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THE HIGH COURT

1979 No. 5261P

BETWEEN/

(984) KRM 434
Recorded

MAY LEECH

PLAINTIFF

and

11 OCT 1983
LJL

ROSE REILLY AND PATRICK REILLY

DEFENDANTS

Judgment of Mr. Justice O'Hanlon delivered on the 26th day of April, 1983.

The Plaintiff and the Defendants are neighbours at Academy Street, Navan, Co. Meath. They have been there for many years and have always lived on friendly terms in the past. It is very unfortunate that they have wound up in the High Court litigating against each other but now that they have done so they are entitled to have a decision of the Court on the matters in dispute between them and one can only hope that in the course of time they will come to realise that the maintenance of good relations between them is of greater importance than success or failure in legal proceedings.

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The story, as told by the Plaintiff, is an all-too-familiar one in present-day Ireland. The Plaintiff is an elderly lady, living on her own in an attractive residence at No. 9 Academy Street, Navan. One day, she said, her next-door-neighbour set about erecting a structure along the line of the dividing wall of the two back gardens, and by night-fall a massive corrugated-iron work-shop was obscuring the landscape at the back of her house. Initially her complaint was that the building had been rushed up without consultation and without planning permission, but during the course of the proceedings she added a claim that it infringed her prescriptive right to light and that she was subjected to nuisance by noise and dust emanating from the operation of a joinery business in the new premises.

On these grounds she claims a mandatory injunction to compel the Defendants to remove the offending structure, and damages for acts of nuisance already committed.

An application was made for interlocutory relief, and by Order of McWilliam.J., dated the 8th October, 1979, an undertaking on the part of the second-named Defendant, Patrick

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Reilly, was recited, whereby he undertook not to do any further building work and not to use any of the new buildings and premises for his joinery business "but remaining at liberty to use the old buildings for such joinery business".

Mr. Smith, for the Plaintiff, placed considerable reliance on the decision of the High Court (Costello J.) and of the Supreme Court in the case of Thomas J. Morris v. Peter Garvey, (1982)ILRM 177 where a developer was ordered to take down and remove a block of flats for which he had obtained planning permission but in respect of which he had failed to comply with the conditions attached to the grant of permission.

In the present case the Defendant, Patrick Reilly, had put up the galvanised structure complained of without ever applying for or obtaining planning permission. When proceedings were commenced against him he applied for permission, not, as one would have expected, to retain an unauthorised structure, but to build, and this application was rejected by the local Urban District Council as planning authority for the area. On appeal to An Bord Pleanala, permission was granted but it was made subject to conditions requiring the said Defendant to

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reduce the length of the building by 15½ feet so as to set it back some distance from the Plaintiff's premises, and also requiring steps to be taken to surpress the level of dust and noise emanating from the structure. This decision came through on the 11th November, 1980, over a year after the refusal of permission by the Urban District Council and the giving of the undertaking by the second-named Defendant to the High Court to desist from further work on the premises.

The second Defendant was now in a cleft stick. He could not comply with the requirements of the planning authority while he was still bound by his undertaking to the High Court, and he should then have come back to the Court to seek to be released from the terms of his undertaking. He did the wrong thing, as he had done at almost every stage since the dispute originated between the parties. He went ahead and reduced the area of the workshop, and carried out certain work with the intention of reducing noise and dust levels, but without securing his release from his Court undertaking. He went further and built a loft area within the building so that the activities of the joinery workshop could be carried out on two

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different levels, and again ran into trouble with the planning authorities on this score.

I propose now to set down my conclusions on the different issues raised for determination in the case and on which the Plaintiff's claim for relief is founded. I refer to Thomas Reilly as "the Defendant" as his mother, Rose Reilly, took no active part in the matters of which complaint is made.

The Position under the Planning Acts.

The Defendant, in defending his action in proceeding to build without planning permission, gave evidence to the effect that he thought planning permission was unnecessary, since he was merely rebuilding a workshop on a site where one had always stood previously. He was wrong in coming to this conclusion, but his evidence, coupled with that of some other witnesses, and an inspection of an earlier ordnance map, was sufficient to convince me that the Defendant's family had carried on a joinery workshop business on the site at the rear of No. 10 Academy Street, Navan, for a very long time past - extending back into the latter half of the nineteenth century, and in premises which were somewhat lower, but otherwise comparable in size with the structure which is the subject-matter of the

present proceedings. The old structure had eventually to be demolished in the 1960s and in or about the year 1970 a new and smaller structure was erected, which, in turn, was merged in the large galvanised structure which the Defendant put up in 1979. I am prepared to accept that the Defendant did not intend to flout deliberately the provisions of the Planning Acts.

