STATE (FINGLAS)

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

THE SUPREME COURT

No. 166 S.S.
No 228/1981

THE STATE (FINGLAS INDUSTRIAL ESTATES LTD.)

v.

DUBLIN CO. CO.

Judgment of Henchy J.
delivered the 17th February 1983

New Law.

In April 1975 an application was submitted on behalf of Finglas Industrial Estates Ltd. ('the developers') to Dublin County Council ('the Council') as planning authority for permission to develop 117.5 acres at Balseskin, Finglas, Co. Dublin, as a light industrial estate. At this stage the developers did not own, nor did they have any interest in, the land in question, nor were they even incorporated as a limited company.

In June 1975 the Council refused the application for development, giving five reasons, the most important seemingly being that facilities for the disposal of piped sewage and surface water were not available and could not be provided, because the only sewer in the vicinity was in the functional area of Dublin Corporation and was already being used to full capacity.

The developers appealed to the then Minister for Local Government against that refusal. The Minister by order dated the 17 February 1977 allowed that appeal and granted the permission sought, subject to this condition:

> "The developers shall pay a sum of money to the Dublin County Council and/or to Dublin Corporation, as may be appropriate as a contribution towards the provision of a public water supply and piped sewerage facilites in the area. The amount to be paid and the time and method shall be agreed between the developers and the said Council and/or the said Corporation before the development is commenced or failing agreement, shall be as determined by the Minister for Local Government".

It was, to say the least of it, an unusual grant of permission. The Council had no foul sewer system within three miles of the lands and the only such system in the Finglas area was and is one maintained by Dublin Corporation, and it was said to be already overloaded. The condition attached to the Minister's permission purported to allow Dublin Corporation to become involved in the provision of the necessary

sewerage facilities, but they were not even a party to the planning application or the appeal. On top of everything, the Minister's permission was granted to developers who had no existence, for they did not become incorporated until April 1981. Were the latter point the only issue in this appeal, I fear that I would hold that the Minister's permission was invalid for having been granted to a non-existent legal person. I do not think that any provisions in the Companies Act, 1963, validating acts done before incorporation, can detract from the fact that it is inherent in the planning code that both the planning authority and the public shall have an opportunity of vetting the planning application in the light of, amongst other matters, the identity of a named and legally existing applicant. However, this is not the main issue in this appeal.

Offers by the developers to meet the financial demands which were written into the condition in the Minister's permission having failed, primarily because, in the opinion of the Council, the piped sewerage facilities could not possibly

be made available within the legal lifetime of the permission (apart from legal as distinct from practical difficulties), the resolution of the condition fell to be determined by the Minister for Local Government.

By this stage, however, the implementation of the Minister's permission had been overtaken by fresh legislation. His permission had been granted pursuant to the provisions of the Local Government (Planning and Development) Act, 1963. That Act was substantially amended by the Local Government (Planning and Development) Act, 1976. Among the important changes made by the latter Act was the setting up of An Bord Pleanála ('the Board'), to which were transferred most of the powers formerly exercisable by the Minister under the 1963 Act.

The developers' advisers formed the opinion that the power given to the Minister in the condition attached to his permission (i.e. to fix, in default of agreement, the amount to be paid by the developers and the time and mode of such payment) had passed to the Board. They therefore wrote to the Board asking them to carry out the assessment or

adjudication that had been reserved to the Minister by the condition. The Board, after giving the developers and the Council an opportunity of making representations, issued an order on the 23 December 1980 determining that the contribution to be made by the developers was to be £1,500 per acre, and that it was to be payable forthwith to the Council as sanitary authority for the area.

The developers now considered that they were free to consummate the condition by making the payment as assessed by the Board. On the 19 January 1981 they sent by hand to the Council a letter containing a cheque for £180,750 being the amount payable in accordance with the order of the Board. But the Council would have none of it. They refused to accept either the cheque or the accompanying letter. The developers, feeling that the authority of the Board was being flouted by the Council, and that they were being thwarted in carrying out what they now considered to be an unconditional planning permission, decided to have recourse to the Courts.

On the 6 April 1981 they got a conditional order of mandamus directed to the Council commanding them to accept the

cheque for £180,750, which was the amount of the financial contribution fixed by the Board. That conditional order was made absolute, notwithstanding cause shown, on the 10 July 1981, and it is from that absolute order that the present appeal has been taken.

The arguments in this appeal have ranged over a wide field, but in my opinion the essential issue is whether an order of mandamus should have been made compelling the Council to accept the cheque tendered. While this question (or its ramifications) does not appear to have been explored in the High Court, I think it is so crucial to this case, and possibly to others, that it cannot be ignored.

Counsel for the developers have proceeded on the basis that the Board's order of the 23 December 1980 could not be questioned as to its validity. This belief was reached because s. 82(3A) of the 1963 Act (as inserted by s. 42 of the 1976 Act) provided as follows:

> "A person shall not by prohibition, certiorari or in any other legal proceedings whatsoever question the validity of -

(a) a decision of a planning authority for permission or approval under Part IV of the Principal Act [i.e. the 1963 Act],

(b) a decision of the Board on any appeal or on any reference,

(c) a decision of the Minister on any appeal,

unless the proceedings are instituted within the period of two months commencing on the date on which the decision was given".

