

THE HIGH COURT

1983 No. 3 M.C.A.

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

AND IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF THE COUNTY OF DUBLIN

BETWEEN:

THE COUNTY COUNCIL OF THE COUNTY OF DUBLIN

APPLICANTS

AND

PETER LOUGHRAN

RESPONDENT

Judgment of Mr. Justice Murphy delivered this 18th day of May, 1983.

The Respondent - Mr. Peter Loughran - in conjunction with Bridie Loughran acquired a site comprising approximately one third of an acre on the north side of the Castleknock Road, Dublin and subsequently erected a dwellinghouse thereon.

The need to express this basic statement in such vague terms underscores the uncertainty which surrounds so many aspects of this case.

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It is true that under an Indenture of Lease expressed to be dated the 30th day of June, 1977 (the 1977 Lease) made between Gallagher Group Limited of the one part and Peter Loughran and Bridie Loughran of the other part the site in question was demised to the lessees aforesaid as joint tenants from the 25th day of March, 1976 for the term of one hundred and fifty years. The lease was expressed to be made in consideration of the payment by the lessees of the sum of £10,000.00 and included an express covenant by the lessees to erect before a date which was therein unspecified, a dwellinghouse in accordance with the plans to be approved in writing by the lessor or his agent. It is common case that the lease was not in fact made in consideration of a fine. Mr. Loughran explained that it was in essence an exchange. The more surprising feature of the lease is that it bears thereon a certificate by the lessors' agent to the effect that the building covenant had been performed and this certificate is dated the 28th April, 1977, that is to say, some months before the execution of the lease itself.

It was Mr. Loughran's evidence that he became entitled in

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equity to the site some time in 1975 and that building operations were commenced thereon some time in 1976. There was a significant controversy between the parties as to whether these operations took place in April or May of that year. Certainly foundations had been taken out by the 11th May, 1976. On the other hand the dwellinghouse was not completed until the end of the following year.

There was further controversy as to whether the lands demised coincided, or the extent to which they coincided, with sites in respect of which planning permissions had been granted. There were disputes as to the precise nature of the development works undertaken and the further significant divergence of evidence as to the existence and location of a gateway at or near the site prior to any development thereon.

However, the undoubted fact is that the Respondent did erect a dwellinghouse on the lands demised by the 1977 lease some time between the years 1976 and 1977 and that the premises so erected now known as Tudor Lodge and formerly site 126 consist of a substantial detached dwellinghouse with an

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entrance opening on to the Castleknock Road. At this point it may be helpful to add that the entrance itself is what is described as trumpet shaped being some thirty feet at the outer limit of the boundary wall narrowing to some ten feet at the gateway itself.

The issue in the present case is whether the building and entrance aforesaid is authorised by an appropriate planning permission granted under the Local Government (Planning and Development) Acts 1963 to 1976.

Several planning permissions were indeed granted for the development of the site in question. On the 6th day of July, 1976 the Applicants granted planning permission to Gallagher Group Limited for the erection of one hundred and thirty one houses thereon. That permission in fact varied from an earlier permission granted to the same developers on the 5th April, 1976, for the erection of one hundred and forty three detached houses on the same lands. A significant feature of those two permissions (the Gallagher permissions) was that the houses would be detached and that access there to the houses fronting

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on the Castleknock Road would be gained via a cul-de-sac to be built along the line of the houses fronting on the Castleknock Road and connecting with another access road: there would be no immediate access from these houses to the Castleknock Road itself. It is also of some significance that the identification of the site the subject matter of these proceedings as 126 clearly derives from the plans submitted in connection with the Gallagher permission applications. On the 15th March, 1974 permission had been granted to Messrs. Rohan Homes Limited for the erection of some sixty six houses on and adjoining the site in question in these proceedings. Again this permission related to detached houses and the conditions attached to the permission precluded immediate access to the Castleknock Road.

However as far back as the 1st August, 1956 permission had
(1st 1956 permission)
been granted under the Town and Regional Planning Act, 1934 for
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certain developments on a site delineated on the official plans relating to the application for that permission. The permission so granted is, by virtue of Section 92 of the Local

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Government (Planning and Development) Act 1963 to be treated as a permission granted under Section 26 of the 1963 Act.

Because of a discrepancy between the plans attached to the applications for general permission and special permission in 1956 considerable confusion arose and added further to the difficulty in comparing the precise location of that site with the Respondent's present holding. However, having regard to comparison drawings prepared by the experts on behalf of each party I think it can be said with reasonable confidence that the lands demised by the 1977 lease included the greater part of the lands comprised in the 1956 permission and in particular the frontage thereof.

The Respondent does not make the case that Tudor Lodge was erected in accordance with the Gallagher permissions or the earlier Rohan permission or any of them. The existence of an access to the Castleknock Road would make any such argument impossible. Nor does the Respondent contend that the development undertaken by him was intended to conform with the plans approved in connection with the 1956 permission.

