Neutral Citation No. [2010] NIMag 5

Ref:

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **05/10/10**

Petty Sessions District of Ards

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The Planning Service

Complainant;

And

William Young
Roberta Young

Defendants.

District Judge (MC) White

Introduction

[1] The defendants are prosecuted for one offence of breach of a planning enforcement notice, the particulars being that they:-

> "on the 23rd February 2005 and continuing daily thereafter ….. following conviction for the same offence on 22 February 2005 at Newtownards Court House, did contrary to Article 72(1) of the Planning Amendment Northern Ireland Order 1991 as amended by Article 9 of the Planning Amendment Northern Ireland Order 2003 fail to take the steps required of [them] by the Enforcement Notice dated 9th January 2004, a copy of which is attached herewith, for land to the west of 39 Carrowdore Road Greyabbey …"

[2] The case came on for hearing at Ards M.C. on 11 August 2010, that is over five years after the offence is alleged to have commenced, and over six years after the Enforcement Notice issued, and some explanation for that delay is appropriate by way of background.

[3] On 23 December 2000, the defendants made an application for planning permission to build a house on land to the west of 39 Carrowdore Road Greyabbey. The key events thereafter are set out in a judgment of the

Court of Appeal in In The Matter of an application by William Young for Judicial Review [2007] NICA 32. I have edited their chronology to remove matters irrelevant to this case, and include additional events which are relevant.

[4] The history is as follows:-

- On 23 December 2000 an initial application for planning permission was made by the respondent;

- In September 2001, since the Planning Service had not determined the application, an appeal to the Planning Appeals Commission was launched;

- On 8 March 2002 full planning permission was granted subject to a number of conditions;

- In May 2003 building work commenced;

- On 22 July 2003 the Planning Service wrote to the respondent outlining a number of breaches of planning conditions;

- In January 2004 the enforcement notice giving rise to these proceedings was issued, requiring the defendants to demolish the building;

- In December 2004 a retrospective application for retention of the building without complying with conditions was accepted by the Planning Service;

- On 22 February 2005, the Defendants were convicted of failing to comply with the Enforcement Notice;

- On 14 March 2005, the Planning Service again having failed to determine the application, an appeal was made to the Planning Appeals Commission on the retrospective application;

- On 22 August 2005, after the hearing of the appeal, the Commissioner received additional information that he had sought from the Department;

- In August 2005 the Commissioner supplied his report to the full Commission;

• On 5 September 2005 a PAC meeting considered the Commissioner's report. The commissioners present voted to accept the report and to dismiss the respondent's appeal;

• On 9 September 2005 PAC wrote to the respondent informing him that his appeal had been dismissed;

• On 11 September 2005 the respondent wrote a letter of complaint to PAC outlining eight grounds of complaint;

• On 1 November 2005 the Chief Commissioner replied, rejecting seven of the eight grounds of complaint, but accepting one. It was stated that the Commission had made its decision in ignorance of certain facts; that the commissioner's action was a breach of procedure; and that it was not possible to be certain that the Commission would have reached the same decision if it had been aware of these matters.

• On 16 December 2005, with the consent of the PAC, the decision arrived at as a result of the report was quashed by judicial review.

• On 14 March 2006 PAC wrote to the respondent indicating that his reconstituted appeal would proceed by informal hearing;

• On 18 June 2006 the respondent wrote to PAC, indicating his refusal to participate in the second appeal because of personal circumstances and because he had not been consulted about the procedure to be used;

• On 10 July 2006 following the second appeal, which was heard by another commissioner, PAC adopted his recommendation and dismissed the appeal;

- On 3 October 2006, the present complaints were laid;

- On 30 March 2007, the decision of 10 July 2006 was challenged by way of judicial review and was quashed by Weatherup J., but that decision was reversed by the Court of Appeal on 6 September 2007;

- Following difficulties with service, the present proceeding came before Ards M.C. on 12 May 2008, and again on 9 June 2008, when the defendants were convicted in their absence, and fined £10,000. However, after the defendants

> successfully argued that they had been unaware of the date of hearing, the District Judge (MC) who had convicted them set aside the convictions under Article 158A(3) of the Magistrates Courts (NI) Order 1981, and directed a hearing before a different judge.

