

THE HIGH COURT



OWEN CARTY AND CARTY CONSTRUCTION COMPANY LIMITED

Plaintiffs

and

DUBLIN COUNTY COUNCIL

Defendants

Judgment of Mr. Justice Barrington delivered the 6th day of June 1984

This is an interlocutory application.

In the main action, which is still pending, the plaintiffs claim a mandatory injunction directing the defendants to issue to the plaintiffs a notice of approval for the purposes of the defendants building bye-laws in respect of the plans and specifications lodged with the defendants building control department for six bungalows at the Sand Holes, Carpenterstown Road, Castleknock in the County of Dublin, Register Reference RA 1386 and PC No. 12729. They also seek certain declarations and damages for breach of statutory duty.

In the present motion they seek an order directing the defendants forthwith to issue to the plaintiffs a notice of approval for the purposes of the defendants building bye-laws in respect of the plans and specifications lodged with the defendants building control department for six bungalows at the Sand Holes, Carpenterstown Road, Castleknock, in the County of Dublin Register Reference RA 1386 and

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PC No. 12729.

The background to the case is a complex and unfortunate one.

In the year 1971 the first named plaintiff purchased a plot of land known as the Sand Holes, Carpenterstown Road, Castleknock, in the County of Dublin and was, in due course, registered as the full owner thereof. The land is comprised in Folio 19250 of the Register County of Dublin.

When the lands were purchased they had outline planning permission for the erection of two bungalows drained by septic tanks.

The second named plaintiff which is controlled by the first named plaintiff's family and is a construction and engineering company then applied for outline planning permission for the erection of six bungalows to be drained to a public sewer which runs under the public road fronting the said site. Outline planning permission was refused by the planning authority but was granted by the Minister for Local Government by his order dated the 9th February, 1977. The permission was subject to three conditions. The second condition was in the following form -

"The developers should pay a sum of money to the Dublin County Council as a contribution towards the said Council's expenditure

"on the providing of a public water supply and piped sewerage facilities in the area. The amount to be paid and the time and method of payment shall be agreed between the developers and the said Council before the development is commenced, or, failing agreement shall be as determined by the Minister for Local Government."

The reason given for this condition, which was accepted by the plaintiff, was that the provision of such services in the area by the Council would facilitate the proposed development. In the circumstances it was considered reasonable that the developer should contribute towards the cost of providing the services.

On the 22nd December, 1977 Carty Construction Limited applied for approval for the erection of six bungalows on the said site and also for bye-law approval of the detailed plans and specifications of the said six bungalows.

By notice dated the 19th day of May, 1978 the Planning Authority notified Carty Construction Limited of its decision to refuse full planning permission. One of the reasons given for the refusal was that the foul sewer system to which the applicant proposed to connect was not in fact a public sewer but was a drain serving

specified cottages under a specific drainage agreement.

By notice dated the 21st February, 1978 the Council withheld bye-law approval for the development complaining that adequate drainage details and adequate structural details had not been submitted. The disapproval notice however contained a note advising the applicant to consult with the Building and Development Control Section of Dublin County Council at 4 Coolock Lane, Santry.

On the 17th August, 1978 Carty Construction Limited again applied for approval for the erection of six bungalows on the said site and also for bye-law approval for the detailed plans and specifications of the said six bungalows.

By notice dated the 16th October, 1978 the Building Control Department of the County Council refused bye-law approval giving as its reasons that the proposals for foul drainage were not acceptable and that insufficient information had been submitted. It again advised the applicant to consult with the Sanitary Services Department at 4 Coolock Lane, Santry.

On the same date, id est on the 16th October, 1978, the Planning Department wrote to the applicants looking for further information in relation the planning application. The Department's

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letter noted that the proposed development involved connections into a drain and not into a public sewer. It asked the applicant to submit written evidence to the satisfaction of the County Council Sanitary Services Engineer to indicate his ability to connect into a public sewer. It advised the applicant to consult with the Sanitary Services Engineer with a view to determining the feasibility of making connection to a suitable sewer and obtaining the necessary authorisation.

The plaintiffs did consult with the defendants as requested and understood that the problem was that the sewer running under the public road fronting the site was a private drain and not a public sewer. Subsequently this problem was resolved and the drain was taken in charge and deemed to be a public sewer.

By letter dated the 24th November, 1978 the plaintiffs' architects reapplied for bye-law approval in respect of the development. Their letter was addressed to the Building and Development Control Section at 4 Coolock Lane, Santry, and bore the same references as the disapproval notice of the 16th October, 1978 withholding bye-law approval. The letter was headed "Re Proposed Six Bungalows at the Sand Holes, Carpenterstown Road, Castleknock" and the text of the letter was as

follows -

"With reference to your disapproval notice dated the 16th October, we are now reapplying for building bye-law approval. Please find enclosed one copy of letter from the Deputy County Engineer, Sanitary Services Department in connection with the drainage services for this development."

The enclosed letter from the Deputy County Engineer referred to the problem of connection to the private drain as having been "resolved" inasmuch as this drain had now been taken in charge and was to be deemed to be a public sewer. The letter added the following sentence -

"The question of the extension of the Corporation drainage agreement is, therefore, the only matter in question in relation to the construction of the six houses in question."

