

THE HIGH COURT

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI
 AND IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS
 AND IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT)
 ACTS 1963 - 1976
 AND IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT)
 REGULATIONS 1977
 AND IN THE MATTER OF THE COURTS (ESTABLISHMENT AND CONSTITUTION) ACT
 1961
 AND IN THE MATTER OF THE RULES OF THE SUPERIOR COURTS
 AND IN THE MATTER OF ARTICLE 43 OF BUNREACTH NA HEIREANN



BETWEEN:- THE STATE (AT THE PROSECUTION OF
 ADA K.B. BOYD) Prosecutrix

and

AND BORD PLEANALA Respondent

Judgment of Mr. Justice Murphy delivered the 18th day of February, 1983.

On the 24th day of June, 1982 the Cork County Council, as Planning Authority, granted planning permission to Chemibiotic (Ireland) Limited (the applicants) for the erection of a substantial chemical plant at Brinny, Innishannon, County Cork.

On the 1st day of July, 1982 the prosecutrix, who resides at Brinny Glebe not far from the site of the proposed development and who had unsuccessfully opposed the present and earlier applications, appealed this decision to An Bord Pleanala (the Board).

The grounds of the appeal are set out in a letter dated the 16th July, 1982 from the prosecutrix's solicitor to the Board but it is clear

from that letter, and indeed the evidence given before me by Mr. John Stewart, that the main objection of the prosecutrix to the granting of the permission was the danger which she apprehended that the draw off of water required for the purposes of the proposed chemical process would cause subsidence and consequent damage to her residence.

In late July or early August, 1982, the Board forwarded to the solicitors on behalf of the prosecutrix an impressive report prepared by Mr. Kevin T.C. Cullen M.S.C. The avowed purpose of this report was to provide information regarding the effect of pumping from production wells on the stability of Brinny Glebe. The very fact that this report was commissioned by the applicants - quite apart from any interpretation which may be placed on its contents - makes it clear that the concern expressed by the prosecutrix was not wholly fanciful.

In any event Messrs. Donal T. McCarthy & Co. the solicitors on behalf of the prosecutrix wrote to the Board on the 23rd August enclosing therewith a copy letter from Mr. Stewart, the architect engaged by the prosecutrix. The comments made by the architect and so transmitted to the Board made it quite clear that the prosecutrix did not regard the Cullen report - certainly in the form in which it had been presented - as allaying the reasonable fears of the prosecutrix. Apart from the particular

3.

comments which Mr. Stewart made, he indicated the need to obtain a more specialised expert advice to deal with the matter but as a first step he drew attention to the necessity of obtaining certain information which appeared to have been omitted from the Cullen report. The solicitors in their letter of the 23rd August, 1982 at the outset make that point in the following terms:-

"We note that this report (the Cullen report) does not have attached to it the sections and appendices referred to in the report and without the same the report is not of much use to us. Please arrange to forward these to us as soon as you can to enable us to consider same".

It may be said immediately that the failure to provide the sections and appendices in the Cullen report with the copy originally provided had no sinister connotations. In fact those sections and appendices were included only in a more comprehensive report which constituted an environmental study and it seems clear that this point had not been adverted to.

However it does seem clear beyond dispute that at the end of August, 1982 the Board through their officers were aware that the prosecutrix was seeking to make a case on the appeal in which she had a bona fide belief

and indeed which was supported at least to some extent by her professional advisers. Even more important is the fact that the prosecutrix herself believed and was entitled to believe that the Board recognised that the question of water withdrawal was material to their decision on the appeal.

It is impossible not to conclude from the correspondence that the prosecutrix and her advisers were awaiting and expecting a reply to the letter of the 23rd August, 1982. Indeed a reminder was sent on the 21st September, 1982 repeating the request for the information already referred to. Unhappily that letter was not received by the Board until the 28th September on which date, by an unhappy coincidence, the Board issued their decision on the matter. Whilst the Board in their reasons explained that they were "unable to determine on the evidence available to it whether or not development which has already taken place on the appeal site has caused serious structural damage to the appellants adjoining property 'or' whether a continuance of activity on the appeal site would result in further damage to the appellants property" they went on to grant the permission partly on the basis that the then existing permission related to substantially the same industrial process. The Board further expressed the view that the issue in relation to the alleged structural damage to the Glebe house should be resolved elsewhere "and should not be permitted to govern its decision".

5.

Whilst it is true that planning permission does not confer a licence on the grantee relieving him from the obligation which he owes in tort to his neighbour not to cause unlawful damage to the premises which he owns or occupies, that does not mean that the possibility of such damage takes the matter out of the sphere of planning considerations. It may have been - even in the particular circumstances of the present case - that a stronger, more detailed and more authoritatively supported submission on behalf of the prosecutrix would have led the Board to a different conclusion. I am not concerned as to whether or not that would have been the result but it seems to me that it must be accepted that such was a real possibility. Accordingly the failure - and I have no doubt that it was entirely unintentional - by the Board either to furnish the prosecutrix with the required information or to afford her an opportunity of making a final submission meant that the appeal was not conducted in accordance with the minimum standards of fair procedures guaranteed by the Constitution.

In the circumstances it seems to me that the Conditional Order must to be made absolute and the cause shown disallowed.

As to the consequences of the order made herein, I would propose to follow the procedure indicated by the President of the High Court in the Genport Case (unreported judgment dated the 1st February, 1982) and to

direct the Board to make available for inspection by the prosecutrix the sections and appendices referred to in the Cullen report together with the environmental study supplied or commissioned by the Industrial Development Authority within one week from the date hereof and to allow the prosecutrix a fixed period - I would suggest a period of four weeks - within which the prosecutrix will make her full and final submission to the Board in relation to the subject matter of the appeal.

Thomas D. Munk

11/4/83.