[5] When the proceeding first came before me in late 2009, neither Mr nor Mrs Young was represented. Mr Young appeared personally and made an application to stay the proceedings on the grounds of abuse of process, which I refused. In the course of the argument, he informed me that he had an application before the European Court of Human Rights. One of his grounds was the refusal of legal aid in the various criminal and civil proceedings. He informed me that he was appearing personally because he and his wife had been refused legal aid in the first criminal proceedings back in 2005. He had not applied for legal aid in these proceedings because he had assumed the application would be refused. When it became clear to me that the defendants' financial circumstances had deteriorated drastically since the first prosecution, and having regard to the consequences for them of being convicted and unable to pay a fine, I invited Mr Young to apply for legal aid. I adjourned the case for that purpose, and subsequently granted the application.

[6] Thereafter, Madden and Finucane came on record for the defendants, and applied for further adjournments in order to obtain a report from a planning expert. One final adjournment was necessary because of the unavailability of a prosecution witness.

[7] At the outset of the hearing, Mr Hutton BL, who appeared for Mr Young, drew my attention to the fact that there are even more proceedings relating to this case ongoing in the High Court, (Young and Young v Hamilton and others), in which the Youngs are seeking very substantial damages arising from the original purchase of the building site on which the house was built. Mr Hutton invited me to consider adjourning these proceedings until that case is concluded. I declined to do so, as the case has already run on far too long, and there is no means of knowing when that case, and any subsequent appeals, will end.

[8] In the course of the ongoing case in the High Court, Treacy J gave judgment on a preliminary matter. It transpires that Mr Young was made bankrupt in May 2006 and not discharged until May 2007. Treacy J held that, as a result, his right to bring and continue the litigation passed to his trustee in bankruptcy on 3 July 2006 as did his entire interest in the property the subject matter of the action namely 39a Carrowdore Road, Greyabbey. While that decision is under appeal by Mr Young, Mr Hutton argued that Mr Young was in no position to comply with the Enforcement Notice after his interest in the property passed to the trustee in Bankruptcy. However, I noted

that the offence alleged is a continuing offence running from 23rd February 2005, which allowed ample time to comply with the Notice before the bankruptcy.

The Evidence

[10] Mr Tumelty, an Enforcement Officer employed by the Planning Service in Downpatrick, was the only witness for the prosecution. He produced a copy of the Enforcement Notice, dated 9th January 2004, which was served on the defendants. The relevant passages therein are as follows:-

> "1. THIS IS A FORMAL NOTICE which is issued by the Department because it appears that there has been a breach of planning control, under Article 67A(1)(a) of the above Order, at the land described below. It considers that it is expedient to issue this notice, having regard to the provisions of the development plan and to other material planning considerations.
>
> 2. THE LAND AFFECTED
>
> Land to the west of 39 Carrowdore Road, Greyabbey shown red on the attached map.
>
> 3. THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL
>
> The unauthorised construction of a dwelling in the approximate position indicated hatched blue on the map, being development carried out without the grant of planning permission required in accordance with Part IV of the Planning (Northern Ireland) Order 1991.
>
> 4. WHAT YOU ARE REQUIRED TO DO
>
> (i) Remove the unauthorised building and all building materials and rubble arising therefrom from the said land within 120 days from the date on which this Notice takes effect; and
>
> (ii) Reinstate the land to its original form by levelling and top soiling within 130 days from the date on which this Notice takes effect followed by reseeding in the first growing season following compliance with the above request.

5. WHEN THIS NOTICE TAKES EFFECT

This notice takes effect on 12th February 2004, unless an appeal is made against it beforehand."

[10] Mr Tumelty explained that, in essence, the Youngs had built their dwelling some 19-21 metres further up their site than their consent allowed. The site is on a slope and, as a result, the building is 2 metres higher than it should have been and more prominent in terms of the surrounding landscape. Mr Tumelty noted that there had been no appeal against the Enforcement Notice, either as permitted by the statute or by way of judicial review. He confirmed that the Enforcement Notice had only been served on the Youngs, and had not been served on any bank or building society. He informed the court of the previous conviction of both defendants for breach of the Notice, and, after some debate, counsel for both defendants accepted the existence of those convictions without further proof.

[11] Finally, Mr Tumelty said that he had carried out a recent inspection of the site, and he could confirm that the building is still in existence, and the Notice has still not been complied with. No issue was taken with this aspect of his evidence.

