

PHILIP ELLIS & LESLEY ELLIS

-v-

SEAN NOLAN

BRAY DEVELOPMENTS LTD. (IN LIQUIDATION)

and

J.W. RAYMOND JACKSON.

Judgment of Mr. Justice McWilliam delivered 6th May, 1983

This application is brought under the provisions of section 27 of the Local Government (Planning and Development) Act, 1976, requiring the Respondents to remedy defects in the construction of a dwelling-house at No. 126, Charnwood Estate, Co. Wicklow, by completing the construction of the house in conformity with planning permission and an approval given to the Respondent, Sean Nolan. In order to conform with the plans upon which the permission and approval were given, the interior structural load bearing walls should have had foundations but no foundations were put in for them and they were, instead, built directly off a 4" concrete floor slab. This has resulted in subsidence causing cracks and other damage to the house which it is estimated will cost about £9,000 to remedy. There is no denial

of any of these facts by the Respondents.

No. 126, Charnwood Estate was one of 127 houses included in the planning permission and approval. It was built by the Respondent, Bray Developments Ltd., under a contract with Derek Jackson dated 4th April, 1973, and, the Applicants having purchased from Derek Jackson in 1979, the house is held by them for the residue of a term of 500 years demised by Bray Developments, Ltd., to Derek Jackson by Indenture of Lease dated 24th May, 1973. It may be accepted that the house was completed sometime in 1973.

An affidavit sworn by the Solicitor for Sean Nolan and filed on his behalf states that Sean Nolan does not own and never owned any estate or interest in the land and premises known as Charnwood Estate or in any part thereof and that he was not involved in the construction of No. 126. It also states that Sean Nolan was a director of Bray Developments, Ltd., and that he applied for the planning permission and approval with the consent of Bray Developments, Ltd., and for its sole benefit. It is difficult to reconcile the first of these two statements with the other two. No indication is given in this affidavit,

or elsewhere, as to the circumstances of the acquisition of the property by Bray Developments, Ltd. It is also stated in this affidavit that Sean Nolan is in Australia but no information is given with regard to his return to Ireland.

Notice was given in the Evening Press for 22nd September, 1982, that a meeting of creditors would be held at Ashford, Co. Wicklow, on 15th October, 1982, for the voluntary winding up of the following companies, that is to say:- Nolan Construction, Ltd.; Nolan Agrigate, Ltd.; Picadilly Properties (Ireland) Ltd.; Longwood Developments, Ltd.; and Bray Developments, Ltd. The Notice is stated to be published by Order of the Board and is over the name of Sean Nolan, director from which it would appear that all these companies are closely associated and probably have the same directors. It is a matter for speculation as to which of these companies first owned the Charnwood Estate, or which of them actually built the houses. The last annual return to the Companies Office was made in 1975 and shows that the only shares in Bray Developments Ltd., were held as to 700 by Sean Nolan and as to 300 by Peter

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Nolan and that they and John Mullins were then the directors and that John Mullins was the Secretary. The Respondent, J.W. Raymond Jackson, has been appointed liquidator. No affidavit has been filed on behalf of Bray Developments, Ltd., or the liquidator, but a solicitor attended on behalf of the Company and the liquidator and stated that the liquidator has no funds in hand and is not in a position to carry out any work. It



is stated in the affidavit filed on behalf of Sean Nolan that, when the amount due to the Revenue Commissioners has been finally ascertained, there will not be any money available for distribution amongst the shareholders or directors.

As the Applicants had no contractual relationship with Sean Nolan or Bray Developments, Ltd., they have brought this form to proceeding to have the defects in their house put right or to recover the cost of putting them right. As Bray Developments, Ltd., is insolvent, they have claimed relief against Sean Nolan also, on the ground that he is a director, that he obtained planning permission in his own name, and that

he made a profit from the building estate either by virtue of his shareholding or otherwise.

Section 27 of the Act of 1976 provided as follows:-

(1) Where

(a) development of land, being development for which a permission is required under Part IV of the Principal Act, is being carried out without such permission, c

(b) and unauthorised use is being made of land,

the High Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order prohibit the continuance of the development or unauthorised use.

(2) Where any development authorised by a permission granted under Part IV of the Principal Act has been commenced but has not been, or is not being carried out in conformity with the permission because of the non-compliance with the requirements of a condition attached to the permission or for any other reason, the High Court may, on the application of a planning authority or any other person, whether or not that person has

an interest in the land, by order require any person specified in the order to do or not to do, or to cease to do, as the case may be, anything which the Court considers necessary to ensure that the development is carried out in conformity with the permission and specified in the order.

