McCABE v H

O'Higgins C.J.
Henchy J.
Hederman J.

THE SUPREME COURT

JOHN McCABE

(79/1982)

Plaintiff

and

HARDING INVESTMENTS LIMITED

Defendants

JUDGMENT delivered the 27th day of October 1982 by O'HIGGINS C.J. Hederman ✓ concurring

The issue which arises on this appeal requires consideration in the light of the following facts.

On the 6th April 1981 the Defendants made an application to the Dublin Corporation for a planning permission in respect of a seven-storey office development on a site between Leeson Close and Kingram Place in the City of Dublin. The site had been an open space and car park. This application was made in the following circumstances. There was in existence in relation to the site a planning permission granted under the provisions of the former Town and Regional Planning Act 1934. This planning permission authorised building on the site of a seven-storey office block. The permission was dated the 17th June 1957, and at the date of the passing of the Local Government (Planning and

Development) Act 1976, had not been availed of in any way. It was, nevertheless, a valid permission which was preserved in its authority by the provisions of section 92(2) of the Local Government (Planning and Development) Act 1963. However, by virtue of the provisions of section 29 of the 1976 Act a time limit was placed on this validity and that section, in its application to this particular permission, provided that it would cease to have effect at the expiration of five years from the coming into operation of the section (November 1st 1976).

On the 12th September 1980 Fitzpatricks, Solicitors, entered into a contract to purchase the freehold interest in the site for a sum of £300,000. In so doing Fitzpatricks acted and contracted in trust for interests which are now represented by the Defendants in these proceedings. A deposit of £30,000 was paid on the signing of the Contract and a further sum of £170,000 was paid in accordance with its provisions on the 2nd October 1980. The balance of £100,000 was to be paid pursuant to the Contract on the 2nd January 1981, which date was to be the closing date. However, in the investigation of title queries were raised as to the subsistence of a mortgage and the efficacy of a previous Contract

for Sale. These queries resulted in the vendors agreeing to obtain certain releases and waivers. The result was that the payment of the balance of the purchase money was delayed until the 29th May 1981 and the actual Conveyance was executed on the 2nd November 1981.

The site had been purchased for the purpose of development and, of course, towards this end it was intended to avail of the permission granted in June 1957. However, because of the statutory provision already mentioned this permission was due to expire on November 1st 1981. In these circumstances, although the Contract for Sale had not been completed in a conveyance, the vendors allowed the developers into possession of the site and agreed to the commencement of the intended construction. This took place on the 5th November 1980 and the construction of a seven-storey office block was immediately commenced by building contractors, Farrell and Company, acting on behalf of the interests now represented by the Defendants.

The Plaintiff resides with his wife and family in a mews house at 65 Leeson Close and has done so for approximately seventeen years. He was completely unaware of the intended development of the car park

which adjoined his residence until construction had actually commenced. This was, no doubt, due to the fact that under the former legislation no register of planning permissions was kept and the discovery that a permission existed in relation to a particular site was often a matter of chance. However, having discovered what was afoot the Plaintiff determined to do everything that was lawfully open to him to do, to hinder, obstruct and, if possible, prevent the intended development. In this respect I do not think the Plaintiff's attitude could be regarded as being unreasonable. Suddenly and without warning to find the peace and pleasure of one's residence disturbed and shattered by the arrival of men and machinery committed to the construction, as quickly as possible, of an enormous office block on adjoining ground would be sufficient to goad the most passive of individuals into action. Having armed himself with appropriate advisers, the Plaintiff in association with the company which owned adjoining property, caused the apparent development to be examined very carefully, having regard to what was permitted under the 1957 permission. Being satisfied that what was under construction differed in design from the plans upon which planning permission had been

granted the Plaintiff and Avenue Properties Limited brought a motion in the High Court under the provisions of section 27 of the Local Government (Planning and Development) Act 1976 for an Order prohibiting the continuation of the development and directing the removal from the site of what had been constructed. This Motion was heard by Mr. Justice D'Arcy who, not being satisfied on the evidence that the Order sought should be granted, refused the relief sought. An appeal was then brought to this Court and an application made to allow the introduction of additional evidence. This appeal was allowed and the matter was remitted to the High Court to hear further evidence. Meanwhile, on the 6th April 1981, the Defendants as the developers, submitted a fresh planning application to the Planning Authority seeking a fresh planning permission to authorise what was being constructed although it would vary in some respects from what had been authorised in the original planning permission of 1957. On the re-hearing of the Motion in the High Court, Mr. Justice Barrington, although satisfied that the development, not then completed, would depart from what had been authorised, decided not to make the Order sought under section 27 pending the determination by the Planning

Authority of the new planning application. By a Decision dated the 25th June 1981 the Planning Authority granted the permission as applied for. An appeal was brought against this decision and on the 10th November 1981 An Bord Pleanala, having heard all relevant evidence, also decided to grant the permission sought. The development has been completed in accordance with this permission.