[12] In cross-examination, it became clear that Mr Tumelty had not been involved in the original process, and had taken over the case from another Enforcement Officer. Mr Hutton BL quite properly put his client's case to Mr. Tumelty, but the nature of that case, and the fact that Mr Tumelty had not been involved in the process at an earlier stage, meant that he was limited in the replies he could give. Rather than set his replies out here, it is more convenient to set out the defence evidence, and include any relevant replies by Mr. Tumelty at the appropriate point.

[13] The first witness for the defence was Gemma Jobling, a planning expert employed by Elevate Planning, who had prepared a report for the court. She noted that, when the Planning Appeals Commission issued its determination granting planning permission in March 2002, it had attached to its decision a plan marked "PAC 1", and had specifically referred to that plan when setting out the conditions. However, the photocopy of PAC 1 attached to the decision had cut off one corner of the triangular shaped site, so that if one measured the site from the edge as shown in PAC 1, instead of from the actual corner, there was a difference of about 13 metres.

[14] Examination of the PAC decision reveals that, although it refers to the plan PAC1, the condition in regard to the siting of the dwelling refers to a different plan. Condition 1 reads:-

> "1. The dwelling shall be sited as indicated on the 1:500 scale site plan with a finished floor level not exceeding 1 metre above the level of the road shown on PAC1 as 19.5 metres."

Thus, there was clearly in existence a 1:500 scale site plan. Further, Ms Jobling accepted that, even allowing for the discrepancy in the measurements between the original of plan PAC1 and the cut off photocopy attached to the decision, the house was still not built in the position required by the consent. It is also to be noted that Mr Tumelty was adamant that PAC1 was a document that had been submitted to the PAC by the Youngs or their advisors, as the PAC would never prepare such a plan. This is confirmed by the last sentence of the decision, which states that "this decision relates to the Location Map received by the Department on 28 December 2000 and Drawings PAC 1 and 3 received by the Department on 21 May 2001."

[15] Ms Jobling's second main point was that, in her opinion, the building of the house out of position should not be categorised as an unauthorised development, and therefore as a breach of planning control under Article 67A(1)(a) of the Order, but rather as a failure to comply with a condition subject to which planning permission had been granted, which would constitute a breach of planning control under Article 67(A)(1)(b) of the Order. It is to be noted that that this evidence constituted an attack on the validity of the Enforcement Notice, which refers specifically to Article 67(A)(1)(a) and I questioned whether it was admissible. I decided to hear it, and I will deal with the issue below. Mr Tumelty could only say that the Department had clearly taken the view that the development was a breach of planning control under Article 67A(1)(a), as that was what was stated in the Notice. He also observed that, if the Department had served a breach of condition notice, the Youngs would have had no right of appeal.

[16] Mr Young stated in evidence that he had used PAC 1 to site the house. He had assumed that it was a correct depiction and had not realised that 12 metres had been cut off as a result of photocopying. He had measured where the house should be sited from the cut off edge of the plan, rather than from the front of the site because he had been in a dispute with his neighbours over use of the laneway at the front of the site.

[17] He said that, on legal advice, he had applied for retrospective planning permission rather than appealing the Enforcement Notice. He believed that, by the time he received the advice, it was too late to appeal the Notice. As regards complying with the notice, he said that it would cost £15,000, and he did not have the money. He said that he and his wife are claiming £800,000 damages in their current High Court action.

The Submissions

[18] The defence made a number of submissions, as follows:-

(1) that the Enforcement Notice was invalid because it referred to an unauthorised development within the meaning of Article 67A(1)(a) of 1991 Order, instead of a breach of a condition within the meaning of Article 67A(1)(b);

(2) that the Department could not have been of the opinion that the development constituted a breach of planning control under Article 67A(1)(a);

(3) that the Enforcement Notice had not been served on other persons having an estate in the land as required by Article 68(2);

(4) that the defendants had made out the statutory defence under Article 72(3) of the Order, in that they had done everything they could have been expected to do to comply with the notice;

(5) that the proceedings were a disproportionate step in the circumstances, and amounted to an abuse of process.

I should also record that, although counsel did not (unsurprisingly) make formal submissions on the matter, Mr. Young stubbornly refused to concede that the building is in the wrong place. He blamed everything on the Department attaching a cut off photocopy of PAC 1 to their decision. He did not appear to acknowledge that his own expert conceded that, even allowing for the defective photocopy, the building is still in the wrong place. He did not accept that he should not have used PAC 1 in the first place.