On behalf of all the Respondents it is submitted that the application is statute barred because it is more than six years since the work was completed. I was referred to the case of Pirelli General Cable Works Ltd. -v- Oscar Faber & Partners (1983) 2 W.L.R. 6. This was a decision on a claim in negligence concerning the faulty construction of a chimney in which it was held by the House of Lords that time starts to run against a Plaintiff when the damage first occurs, irrespective of whether it could or should have been discovered at that time or not. This case was decided on a consideration of terms of an English statute identical with the terms of section 11 of the Statute of Limitations, 1957. This section provides that actions to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on

which the cause of action accrued. The time when the damage occurred to the Applicants' house and the application of section 11 was not discussed before me, but the only evidence in the affidavits is that cracks were first noticed in October or November, 1980, and that the doors began to stick in or about that time. As a surveyor for a building society surveyed the property in the Summer of 1979, and does not appear to have observed any such cracks then, it seems reasonable to assume that the cracks and the sticking of the doors occurred in or about the same time and that, up until then, there had been no damage to the building. Thus, if the section is applicable to the claim in this proceeding, I am of opinion that time would not have run against the Applicants.

Although I have discussed the position on the basis that the section does apply to these proceedings, I am of opinion that it does not. Although the Court is given very wide powers under section 27(2) of the 1976 Act, it does not seem to me that this proceeding is one to recover money recoverable under the section. What is here alleged is that a development has

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been carried out in conformity with the permission granted under the Local Government (Planning and Development) Act, 1963, and I am solely concerned to consider the right of the Applicants to enforce conformity under the provisions of section 27(2) of the 1976 Act. Save as hereinafter mentioned, no section of any limitation statute was opened to me and I am of opinion that there is no statutory limitation for the commencement of these proceedings.

It was then submitted that, if the period of six years is not applicable as a limitation, a period of five years from the completion of the work must be adopted by analogy to the provisions of sections 31(1) and 32(1) of the 1963 Act. These sections name a period of five years from the time when a development has been carried out as the time within which notice must be served requiring the carrying out of the conditions of planning permission, but I note that section 35(1) of the 1963 Act, which more resembles section 27(2) of the 1970 Act does not name any time for serving notice requiring the carrying out of a development in conformity with planning permission. No

argument has been advanced before me as to the different application of sections 31 and 35 of the 1963 Act and it may be that the earlier section refers to a situation where all work has been completed whereas the later section refers to work which is still in progress, but I am of opinion that I am not entitled to apply a statutory limitation to proceedings under one section merely because a limitation has been provided for proceedings under other sections.

I was then referred to page 125 of the book by Walsh, J., on Planning and Development Law at which the author expressed the view that an application under subsection (1) of section 27 must be made before the development has been completed and it was argued that this is the correct interpretation of subsection (2) also. I do not accept this argument. The phraseology of the two subsections is completely different and, if the interpretation sought to be placed on subsection (2) were to be accepted as correct, it would seem to attach no importance to the words "but has not been".

On behalf of Sean Nolan it has been submitted that he

cannot be made personally liable merely because he applied for planning permission or because he is or was a director of Bray Developments, Ltd.. I was referred to the case of Frescati Estates Ltd. -v- Walker (1975) I.R. 177, but this seems to me to be relevant only to the question of the right of Sean Nolan to apply for planning permission in his own name provided he had the consent of the owners of the property to do so. It does not give any assistance on the question of his personal responsibility for failure to carry out the conditions of the permission. I was informed by Counsel that some orders have been made making directors amenable in certain cases, but I was also informed that there were no reported cases or written judgments available so that I have no idea what was the form of proceeding in which such orders were made. A conglomeration of associated companies such as appears from the present proceedings deserves very close investigation and directors may well be made responsible for fraud, misrepresentation, improper application of money or negligence but this would normally be done in a different form of proceeding and with a

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great deal more evidence than has been placed before me, and I do not see how I could hold Sean Nolan responsible on this application merely because he made the application for planning permission in his own name.

Finally, it appears to me that section 27(2), although very wide in its terms, was not intended to include a claim in damages, which is the essence of the alternative claim on this application, and I will confine myself to making an order directing compliance with the planning permission and approval although, in view of the liquidation, I will hear further argument as to the form of the order.

Herbert R. McWilliam.
28/3/84.