In these proceedings which were commenced on the 8th January 1982 the Plaintiff alleges that the Defendants in their application of the 6th April 1981 for the planning permission which they obtained, failed to comply with the requirements of Regulation 17(a) of the Local Government (Planning and Development) Regulations 1977 in that they incorrectly stated their interest in the site to be a freehold interest. On this ground the Plaintiff claims a declaration that the purported grant of planning permission to the Defendants was null and void and an Injunction restraining them "from carrying out or taking the benefit of the said purported planning permission". Faced with this claim, the Defendants by Notice of Motion dated the 25th January 1982 sought an Order pursuant to the provisions of Order 19 r. 28 of the Rules of the Superior Courts, or alternatively, pursuant to the inherent

jurisdiction of the Court, striking out and dismissing the same. This Motion was heard by Mr. Justice Hamilton in the High Court, who came to the conclusion that the Plaintiff's action was vexatious and in pursuance of the inherent jurisdiction of the Court, granted an Order dismissing the same. Against this decision and Order this appeal has been brought.

The Defendants' Motion was supported by a long and detailed Affidavit from Francis X. Woods, a director of the Defendant Company, which dealt with all the facts concerning the Defendants' acquisition of the site and the state of its interest therein at the date of the planning application. There was also before the Court an Affidavit from the Plaintiff which in this respect did not controvert or put in issue what was deposed to by Mr. Woods. It is clear from these Affidavits and from what has been urged on the hearing of this appeal that Mr. Justice Hamilton had before him, on the hearing of the Defendants' Motion, all the relevant facts and material which would have been available on a plenary hearing of the Plaintiff's action. The relief claimed by the Defendants could not, in the circumstances, have been granted under Order 19 r. 28 which provides as follows:

"The Court may order any pleadings to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just."

It seems clear that for this rule to apply, vexation or frivolity must appear from the pleadings alone. Here it was necessary to adduce evidence in explanation of the pleadings. I am satisfied that where vexation is so established by undisputed facts which explain the nature of the claim made or pleading, the Court has an inherent jurisdiction in the interests of justice, to dismiss or strike out. It was on that basis that Mr. Justice Hamilton made the Order. The Plaintiff, however, contends that the jurisdiction was exercised wrongly in this instance.

What is in issue is whether there is any element of reality in the Plaintiff's complaint that the Defendants in completing the application for planning permission failed to comply with the provisions of Regulation 17(a). Regulation 17 of the Permission Regulations deals with what shall accompany a planning application. By paragraph (a) it is provided that such an application shall be

accompanied by

> "(a) Particulars of the interest held in the land or structure by the applicant, the name and address of the applicant, ..."

In Dublin it appears that applications for planning permission are required to be made on a form issued by the Dublin Corporation as the Planning Authortiy. This form provides that the particulars referred to in Regulation 17(a) are to be given by filling a blank space at paragraph 10 opposite the requirement: "State applicant's legal interest or estate in site (i.e. freehold, leasehold etc.). From this it would appear that what the Planning Authority seek is a general idea of the applicant's interest or estate in the lands and not a precise legal definition of what it is. The concern of the Planning Authority is that the applicant should have an interest in the lands sought to be developed. Further, it is to be noted that Regulation 17 (and also Regulations 18, 19 and 20) deal with what is to accompany the application made to the Planning Authority. In this respect these Regulations differ from Regulations 14, 15 and 16 which refer to what the applicant is required to do prior to applying for planning permission. These particular Regulations cater for and deal with the interest of the general public in an

intended development. In this case no question arises as to compliance by the Defendants with the provisions of the Regulations affecting the general public. The Plaintiff's complaint is that the Defendants in dealing with paragraph 10 in the application form inserted the word "freehold" as descriptive of their then interest in the site. The Plaintiff asserts that this did not accord with the factual situation which obtained on the 6th April 1981, when the application form was completed, and that accordingly the provisions of Regulation 17(a) were not complied with. On this ground the Plaintiff claims that the application was not made in compliance with what was essential to a valid application and that accordingly the permission granted to the Defendants was null and void. The net question, therefore, is whether, the information given by the Defendants at paragraph 10 in the application form was so inaccurate, wrong and misleading as to constitute a failure to give particulars of the Defendants' interest in the site and a breach of the statutory requirement imposed upon them by Regulation 17(a). I have come to the conclusion that it was not, for two reasons.