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The actual plans approved for the purposes of that permission relate to two semi-detached houses each having an access to the Castleknock Road measuring six feet in width. Moreover the 1956 special permission was granted subject to certain express conditions which included a condition requiring that details of the front boundary wall should be submitted to and approved by the local authority before the same was erected and it is common case that no such action was taken.

Indeed it is the Respondents case that whilst he was aware of the existence of the 1956 permission he did know of the plans which had been approved in connection with that permission and did not seek to erect premises in accordance with any such plans but instead that he had retained the services of the architect employed by Messrs. Gallagher Group Limited in 1976 and instructed him to prepare appropriate plans for the building of a house and to secure all necessary permissions therefor. The Respondent maintained that he was convinced at all times that his architect had in fact made the appropriate applications and received all necessary consents. Again it is clear that no

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application whatever was made for permission to build the particular house which the Respondent in fact erected on the site. Whilst this would seem to suggest a serious dereliction of duty and perhaps breach of contract by the Respondent's professional advisers it does seem extraordinary that the Respondent himself, who is an experienced builder, made no enquiries at any material time as to the existence of a permission authorising the erection of the particular structure. This is particularly so as I am satisfied that inspectors from the Applicants did alert the Respondent to the fact that the particular structure was not authorised by an appropriate permission.

On the 21st January, 1977 the Respondent sought permission to retain the entrance to Tudor Lodge and on the 18th March 1977 this application was refused. On the 14th November, 1977 an application was made on behalf of the Respondent seeking permission to retain both the house and the entrance as built by the Respondent and this application too was on the 13th of January, 1978, refused. However, on the 25th of September,

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1978 An Bord Pleanála on appeal granted permission for "the revised house type" but refused permission for "the revised entrance". The permission so granted on appeal included in the schedule thereto a provision to the effect following:-

"It is also considered in the interest of road safety that there should be no direct access from the house to Castleknock Road for either vehicular or pedestrian traffic and that for this purpose the existing entrance from Castleknock Road should be blocked up by a boundary wall set back on a line which shall have regard to the land reservation required for the improvement of Castleknock Road".

Whilst it is accepted by both parties that the planning board was entitled, and indeed required, to consider the desirability of granting such permission by reference to relevant planning considerations as at the date of the appeal it was urged on behalf of the Respondent that the board was not entitled to impose in effect what was a condition requiring the Respondent to forsake the right of access to the Castleknock

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Road which he possessed first as a matter of law and secondly as a right attaching to the site by virtue of the 1956 permission. In my view that argument is not well founded. Whilst I accept that in general the owner of property fronting on a public highway has ordinarily the right of access to the highway from every part of his property it seems to me entirely within the competence of a planning authority to impose conditions restrictive of the exercise by an owner of his property or other rights as a term of granting the particular permission. In so far as the right of access was authorised by the 1956 permission this was appurtenant to or formed part of the permission to erect two semi-detached houses which were never built. Moreover the access as actually laid out does not accord with that provided for in the plans approved in 1956. It seems to me that in effect the Respondent is seeking to establish something in the nature of a composite permission by selecting the mode of access as provided for in 1956; the general type of house as approved by the Gallagher permissions and the particular house as ratified by the retention

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permission granted by the planning board. In my view such an approach is not warranted by the Planning Acts. There is no single permission authorising the existing house with an access from the Castleknock Road. Indeed logically the house itself - not having conformed with the 1956 permission - is unauthorised if and as long as the access to it is directly from the Castleknock Road as the only permission authorising its retention requires the access in the manner provided by the retention permission of 1978.

A further effort was made by the Respondent to regularise the matter by applying to the planning board for a ruling to the effect that the entrance to his premises was an exempted development and that question was decided adversely to his contention on the 26th of February, 1980. In my view the Court has no function to go behind that decision at this stage having regard to the fact that the time for appealing from that decision has expired. The Respondent is understandably concerned by the fact that the closure of the access to the Castleknock Road will reduce considerably

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the value of his premises and furthermore create serious practical problems in relation to alternative modes of access. At the present time a wall erected by the Respondent himself separates his premises from the estate road and there is some doubt as to the existence of a right of way in favour of the Respondent over that road which has not yet been taken in charge. It may take some time to resolve these problems but resolved they must be. The reduction in value of the Respondent's premises, however, is not in my view a relevant consideration in these proceedings.

The Applicants have claimed an Order in the nature of a mandatory Injunction requiring the Respondent to carry out the development at Tudor Lodge in accordance with the later of the Gallagher planning permissions. I do not see the basis for making such an Order accepting, as I do, that the Respondent did not purport to develop in accordance with that permission. It seems to me that the appropriate Order at this stage is to grant an Order requiring the Respondent to discontinue the unauthorised use of the present entrance to

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the premises Tudor Lodge (formerly 126 Castleknock Park) but to put a stay on the Order until further Order. The matter may be re-entered as soon as the estate has been taken in charge. As soon as I am satisfied that that has been done I will lift the stay on the Order.

Edward M. Kelly