

DROGHEDA *cp* v. *Michael Gantley*

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THE HIGH COURT

57 M.C.A. of 1982

IN THE MATTER OF SECTION 27 OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1976

BETWEEN :-

THE MAYOR ALDERMEN
AND
BURGESSES OF THE BOROUGH OF DROGHEDA

Applicants

-and-

MICHAEL GANTLEY, LOUIS MAGUIRE,
SEAN BYRNE AND HUGH BYRNE

Respondents

Judgment of Gannon J., delivered the 28th day of July 1983.

The application now before the Court raises for consideration some interesting questions upon the construction of section 27 of the Local Government (Planning and Development) Act, 1976. Although the application is entitled as an application by the Drogheda Corporation for relief under that section the present application is brought by the above-named third and fourth respondents to the Corporation's application. These respondents as applicants in this motion name the Drogheda Corporation as respondents to their application. They have also

served notice on the Insurance Corporation of Ireland of their intention to make the insurers added respondents to the application of the Drogheda Corporation because they are sureties for the above-named first respondent.

The proceedings referred to in the title consist of an application by motion on notice dated the 9th of June 1982 pursuant to section 27 of the Local Government (Planning and Development) Act, 1976 brought by the Drogheda Corporation against the respondents named in the title to compel completion in conformity with planning permission of works consisting of a development which had been commenced pursuant to an authorised permission previously granted. No relief was claimed against the Insurance Corporation by the Drogheda Corporation. That application was heard and an order made on the 9th of July 1982 pursuant to section 27(2) of the 1976 Act setting out in a schedule uncompleted works to be commenced within two weeks and completed within three months from the 5th of July 1982. It provided for the costs incurred in those proceedings and concluded with the words "liberty to apply". In form that order concluded the determination of the issues brought before the Court as between the parties named in the application. Nevertheless the third and fourth named respondents to that motion now claim as being authorised under the expression "liberty to

apply" to move the Court upon a new application entitled in the same matter for what can be described only as further and other relief at the instance of such respondents and not of the applicants, the above-named Drogheda Corporation.

To identify the difficulties presented by this second application it is necessary to refer to the order made by Costello J., on the 9th of July 1982. That order is as follows:-

"IT IS ORDERED that the respondent Michael Gantley do carry out the works specified in the schedule hereto, he to commence the said works within two weeks from the 5th day of July 1982 and to complete them within three months from the 5th day of July 1982.

In default of Michael Gantley commencing the said works within the said two weeks or in default of his completing them within the said three months IT IS ORDERED that the respondents Sean Byrne and Hugh Byrne do carry out the said works or any works not completed by the said Michael Gantley and do complete them within three months of commencement

And IT IS ORDERED that the preceding order against the respondents Sean Byrne and Hugh Byrne shall take effect only

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if the works specified in the schedule hereto have not been carried out by the Insurance Corporation of Ireland under the Bond dated the 15th day of November 1979 or if the said Insurance Corporation of Ireland having elected to do the said works fail to enter on them within two weeks from the date of default of Mr. Gantley or having so entered fail to complete the said works within three months of the date of entry on them

And IT IS ORDERED that the applicants do recover against the respondents Michael Gantley and Sean Byrne and Hugh Byrne their costs of this motion and order when taxed

Liberty to apply."

It may be noted that on the hearing of that motion on notice founded on evidence presented on affidavit in the regular manner evidence was also taken by oral examination of witnesses on oath in Court. An unusual feature of the order made is the inclusion in the order of the secondary order commencing with the words:-

"And IT IS ORDERED that the preceding order against the respondents Sean Byrne and Hugh Byrne shall take effect only if....."