The Legislation

[19] The relevant provisions of the Planning (Northern Ireland) Order 1991, as amended are as follows:-

"67A. - (1) For the purposes of this Order –

(a) carrying out development without the planning permission required; or
(b) failing to comply with any condition or limitation subject to which planning permission has been granted,
constitutes a breach of planning control.

68. – (1) The Department may issue a notice (in this Order referred to as an "enforcement notice") where it appears to it -

(a) that there has been a breach of planning control; and
(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served-
(a) on the owner and on the occupier of the land to which it relates; and
(b) on any other person having an estate in the land, being an estate which, in the opinion of the Department, is materially affected by the notice.
(3) The service of the notice shall take place-
(a) not more than 28 days after its date of issue; and
(b) not less than 28 days before the date specified in it as the date on which it is to take effect.

Contents and effect of enforcement notice

68A. – (1) An enforcement notice shall state-

(a) the matters which appear to the Department to constitute the breach of planning control; and
(b) the sub-paragraph of Article 67A(1) within which, in the opinion of the Department, the breach falls.

(2) A notice complies with paragraph (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
(3) An enforcement notice shall specify the steps which the Department requires to be taken, or the activities which the Department requires to cease, in order to achieve, wholly or partly, any of the following purposes.
(4) Those purposes are-

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
(b) remedying any injury to amenity which has been caused by the breach.

(5) An enforcement notice may, for example, require-

(a) the alteration or removal of any buildings or works;
(b) the carrying out of any building or other operations;
(c) any activity on the land not to be carried on except to the extent specified in the notice; or
(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to Article 69(8), shall take effect on that date.
(9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.
(10) An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under Article 68 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under Article 69.

72. - (1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.
(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.
(3) In proceedings against any person for an offence under paragraph (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice.
(4) A person who has control of or an estate in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.
(5) A person who, at any time after the end of the period for compliance with the notice, contravenes paragraph (4) shall be guilty of an offence.
(6) An offence under paragraph (2) or (5) may be charged by reference to any day or longer period of time and a person may be convicted of a second or subsequent offence under the paragraph in question by reference to any period of time following the preceding conviction for such an offence.
(7) Where-

(a) a person charged with an offence under this Article has not been served with a copy of the enforcement notice; and
(b) the notice is not contained in the appropriate register kept under Article 124,

it shall be a defence for him to show that he was not aware of the existence of the notice.

(8) A person guilty of an offence under this Article shall be liable-

(a) on summary conviction, to a fine not exceeding £30,000;

(b) on conviction on indictment, to a fine.

(9) In determining the amount of any fine to be imposed on a person convicted of an offence under this Article, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence."

The case law

[20] The prosecution relied on the case of R v Wicks [1997] 2 All E R 801. That case also involved a prosecution for failing to comply with a planning enforcement notice under equivalent legislation in England and Wales. The House of Lords held that, on the true construction of section 179(1) of the Town and Country Planning Act of 1990 'enforcement notice' meant simply a notice issued by the local planning authority that was formally valid and had not been set aside on appeal or quashed on judicial review; and that, accordingly, since the defendant had failed to comply with such a notice within the compliance period, he had been guilty of the offence charged.

[21] The rationale for the decision was that, since the Act contained an elaborate statutory code with detailed provisions regarding appeals that indicated that the appropriate forum in which to challenge the procedural invalidity of an enforcement notice was the Divisional Court and not criminal proceedings. It is inherent in the decision that the appropriate means of challenging the merits of an enforcement notice is by way of appeal under the planning legislation and not in criminal proceedings.

[22] This decision is clearly applicable to the present case. The only issue is therefore the meaning of a notice which is "formally valid." It is clear from the judgments in R v Wicks that it is open to the defence in a criminal prosecution for failure to comply with an enforcement notice to argue that the order is not formally valid, or to put it another way, invalid on its face. (see the judgment of Weatherup J In The Matter of an Application by the Department of the Environment for Judicial Review [2004] NIQB 51 at para. 21.)