Carty Construction Limited has no record of receiving any reply to the said application for bye-law approval and it does not appear that any reply was in fact sent.

Meanwhile Carty Construction Limited proceeded with their planning application and on the 24th November, 1978 submitted a copy of the said letter from the Deputy County Engineer, Sanitary Services, dated

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October, 23rd, 1978, as further information in the planning application.

On the 26th January, 1979 the planning authority refused planning permission for the erection of the said six bungalows giving as its reason that there was no public piped sewerage facilities available to serve the proposed development as the drainage for the area was to a Dublin Corporation sewer under an agreement between the County Council and Dublin Corporation and that the proposed development could not discharge into the Corporation sewer due to lack of capacity. It added that the proposed development was for that reason premature.

Carty Construction Limited, by letter dated the 16th February, 1979, appealed this decision to An Bord Pleanala and An Bord Pleanala by order dated the 4th January, 1980 reversed the Planning Authority's decision and granted full permission subject to certain conditions. The Board in its order noted that the principle of the proposed development had already been accepted by the outline permission of the 7th February, 1977. The Board added that no objection could be seen to the details of the development provided that the conditions specified in its order were complied with. Condition No. 2 in this order was in effect a repeat of the second condition in the Minister's

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order granting outline permission of the 7th February, 1977 to wit that the developer was to pay a sum to the County Council as a contribution towards the provision of a public water supply and piped sewerage facilities.

Carty Construction Limited discussed with officials of the County Council the appropriate sum to be paid by Carty Construction Limited as a contribution under Condition No. 2 and a sum of £1,025-00 was agreed and paid. On the 22nd September, 1980 an official of the County Council wrote to Carty Construction Limited stating -

"I wish to inform you that the Council has accepted your cheque in the sum of £1,025-00 in full compliance with Condition No. 2 of An Bord Pleanála's Order dated the 4/1/80."

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Previously Carty Construction had, on the 16th October, 1972, made a contribution of £200-00 in full compliance with Condition No. 6 of the original planning permission dated the 12th November, 1970.

The plaintiffs now felt free to proceed with the development.

In August, 1983, they proceeded to clear the site and to dig the foundations for six bungalows in accordance with the planning permission.

They advertised the bungalows for sale and accepted some deposits.

But a Building Inspector employed by the defendants visited the sites, said there was no record of bye-law approval having been issued in respect of the development and ordered the developers to stop work immediately.

On the 26th August, 1983, Carty Construction Limited again applied for bye-law approval for the development but, on the date of the institution of these proceedings on the 29th November, 1983, had received no ruling on this application.

I have great sympathy with the plaintiffs who are a family building company in a small way normally employing some thirty men. As a result of the work stoppage they have had to let their workmen go and now have only one man employed on the site in a maintenance capacity. The question arises however of what relief they can get on this interlocutory motion.

The plaintiffs' solicitors in a letter to the County Council dated the 27th October, 1983 put the matter as follows -

"You are referred to the applications for building bye-law approval dated the 24th November, 1978 and 26th August, 1983 lodged by our clients' architects, Messrs Conroy, Manahan and

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"Associates, Maryland House, 20/21 South William Street,
Dublin 2. Not having received the bye-laws approvals sought
we are now instructed to call upon you to furnish the appropriate
notice of approval within the next seven days to enable our
clients to proceed with the building of these bungalows
bringing to your notice that the construction work has now been
held up for some considerable time resulting in considerable loss
and damage to the company which is continuing."

THE LAW

Mr. O'Sullivan who appeared for the plaintiffs in the application
before me put his case on two alternate bases -

1. First he said that the principle and many of the details of
the proposed development were approved by An Bord Pleanala
after they had adverted to the drainage problem and that it
was not therefore competent for the County Council to
withhold bye-law approval for any matter which had been
approved by the Board.
2. Secondly he submitted that in the circumstances of this case
the developers had acquired bye-law approval by default or,
alternatively, they no longer required it.

Mr. Smith, who appeared for the County Council, submitted that Mr. O'Sullivan's first submission is not formally correct because the obtaining of planning permission does not, on its own, and without more, authorise the commencement of development. See Section 26 sub-section 11 of the Planning and Development Act, 1963.

Mr. Smith's submission is formally correct. As the late Mr. Justice Walsh pointed out in his book "Planning and Development Law" 1979 Edition, page 49, bye-law approval and planning permission are two separate and distinct things. Bye-law approval would usually be concerned merely with the detailed implementation of matters permitted by the planning permission. It should therefore be possible for the developer to meet, within the ambit of the planning permission, the detailed requirements imposed by the local authority under the bye-laws. If the local Authority imposes detailed requirements which the developer cannot reasonably be expected to meet a question may arise as to whether the bye-law authority is validly exercising its powers or is invalidly seeking to frustrate the purpose of the planning permission.