The Bond referred to in that part of the order is a guarantee Bond entered into by the first named respondent as developer and the Insurance Corporation of Ireland jointly with the Drogheda Corporation, the Planning Authority by whom the planning requirements may be enforced. The Insurance Corporation of Ireland were not parties to that motion nor were they heard on the application in which that order was made. The third and fourth respondents are not parties to that contract of guarantee and disclaim having any contractual obligations to the first named respondent, the developer or to the planning authority. By virtue of the Bond referred to the Insurance Corporation of Ireland have a contractual obligation to the planning authority either to make good the default of the first named respondent, the developer or to pay the amount of the agreed fine or penalty prescribed in the Bond. The Insurance Corporation of Ireland have no contractual obligations to the third and fourth named respondents who now seek to make the Insurance Corporation of Ireland respondents to the motion brought by the planning authority for the purpose of having them compelled by Court order to pay to the planning authority the fine or penalty of the Bond. The planning authority did not seek such an order on their application, and the third and fourth respondents now

endeavour to have such a claim on behalf of, though not made by, the planning authority entertained and established by the Court.

Recourse to the Court for relief by any claimant, complainant, or aggrieved party must be regulated in an orderly manner. The procedures for recourse to the High Court are regulated by the rule-making authority of the Superior Courts and are set out in the Rules of Court adopted in 1960 and as amended. Section 27 of the 1976 Act by sub-section (3) prescribes that an application for relief in the circumstances and by the persons indicated in that section shall be made to the High Court by motion. But that section does not thereby purport to prescribe a procedure different from or at variance with the procedures prescribed by the Rules of the Superior Courts. The sub-section designates one of the procedures prescribed in the Rules as available for the relief conferred by section 27 but without altering the mode or nature of that procedure. The procedure by motion is normally resorted to as incidental to proceedings initiated by summons or in relation to matters within the administrative functions of the Courts. The reference in sub-section (3) of section 27 to making interim or interlocutory orders confirms that procedure under section 27 may be supplementary to substantive proceedings brought by

summons for oral hearing of evidence. It would appear therefore that a final order may be made under section 27 upon a determination only of the issues put before the Court on affidavit by motion on notice or an order of a temporary nature may be made pending resolution of disputed questions of fact or law submitted for adjudication by formal pleadings.

The order made by Costello J., on the 9th of July 1982 appears to be a final order which deals completely with all matters then before the Court for determination. The addition to an order of the expression "liberty to apply" is made in practice to enable further application to be made to the Court for the implementation of its order by way of enforcement or variation or suspension. I do not think this formula may be used for the purpose of requiring the Court to revise its decision or to entertain and resolve further or other matters in dispute which the parties had omitted to submit to the Court. It is not in my view a formula which permits a party found in default to resort to a type of third party procedure for the purpose of obtaining contribution or of casting on some third party the burden of compliance with the order made upon the claim. The nature of the application now brought by the above named third and

fourth respondents goes even further as they do not claim contribution from the party intended to be added but merely seek enforcement against that party of a claim which the applicants, the planning authority, did not and do not make against that party. The nature of the order sought does not put it in the category of an implementation of the order made.

Section 27 of the Local Government (Planning and Development) Act, 1976 is unusual in that it allows persons who may have no interest in a development to have recourse to the courts to enforce obligations imposed in the public interest on designated authorities and persons to ensure that a development be carried out in conformity with planning permission. But I do not think section 27 of the 1976 Act goes so far as to allow persons to call upon the Court to construe and enforce private contractual arrangements between other parties which are entirely collateral or merely ancillary to the permitted development. An order pursuant to sub-section (2) of section 27 must specify in it what the Court requires the person designated in the order to do or to not do or to cease to do and such matters should appear to be necessary to ensure that the development be carried out in conformity with the permission granted. I do not think that this

Court could specify the payment of a fine or a penalty by a guarantor upon the default of the compliance with the planning permission by the developer as something which ensures the carrying out of the development in conformity with the permission granted. This is particularly so when the applicants themselves are held by the Court liable to carry out the development but without any guarantor for their default.

This present application by the above-named third and fourth respondents in the title hereof does not come within the range of application authorised by section 27 of the 1976 Act nor within the procedures prescribed in the Rules of Court and accordingly must be dismissed.

S. G.
25/9/83