[23] The defence sought to argue that the enforcement notice in this case is invalid, because it should have referred to Article 67A(1)(b) and not (a). They pointed out that Article 68A(1)(b) requires that the Enforcement Notice state the sub-paragraph of Article 67A(1) within which, in the opinion of the Department, the breach falls. They submitted that, if the court concluded, having considered the evidence of Ms Jobling, and the terms of the statute, that the breach could not be regarded as falling within Article 67A(1)(a), it should hold that the notice is invalid. I do not accept that submission. In my view, the defence are seeking to attack the Enforcement Notice in a manner which is not permitted by the decision in R v Wicks. The proper course would have been to appeal the notice under the legislation or to have challenged it

by way of judicial review. If the Enforcement Notice is formally valid, the court cannot go behind it. In those circumstances, the evidence of Ms Jobling is irrelevant. The statute permits the Department to reach the view that there has been a breach of planning control under Article 67A(1)(a), and the notice indicates that it reached that view. As stated by Lord Hoffman in R v Wicks, "enforcement notice" means a notice issued by a planning authority which, on its face, complies with the requirements of the Act and has not been quashed on appeal or by judicial review. That describes the notice in this case.

[24] In those circumstances, I do not have to reach a concluded view on the defence submission that Article 67A(1)(a) could not apply in this case. The submission relies on interpreting that provision as applying only when there has been no permission at all, and requiring all breaches of conditions to be dealt with under (b). The argument is set out by Ms Jobling at paragraphs 1.82-1.88 of her report, and is not without merit. However (a) states that carrying out development without the planning permission required (my emphasis) constitutes a breach of planning control. Where the breach of condition is so fundamental that the remedy is to order the building to be demolished, then it may be possible to regard the building as having been built without the required permission. I should note that I did not receive detailed submissions on that matter from the prosecution, who concentrated on the issue of the formal validity of the notice, on which point I find in their favour.

[25] That disposes of the first two defence submissions. The third argument, namely that the notice was not served on the financial institution who had loaned money to purchase the site, has no merit. Article 68(2) requires the Department to serve the notice "on any other person having an estate in the land, being an estate which, in the opinion of the Department (my emphasis), is materially affected by the notice. It was therefore a matter for the Department whether they should serve anyone else, and there is no indication that there is anyone else making the case that they should have been served.

[26] As regards the statutory defence, I find no evidence that the defendants have done anything to comply with the Enforcement Notice, let alone everything they could be expected to do. The defence referred to the prolonged delays in the case, to the applications for retrospective permission and to the fact that Mr Young was adjudged bankrupt in 2006. However, the evidence satisfies me that the defendants have taken a conscious decision not to comply with the notice. There was ample time for Mr. Young to take steps to comply with the notice after his previous conviction and before he was adjudged bankrupt. I do not find the defence made out by either defendant.

[27] The final argument was that these proceedings are disproportionate and should be stayed as an abuse of process. It is undoubtedly true that this

has been a long drawn out saga. The defence blamed that on delays by the Planning Service and the High Court, while their clients pursued their legal rights. However, in my view, one has to look at the central issue, which is that the building is sited in the wrong place. That failing is the responsibility of Mr. Young. He says it was caused by the incomplete photocopying of PAC1.

[28] I do not accept this explanation. The permission specifically referred to a requirement to site the building as indicated on a different plan, namely a 1:1500 site plan. Mr Young knew the shape of his site and it should have been obvious to him that there was a bit missing from the photocopy. It was, at the very least, a grossly negligent act for Mr. Young to site the building on the basis of measurements taken from an incomplete photocopy of PAC1, without apparently seeking professional advice. While his state of mind and reasons for siting the building where it is are irrelevant to the issue of his guilt or innocence on the charge before the court, they are relevant to the application to stay the proceedings. I have to say that I am far from persuaded that it was not a deliberate act, as Mr. Young appears to me to be an intelligent man, and I find it difficult to believe that he did not know that he was building the dwelling further up the site than the consent permitted. Whatever the reason, by siting the building in the wrong place, he has brought these proceedings upon himself and his wife. They have pursued every possible legal avenue (save for appealing the Enforcement Notice) and those proceedings have, by their very nature, taken a long time.

[29] I find nothing to indicate that these proceedings are disproportionate. The public expect planning laws to be obeyed, and breaches to be prosecuted.

[30] I am satisfied that the Enforcement Notice is a formally valid document which has not been quashed on appeal or by judicial review. I am further satisfied that the defendants were convicted of a failure to comply with it on 23 February 2005 Finally, I am satisfied that, following that conviction, they continued to fail to comply with the Notice. I therefore convict them of the offence.