He then proceeded to make good his default by applying for permission to the Urban District Council, and on appeal to An Bord Pleanala. The structure was legitimised by the decision of the Board, subject to compliance with the conditions laid down by them. Once again, I have come to the conclusion that the Defendant was willing and anxious to comply with the requirements of the Board, but was hampered in doing so, first, by the effect of the High Court Order which considerably curtailed the scope for any activity on his part on the site, and secondly, by the decision of the Plaintiff not to co-operate in any way with the Defendant pending the hearing of these proceedings. One of the most effective ways of complying with the requirements of An Bord Pleanala with regard to noise and dust was to substitute or superimpose block-work, in place of, or over, the galvanised sheeting which formed the original

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outer shell of the structure. The Defendant was willing to do this work, but it could not be completed satisfactorily without gaining access to the Plaintiff's back garden for part of the work. He has done the work so far as it can be done without such access. In doing so, he has committed a technical breach of the High Court Order, and he has left the Plaintiff with a raw-looking, unsightly, and uncompleted building on her boundary, but I am not prepared to condemn him for any of these matters as it appears to me that he has made a bona fide effort to eliminate possible sources of nuisance, and to comply with the conditions laid down by An Bord Pleanala. That the work has not been satisfactorily completed by now, I attribute to an unreasonable refusal on the part of the Plaintiff to help the Defendant in any way in making good his previous defaults.

For these reasons, I am of opinion that the circumstances of the present case are clearly distinguishable from those which obtained in the case of Morris v. Garvey, and that the failure to secure full compliance with the requirements of An Bord Pleanala has not been of such a character as would support a claim for a mandatory injunction to remove the structure.

With regard to the further work carried out by the Defendant in altering the internal lay-out of the workshop and installing a second floor within the building, he claims to have submitted a proper application for planning permission to the Urban District Council in respect of this work and to have obtained the necessary permission by default when the statutory period of two months had elapsed without any communication having been received from the Planning Authority.

For the Planning Authority it was said that during the two-month period they sought further information from the Defendant, which would have stopped time running against them for the purposes of the Acts, but their evidence stopped short of positive testimony to confirm that this notice had ever been despatched to the Defendant. He, on the other hand, deposed on oath that he had never received any such notice from the Planning Authority, and a prosecution brought against him under the Planning Acts was dismissed. The evidence in these proceedings did not satisfy me that the additional work carried out on the interior of the building was carried out in breach of the requirements of the Planning Acts, and I am not prepared to

grant an injunction under this heading.

Once again, it must be recognised that the Defendant in reconstructing the interior of the building was doing so in breach of his undertaking given to the High Court, but he stated that when he was compelled to curtail the length of the building by 15½ feet in obedience to the requirements of An Bord Pleanala, it made it impossible for him to continue his joinery business as before save by recapturing some of the floor area lost, and he was thus driven to work on two levels instead of one. In such circumstances I believe that if application had been made to the High Court to release the Defendant from his undertaking, so as to enable him to do this internal work on the premises, the permission of the Court would have been readily forthcoming. I am prepared to overlook this default on the part of a man who was trying to keep an old established business in operation and coping at the same time with the hostility of his neighbours; the wear and tear of proceedings in three different Courts, and the intervention of the Planning Authorities.

Diminution of Light.

A major part of the Plaintiff's claim concerned the

diminution of light to her premises, caused by the erection, in ⁰⁰³⁰¹¹ the garden next-door, of this very substantial building, whose present dimensions are approximately 65 feet in length, 25 feet 4 inches in breadth, and about 26½ feet in height at its highest point.

The evidence for the Defendant was to the effect that there were always very substantial buildings on the site, within living memory, save for a brief period during the 1960s, and that the height of the original buildings was not far below that of the present structure. The 1954 Ordnance Survey Map shows almost complete coverage of the site to the rear of the Defendants' premises - to a much greater extent than is now achieved by the present workshop in its reconstructed form, and it is very difficult to assess how much worse off the Plaintiff's premises are, in terms of access of daylight, than they were in their former situation until the demolition of the original buildings on the Defendants' lands.

The testimony of the persons affected by alleged diminution of light is generally regarded in this type of case as carrying as much weight as, if not more weight than, the

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testimony of experts who attempt to measure diminution of light in mathematical terms. The Plaintiff commenced by saying that her house was "completely overshadowed" by the offending structure, and that "no sun could get in". On cross-examination however, she receded considerably from this position and said that her garden was completely overshadowed until the shed was reduced in length by 15½ feet; that this did not happen for months; that "the light is now alright - not as good as it was... (the lower rooms) not darkened since they took down the 15 feet; the big bedroom upstairs is not much darker than it was - I have painted it up; the little room downstairs is slightly darker because of the galvanised building."

I do not consider that this adds up to any significant complaint of diminution of light to the building at the present time, whatever about the position before the galvanised structure was reduced in size, and it would not give any real support to the claim for a mandatory injunction to remove the Defendants' building.

