

THE HIGH COURT

ON APPEAL FROM/

THE CIRCUIT COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

BETWEEN/

JOHN KELLY AND ITA KELLY

Plaintiffs  
(Respondents)

and

DUBLIN COUNTY COUNCIL

Defendant  
(Appellant)

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Judgment of Mr. Justice O'Hanlon delivered the 21st day of February 1986

For some years past Dublin Co. Council has been engaged in extensive road-works in the vicinity of the Plaintiffs' home at Clonkeen Road, Co. Dublin. I am satisfied that these works have been carried out by the Defendant in exercise of its statutory powers under the provisions of the Local Government Act, 1925, Part III, and amending Acts, and also that the authority conferred on the Defendant under these provisions is imperative, and therefore absolute - it is not merely a permissive or conditional authority, conditional upon it being possible to carry out these functions without causing nuisance.

The Defendant was at all material times the owner of a vacant cottage fronting onto Clonkeen Road with a fairly extensive area of ground around it, and this property immediately adjoins the

residence of the Plaintiffs, Mr. and Mrs. Kelly, who live at No.181 Clonkeen Road. The Defendant decided that, for the purpose of carrying out part of its road construction programme near Clonkeen Road it would make use of the land behind the cottage for the purpose of storing vehicles and materials. In order to do so it had to set about clearing a large area of waste ground behind the cottage, levelling the site and re-surfacing it - apparently with tarmacadam - to make it suitable for the proposed purpose, and it embarked on this work in or about the month of May, 1982.

The Plaintiffs claim that from that time onwards they have been subjected to nuisance of various kinds which has made living conditions in their own home very unpleasant. They say that initially while the site was being cleared and re-surfaced they were plagued by noise and vibration. They claim that when the site had been turned into a compound for vehicles that from about September/October 1982 onwards large numbers of heavy vehicles and machines were stored in the compound; that they made an intolerable noise every morning when starting up, with engines left idling for as long as three-quarters of an hour at a time. They complain of noise, dust, diesel fumes, bad language used by workmen, and a particularly penetrating noise at times caused by the use of a disc cutter on metal barrels for the purpose of cutting the top off the barrels, or cutting reinforcing bars. They say that when the road-work finished in the evening, the return of vehicles and machinery to the site caused similar nuisance to that experienced in the mornings. They complain of

trespass by workers from the site over their garden, and say they have not been able to make any use of their own back garden since the work commenced, by reason of dust, noise, and, on one occasion at least, noxious smells.

I am satisfied that the Plaintiffs have established by their evidence that the County Council has caused an actionable nuisance under a number of headings, unless it can be shown that a defence to the claim can be shown by reliance on its statutory powers.

Work carried out in exercise of what has been referred to as an "absolute" statutory power (such as I have held to exist in the present case) does not give rise to a claim for damages for nuisance resulting therefrom in the absence of negligence in the manner in which the statutory powers are exercised.

"Where a statute authorises the doing of a particular act by a local authority, no action will lie at the suit of any person in respect of that act, even if it causes damage, provided it is done without negligence" (Keane, Law of Local Government, p.52). Lord Blackburn said in Geddis v. Proprietors of Bann Reservoir, (1877-78) 3 AC 430, at p.435:

"I think that if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law, that damage could be prevented, it is within this rule negligent not to make such reasonable exercise of their powers."

It was submitted on behalf of the Plaintiffs in the present case that the statutory protection which existed in favour of the

Defendant in connection with its exercise of its functions of maintenance and construction of roads was not wide enough to extend to the setting up of a depot for vehicles, machinery and materials as an ancillary activity to the road-building project; and, secondly, that even if the statutory protection did apply to this activity as well, nevertheless there had been negligence on the part of the Defendant in the manner in which it exercised its powers and the statutory authorisation was of no avail.

In Rapier v London Tramways Co. (1893) 2 Ch 588, it was held that the Defendant Company were empowered by statute to create and make a certain tramway; that it (~~the~~ Statute) proceeded on the assumption that they could use animal power, without otherwise authorising such use; that stables for horses used by the tramway company were a source of nuisance to occupiers of adjoining premises, and the continuance of such nuisance could be restrained by injunction without requiring the Plaintiff to prove negligence against the company in their user of the stables.