In the first place it seems to me that a general description of the Defendants' interest in the lands at the time as being

"freehold" was neither inaccurate, wrong or misleading. The Defendants were the purchasers of the site under a valid and subsisting contract by which they were purchasing the fee simple interest for £300,000. They were willing purchasers and at the date of the application had already paid £200,000 of the purchase money, the balance being withheld merely for the completion of conveyancing steps already agreed to by the vendors. In these circumstances the Defendants clearly had a beneficial interest in the site, certainly to the extent of the purchase money paid, which, as they were purchasers of the fee simple, could fairly be described as a freehold interest.

In the second place it seems to me that even if the description given of the Defendants' interest lacked accuracy or particularity. which I do not accept, the divergence from accuracy and particularity was so insignificant and trivial as proper to be ignored. In this respect I regard as applicable the words of Henchy J. in dealing with the application of the de minimis rule to these permission regulations. He said in Monaghan Urban District Council v. Alf-A-Bet Promotions Limited as follows:

"In other words, what the legislature has prescribed, or

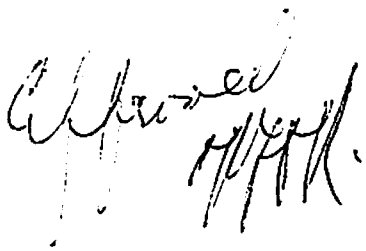
> allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially and therefore adequately, complied with."

In my view, these words apply in the circumstances of this case. Even if the description of freehold wanted in accuracy, I believe what was lacking was so technical and insubstantial as proper to be ignored.

I have come to the conclusion that the claim made by the Plaintiff in these proceedings lacks reality and is without foundation. It is admittedly made for the sole purpose of seeking to deprive the Defendants of the benefit of the planning permission which they obtained both from the Planning Authority and An Bord Pleanala. However justifiable the Plaintiff's annoyance at this development may have been or still is, it cannot excuse the mounting of an action which cannot succeed and which is therefore vexatious. In the circumstances and on the facts the continuance of this action would constitute an injustice to the

Defendants. In my view, the learned trial Judge was correct in the Order which he made dismissing the Plaintiff's claim.

I would dismiss this appeal.



McCABE v H

O'Higgins C.J.
Henchy J.
Hederman J.

THE SUPREME COURT

1982 No. 182P
1982 No. 79

JOHN McCABE

v.

HARDING INVESTMENTS LTD.

Judgment of Henchy J.
delivered the 27 October 1982

In 1957, when planning controls were laxer than they are today, a company called Farrell Homes Ltd. got planning permission to build a seven-storey office building on what had apparently been a car park in an area of laneways and mews houses between Leeson Close and Kingram Place, off Lower Leeson St., Dublin. Farrell Homes Ltd. seem to have had only a leasehold interest in the site. The planning permission they got would become spent and useless unless the permitted development was completed by November 1981. They therefore set about building the office block with all speed, the builders working from early

morning until late at night, until by May 1981 it stood seven storeys high.

However, the building as erected was, in the opinion of the Dublin Corporation Planning Department, different in a number of material respects from that for which permission had been granted in 1957. In December 1980, when the development was at an early stage, the architects for Farrell Homes Ltd. were informed that if the development proceeded in accordance with the plans then lodged with the Planning Department, there would be many breaches of the 1957 permission, and that a fresh planning permission would be needed for the proposed revised permission.

The objections made by the Planning Department do not seem to have been contested by Farrell Homes Ltd. In fact when a motion by the present plaintiff and another neighbouring landowner under s. 27 of the Local Government (Planning and Development) Act, 1976, seeking to compel Farrell Homes Ltd. to remove from the site all structures not authorised by planning

permission was heard in the High Court in May 1981, Barrington J. found that Farrell Homes Ltd. had placed themselves formally in the wrong in that the new building had been erected some few feet nearer to an adjoining building than had been permitted and the projections provided for in the original plans had been omitted, as also had the basement. While Barrington J. was prepared to treat those deviations as only formal breaches which did not entitle the applicants then before the court to the order sought, the fact remains that those who controlled Farrell Homes Ltd. had flagrantly breached conditions of the 1957 permission. For example, the omission of the basement cannot be treated as being other than a deliberate breach.

In 1981 Farrell Homes Ltd. disappeared from the story of this development. They were replaced as developers by Harding Investments Ltd. We have not been told whether the same individuals controlled both companies. The corporate veil has not been drawn aside. However, we are entitled to impute to those who control

Harding Investments Ltd. knowledge of the breaches of the 1957 planning permission that had been committed by Farrell Homes Ltd. And it is proper to note that fact when evaluating the conduct of Harding Investments Ltd. They are not to be treated as uninformed beginners.

