013, they were already out of time to seek to judicially review Mr. Gorman's report.

36. Turning now to the ground that the respondent's decision contravenes the NLAP 2003 commitment regarding existing pedestrian

routes being preserved, I am satisfied that this cannot refer to the walkway as even on the applicant's case, it did not exist in 2003 when the NLAP was adopted.

37. With regard to grounds E 3 and 4, I am satisfied that the applicant has not established any basis for suggesting that the decision in issue or any works consequent thereon constitute a material contravention of either the KCDP or the NLAP. In relation to ground E 5, the fact that Mr. Gorman's report does not refer to the preservation of existing pedestrian routes is of no relevance for the reasons already explained. The fact that his report does not mention the objection of the National Transport Agency does not mean that he was not entitled to reach the conclusion he did. There was no obligation on Mr. Gorman to slavishly set out every single item of correspondence and objection he had regard to in coming to his conclusion nor can it be said that the members of the respondent were in any way misled having regard to the fact that the executive summary of objections explicitly referred to the National Transport Agency whose objection was available on request.

38. Ground E 6 relates to the fact that the letter of notification dated the 21st of October, 2013 of the respondent's decision of the 30th of September, 2013 erroneously gave the date of that decision as being the 13th of September, 2013. Nothing turns on this as the applicant was sent a copy of the decision in any event and no prejudice accrues to the applicant arising from this trivial error.

39. I am also satisfied there is no substance to ground E 7 which alleges that the decision is vague and uncertain because the extinguishment comes into effect on the occurrence of an event outside the respondent's control, namely, the completion of a road. The road in question must be completed to the satisfaction of the respondent before the extinguishment takes effect and therefore it cannot be said to be outside the respondent's control. Finally, with regard to E 8, there has been no failure of publication pursuant to s. 73(7) of the extinguishment of the right of way because it has not yet been extinguished.

Conclusion

40. For the foregoing reasons, I am satisfied that the applicant has not made out any of the grounds upon which leave was granted in this case and I will accordingly dismiss this application.