The present is an interlocutory application and even though I have heard oral evidence as well as evidence on affidavit, it would be wrong of me to reach a definitive conclusion on the facts. A mandatory injunction may, of course, be granted at the inter Court copy stage but only in

exceptional circumstances (see Campus Oil .v. Minister for Industry and Energy Ors 1984 I.L.R.M. Vol 4 No. 2 p.45)

The County Council appears to have had two problems in relation to the drainage of these premises.

The first problem was that the drain into which the developer proposed to drain the premises was a private drain and not a public sewer. This problem was overcome when the drain in question was taken in charge and deemed to be a public sewer. This matter is referred to in the letter of the Deputy County Engineer Mr. Brazil dated October 23rd, 1971

But there is another problem also referred to in that letter.

This is that the County Council sewer into which it was proposed to drain the premises was itself drained by a sewer and outfall under the control of Dublin Corporation. The County Council had an agreement with Dublin Corporation under which Dublin Corporation had agreed to accept sewerage from certain parts of County Dublin. The developers lands were near to - but outside - the lands from which the County Council was authorised to discharge sewerage into the Dublin Corporation sewers. Moreover the situation appears to be different from the situation which notionally arose in Dublin County Council .v. Short (1983 I.L.R.M. Volume 3, No. 9, page 377). It is, according to the County Council witnesses who gave evidence before me, not merely a question of the County Council's

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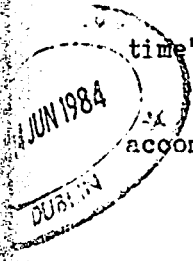
existing sewerage pipe being committed to drain other areas; it is they say, already overloaded with the result that, at peak hours, foul sewer, occasionally overflows into the River Liffey. The plaintiffs submit that the additional sewerage from the proposed six new bungalows would be minimal and that, in any event, the statutory duty to drain the area rests on the County Council in accordance with the provisions of Section 17 of the Public Health Act 1878. In any event they say that there are matters which ought to have been taken into consideration, and were taken into consideration, by An Bord Eleanala when they decided to grant full planning permission for the erection of the bungalows.

Mr. Thomas Doherty, the Senior Administrative Officer, of the County Council, in his affidavit sworn herein, says that design work is in progress on a scheme which will improve the sewerage system in the Lucan area and that when this work is completed "in three to five years time" it will create spare capacity in the Liffey Valley sewer to

accommodate the foul discharge from the plaintiffs' site.

By that time the plaintiffs allege that their company may be out of business and their planning permission spent.

In these circumstances it seems strange that the County Council accepted from the plaintiffs a contribution towards the drainage of the



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lands. I have, as I said, great sympathy with the plaintiffs.

Nevertheless if the facts deposed to by the County Council's witnesses were borne out in evidence at a plenary hearing the case would clearly not be one for a mandatory injunction. For this reason it appears to me that it would be wrong for me to interfere by a mandatory injunction at this interlocutory stage when the effect of granting such an injunction would be to determine the central issue in the case.

However Mr. O'Sullivan has another point arising out of the alleged failure on the part of the County Council to deal with the developers applications for bye-law approval dated respectively the 24th day of November, 1978 and the 26th day of August, 1983. The effect was, Mr. O'Sullivan submits, to give him bye-law approval by default.

The County Council says that the plaintiffs' letter of the 24th November, 1978 was at all times treated by the Council as a reply to the Council's letter of the 16th October, 1978 in the planning matter. This seems strange as the letter is addressed to the Building and Development Control Section - not to the Planning Department and the letter consists of two sentences only of which the first contains the words "we are now reapplying for building bye-law approval".

Moreover the Council says that no plans drawings or sections, as required

by the Dublin County Council building bye-laws, accompanied the letter and that the letter was not therefore a valid "application" for bye-law approval. The developer admits that no plans, drawings or sections did in fact accompany the letter but they say that this was not necessary because the Building and Control section already had them in relation to the plaintiffs' earlier application for bye-law approval which had been disallowed. But the earlier application had been disallowed by notice dated the 16th October, 1978 not only because of the drainage problem but also because "insufficient information" had been submitted. There is clearly an issue between the parties on this point which would have to be resolved at a plenary hearing.

However even assuming that the plaintiffs are correct in this point I don't think it means that they have obtained bye-law approval by default or that the County Council is obliged to issue a formal approval or the Court competent to direct it to do so. Under Section 26, sub-section 4 of the Local Government (Planning and Development) Act 1963 a planning authority which fails to deal with a planning application within the prescribed time is deemed to have granted a planning permission. But there is no provision in Sections 41 and 42 of the Public Health Act 1878 providing that a sanitary authority which fails to deal with an application

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for bye-law approval in time is, at the expiration of that time, to be deemed to have granted bye-law approval. The penalty for failure so far as the sanitary authority is concerned would appear to be that if they do not signify their disapproval within the prescribed time they cannot afterwards object to the building being erected according to the plans submitted (Masters .v. Pontypool Local Government Board) 9 Chancery Division page 677.

In all the circumstances I do not think that this is a proper case for the Court to intervene by way of Interlocutory Mandatory Injunction. I will accordingly dismiss the plaintiffs' application.

John Bz
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