Lindley LJ, (with whom the other members of the Court of Appeal concurred), said (at p.599):

"The Act of Parliament...does not appear to me to do more than authorize them to create and make a certain tramway; it proceeds on the assumption that they may use animal power; I do not think it otherwise authorizes such use. Animal power for such a purpose in this country means horse-power, and as a matter of course the Defendants must have horses. That involves, as a natural consequence, stables to put them in. To that extent the Act of Parliament authorizes the Defendants to have the stables and horses. I agree...that it is for the directors to say, within limits...where they shall have stables, how many horses they will have and where they will locate them.....I cannot

find that the Act of Parliament contains any clause which warrants us in saying that no limit is set to the exercise of the discretion of the directors except the duty to take reasonable care not to create a nuisance. The only limit I can find is the limit which is set by the general law of the Country that they do not commit a nuisance. Within that limit they may have what stables they like, they may have what number of horses they like, and they may conduct them how they like."

I come to the same conclusion about the statutory powers in the present case, on which the Defendant relies in defence of its activities at the depot in Clonkeen Road. While the Defendant has absolute powers in relation to the road maintenance and construction works referred to in the Act of 1925 and amending Acts, I do not consider that the same statutory authorisation of an absolute character extends to the provision and use of a depot for vehicles and materials.

There are, however, statements of the law which tend to support the contrary view. In Dunne v NW Gas Board, (1964) 2 QB 806, the Court of Appeal in England held that a person acting under a mandatory statutory obligation does not incur liability in nuisance "provided that what is done is that which was expressly required to be done or is reasonably incidental thereto and done without negligence" (emphasis added) - Sellers LJ at p.835.

And Clerk and Lindsell on Torts, refer to "a discernible tendency in fairly recent times for the courts to interpret "necessary implication" and "reasonably incidental" in the light of social utility...If the interference is very small in comparison with the public advantage to be derived from the activity complained of it has sometimes been held that the statutory authority is a sufficient justification". (15th Edition (1982) Par.1-158).

Accordingly, I think I should express a view on the other reply to the plea of statutory authorisation, and in this case also I support the Plaintiffs' contention. The onus of proof lies on the party relying on statutory authorisation to commit what would otherwise be an actionable nuisance, to satisfy the Court that the nuisance was an inevitable result of the exercise of the statutory powers (Allen v. Gulf Oil Refining Ltd., (1981) 1 AER 353, per Lord Wilberforce at p.357j).

It seems to me that the back garden of a dwelling-house situated on a residential road with houses on each side was a very unsuitable place to choose for the Council's activities as described in the present case, and I agree with the suggestion made by Counsel for the Plaintiffs that if the Defendant were not dispensed from the obligation to seek planning permission, it is a virtual certainty that no responsible planning authority would ever have granted permission for the use which was made of the site in question. No evidence was put before the Court to show that the Council had no alternative, or no reasonable alternative, but to use this particular site for these purposes, or to suggest that the Council would have been involved in quite unreasonable difficulty and/or expense in procuring an alternative site. I conclude, therefore, that the plea of 'no negligence' has not been established and that the Plaintiffs are entitled to succeed in their claim for damages.

I cannot help feeling that, as happens in so many cases of nuisance, the Plaintiffs became somewhat obsessed with the

activities of the Council's workmen on the adjoining site, and that legitimate causes of complaint may have become greatly magnified in the process. One of the major complaints related to noise and disturbance caused while the Council were clearing, levelling and resurfacing the site, but this is the kind of work that any property-owner, even in a residential district may have to carry out from time to time, and adjoining owners have to live with a certain amount of noise and disturbance for a limited period while the work is in progress. A complaint about noxious smells was found to refer to a single incident which was not repeated.

Nevertheless, I am satisfied that a serious nuisance did exist, and did continue over a long period of time, and while the sum awarded in favour of the second-named Plaintiff is, possibly, greater than I would have awarded myself, it is not of such an order that I would feel justified in interfering with the decision of the learned Circuit Court Judge. I therefore affirm the Order giving the first-named Plaintiff a sum of £1500 and the second-named Plaintiff a sum of £3000 as damages for nuisance; the Plaintiffs to have the costs of the proceedings in both Courts, based on what a Decree for £4500 damages for tort would carry, when taxed and ascertained.

*R J O'Hanlon*

R.J. O'Hanlon.

21st February, 1986.

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Cases and Materials cited:-

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