On the 6 April 1981 Harding Investments Ltd. lodged a fresh application for development in respect of this office block. The partly completed building was then five storeys high, so Harding Investments Ltd. were really seeking to acquire the benefit of the breaches of the 1957 permission committed by Farrell Homes Ltd. One would have expected them in those circumstances to be meticulously accurate and open in furnishing to the planning authority the necessary statutory particulars. Unfortunately that was not the case.

Amongst the matters required to be stated in a planning application is the applicant's interest in the site: see art. 17 of the Local Government (Planning and Development) Regulations, 1977. In

their application of April 1981 Harding Investments Ltd. stated their interest in this site as being freehold. That was not correct.

What had happened was this. In September 1980 a written contract was made whereby Investdel Ltd. agreed to sell the site to Fitzpatricks (a firm of solicitors) in trust, for the sum of £300,000. £30,000 was paid on the signing of the contract, £170,000 was to be paid on the 2 October 1980 and the remaining £100,000 was to be paid on the 2 January 1981, which was the closing date fixed for the sale. In an affidavit made on behalf of Harding Investments Ltd. it is stated that in November 1980 they had gone into possession of the site and had "commenced construction of the office block". That should have read "commenced completion of the office block". In other words, they proceeded to carry out what they must have known was an unpermitted development. The uncontroverted evidence on affidavit of the plaintiff is that the work of completing the office block went on

from November 1980 with feverish haste, the builders working from morning until late at night and often until the early hours of the following morning. The only reasonable inference is that they wished by such flouting of the planning law to present the planning authority with the accomplished fact of a largely completed office block.

The sum of £30,000 was paid to the vendors on the signing of the contract and £170,000 was paid in October 1980. Difficulties in making title in accordance with the contract delayed completion and it was not until the 29 May 1981 that the balance of the purchase money was paid over and the sale completed. As those who acted on behalf of Harding Investments Ltd. must have known, they were not entitled before the 29 May 1981 to say that they had the freehold. I consider that when it was stated on behalf of Harding Investments Ltd. in their planning application of the 6 April 1981 that they were then entitled to the freehold, that statement was made in

the knowledge that it was not accurate, but in the expectation that if its correctness were queried they would be able to say that they had subsequently got the freehold. This untruth cannot be viewed in isolation. It was part of a course of conduct designed, by flouting the requirements of the planning code, to get planning permission as soon as possible for the completion of an unlawfully erected office block so as to reap an early harvest from the rental of the building, which is now ready to be leased at a rent of £315,000 per annum.

The techniques adopted by Harding Investments Ltd., uncommendable though they were, proved successful. On the 25 June 1981 Dublin Corporation granted them a planning permission for the office block which had been somewhat illegally built and, although a local residents' association appealed against that permission, An Bord Pleanála regranted the permission on the 10 November 1981 with some slight variation of the conditions. In those circumstances, even if the Court

were to hold that permission to be bad for being based on a bad application, it is safe to assume that if Harding Investments Ltd. were to lodge a fresh application, the same or a similar permission would issue. Because of the planning permissions that have been granted, this office block must be treated as an accomplised fact in the eyes of the law. While the statement in the planning application of the 6 April 1961 that Harding Investments Ltd. then had the freehold was not strictly correct, they had acquired it both when Dublin Corporation granted planning permission on the 25 June 1981 and when An Bord Pleanála granted that permission in a slightly varied form on the 10 November 1981. Considering that both the Dublin Corporation and an Bord Pleanála were prepared to overlook the questionable methods whereby Harding Investments Ltd. were able to apply for planning permission for a somewhat illegally erected building, I agree with Hamilton J. in his conclusion that the false statement in the planning application that the developers then

had the freehold must be overlooked, particularly as we know that they acquired the freehold some seven weeks after making the application and before the application was dealt with.

While the relief claimed by the plaintiff should in my opinion be refused, the defendants will not have disregarded the planning laws with impunity. By their conduct they have attracted this claim by the plaintiff which, although unsuccessful in law, is not without merits. Because of what seemed to him an unaccountable grant of planning permission for the erection of an office block which was then substantially, but not entirely legally, erected, and because of the way his rights as an adjacent home-owner were interfered with by the building work, he felt impelled to bring these proceedings. As a result, an intending lessee of the building at an annual rent of £315,000 has understandably refused to enter into the lease until these proceedings are terminated. This means that the defendants will

have lost the most of a year's rent. That is a not insignificant penalty.

I would dismiss this appeal.

Approved
S.-H.
1-11-52