Nuisance by Dust, Noise and Flooding.

The joinery workshop undoubtedly gives rise to considerable

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dust in the atmosphere, and one of the conditions imposed by An Bord Pleanala was designed to eliminate any nuisance of this kind. If the building is properly enclosed by an outer fabric of blockwork, at least on the sides where it abuts onto the Plaintiff's premises, then it may be anticipated that dust will no longer be a source of complaint save perhaps to those who have to work in the building. Even as it is, however, the Plaintiff made very little of this complaint in her evidence. The photographs put in evidence showed that dust penetrated into old sheds in the Plaintiff's back garden and settled there, but the Plaintiff said that it was not a nuisance inside the house and only got onto the smaller out-house at the end of the garden. Therefore I am inclined to regard it as a minor source of complaint which may have ceased altogether by now, and should certainly cease to trouble the Plaintiff if and when the Defendant puts in the dust extraction system which he said in evidence it was his intention to provide for the benefit of his staff.

The evidence of nuisance by noise was of a more compelling nature. While the galvanised structure was housing the joinery workshop and while it was left in an unfinished condition

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by reason of the undertaking given by the Defendant to the Court to suspend work on the building, the noise of the machines caused considerable trouble and annoyance to the Plaintiff. She said the back of her house was "unliveable with noise"; that there had been no noise audible prior to 1979; (after that) "there was noise every day - it was outrageous - grinding, squealing every day". She conceded that since the blockwork had been put in the noise had diminished - "the noise is not fully on - I don't know if the same work is going on or not."

As the reconstruction of the outer fabric of the building has been left incomplete, some noise of the machines can still be heard outside, but the Defendant professed an intention to close off the remaining gaps and openings in the building whenever he can do so with the co-operation of the Plaintiff. My conclusion is that the Plaintiff did have to endure an unreasonable amount of noise over a long period of time between 1979 and 1983, but that that situation had been remedied in part already and will be remedied in full by the Defendant if and when the Plaintiff enables him to do so.

The complaint of flooding related to water pouring from a gutter on the new galvanised structure, which in the early stages caused flooding right into the Plaintiff's kitchen. Since the building has been reduced in size by 15½ feet, the water when it escapes now falls into the Plaintiff's back garden, where it is less of a nuisance. The Defendant says that this matter of complaint was never brought to his notice before and that if he had been told about it he would have taken immediate steps to remedy it. I do not regard it as being of great moment since it does not appear to have featured in the correspondence or pleadings at any stage.

To summarise my conclusions on the material parts of the evidence I do not regard this as a case where the Defendant attempted to ride rough-shod over the Plaintiff's rights as has happened in many other cases where the provisions of Sec. 27 of the Local Government (Planning and Development) Act, 1976, have been invoked before the Court. When the work of construction was first initiated by him he actually applied to the Plaintiff and obtained permission to bring a crane in through her rear garden, for the purpose of carrying out the

work which was later to cause litigation to arise between the parties.

I do not propose to give relief by way of injunction to compel the removal of the structure or any part thereof, or to restrain the Defendants from completing same in a proper manner, and I discharge the second-named Defendant from further compliance with the undertaking given by him on the occasion of the making of the Order of McWilliam J. on the 8th October, 1979.

I think the Plaintiff has been subjected to a certain amount of nuisance by noise, dust and flooding over the past four years, but I believe this could have been minimised and perhaps terminated altogether had she not taken up an entrenched position in relation to her complaints against the Defendant.

I propose to allow the Plaintiff to amend the pleadings to include a specific reference to these matters of complaint, and I propose to award a sum of £1,000 damages in respect of same.

With regard to the question of costs, I propose to put this matter in for mention on Monday 4th July 1983 at 10.30 a.m.

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if this time and date are suitable for the parties. In the meantime I expect the Defendants to put in hand without delay, all works necessary to comply fully with the conditions laid down by An Bord Pleanala to eliminate nuisance by dust and noise, and I expect the Plaintiff to allow the Defendants all reasonable rights of access to the rear of the Plaintiff's premises at No. 9 Academy Street aforesaid, to enable the said works to be completed satisfactorily for the benefit of all parties. I trust it will be possible to arrange this either by direct contact between the parties, or indirectly through their respective solicitors. My ultimate decision on the issue of costs will be influenced by the amount of diligence shown by the Defendants, and the amount of co-operation shown by the Plaintiff, in relation to the completion of the building works.

Approved.

R. J. O'Hanlon

R.J. O'Hanlon.

26th April, 1983.



Counsel for the Plaintiff:-

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Cases cited:-

Morris v. Garvey (1982) ILRM 177

Crodaun Homes Ltd. v. Kildare Co. Council, (1983) ILRM 1.