It is common case that the Council did not question the validity of the Board's order within two months after it was made. But does the two-months period of limitation apply to the order? I think not. It did not come under (a), for it was not a decision of a planning authority as statutorily defined; it did not come under (b), for it was not a decision of the Board on any appeal or reference (which latter term is statutorily limited to questions as to what is or is not development or exempted development); and it plainly was not a decision of a Minister on any appeal, but was only a matter included in a condition attached to such a decision. I am satisfied, therefore,

that the two-months time bar on questioning the validity of the Board's order does not apply and that it is open to the Council to argue that that order was invalid.

For my part, I consider that the Board's order was and is a nullity. The power of the Minister to attach the condition requiring the developers to pay a sum of money before the permission became effective was inserted by the Minister in purported exercise of the power vested in him under s. 26 of the 1963 Act. If there could be a transfer to the Board of the assessment or arbitration power given to the Minister under the condition as a persona designata, that transfer would have taken place under s. 14(4) of the 1976 Act, which is in the following terms:

> "In case there is attached to a permission or approval granted under s. 26 of the Principal Act a condition which provides that a contribution or other matter is to be agreed between the planning authority and the person to whom the permission or approval is granted and that in default of agreement the contribution or other matter is to be determined by the Minister, the condition shall be construed as providing

(9)

that in default of agreement the contribution or other matter is to be determined by the Board".

It is to be noted that the type of condition envisaged by this subsection is one that required agreement between the developer and the planning authority. In other words, it is the type of agreement that could have been inserted as a condition by the Council as planning authority if they had granted the permission. But the Minister, in purported exercise of his appellate jurisdiction, provided for a payment "to the Dublin County Council and/or to Dublin Corporation". If the Council had granted permission subject to such a condition they would have been acting ultra vires, for the statute does not provide for a condition as to payment to another planning authority, either primarily or in the alternative. Since the Council as planning authority had no power to do so under s. 26, the Minister in exercising his appellate jurisdiction was no less bereft of such a power.

S. 14(4) of the 1976 Act must be read as referring to a permission validly containing a condition as to a contribution as between the developer and the relevant planning authority, and

as the Minister's condition introduced without authority a possible contribution to a third party, i.e. the Dublin Corporation, it is to be said that s. 14(4) does not apply to it, so that the Board had no power to fix the contribution.

But even if the contrary were held to be the case, namely that the Board had power under s. 26(4) to fix the amount, the time and the method of payment, it would have to be held that the effect of their order was merely to determine the nature and extent of the financial duty that fell on the developers as the condition for getting development permission. The developers were then entitled to tender the required amount; and this they did. However, I fail to see how mandamus could issue to compel the Council to accept the amount tendered. The developers might have had other remedies open to them, such as a declaratory action as to their rights, or a claim for a mandatory injunction, but I have heard no valid argument advanced to show that there was a public duty, at common law or under statute, on the Council to accept the cheque tendered by the developers. And as I understand the law of mandamus, a public authority, be it a planning authority or a sanitary authority,

cannot be compelled by mandamus to accept money tendered to it unless there is a public duty to accept it.

This case falls outside the scope of the decision of this Court in The State (Pine Valley Developments Ltd.) v. Dublin Co. Council (1982) I.L.R.M. 169 and so is unaffected by s. 6 of the Local Government (Planning and Development) Act, 1982.

One of the curious aspects of this case which emerged during the hearing of the appeal was the assumption that the Minister's order, in so far as it required the payment of a sum of money to the sanitary authority, necessarily imposed an obligation upon that authority to supply the sewerage facilities.

The duties and obligations of sanitary authorities to permit connections to their sewers are governed by ss. 23 and 24 of the Public Health (Ireland) Act, 1878. S. 23 deals with the rights of the owners and occupiers within the district of a sanitary authority to be connected to the sewers of that sanitary authority; and s. 24 deals with the use of sewers by owners and occupiers outside that district. A glance at the extensive notes to each of these sections which appear in Vanston's Public Health (2nd edition) will give some idea of the complex issues which have arisen in the many cases on these sections. The

numerous and sometimes conflicting judicial pronouncements on the obligations of the sanitary authority raise such questions, among others, as the adequacy of the sewerage system to carry any additional sewage - a point which is raised in the present case by the Council as an objection to the granting of planning permission. But these sections appear to deal with the right of the onwer/occupier of premises to cause his drains to empty into the sewers of the sanitary authority. They therefore presuppose the existence of these sewers at a point where a connection may be made from the premises in question to the sewers. They do not appear at first sight to deal with the more knotty problem of what is to be done where there are no sewers in the locality.

When there <u>are</u> sewers adjoining the premises in question, the granting of planning permission for the erection of those premises may bring into force an existing legal obligation of the sanitary authority to make a connection. The question could well arise in such a case as the present whether the inclusion of a condition in the planning permission compelling the payment of a contribution towards the provision of sewerage facilities can lawfully be made if its effect is to impose an obligation on the sanitary authority to overload their sewers. That point has not been

fully argued in the present case and therefore it is unnecessary for the Court to express any view on it.

Quite apart from that, however, there is the situation (such as arises in the present case) in which there is no sewerage system to which a connection may be made to a sewer or drain from the premises in question, and in which, in order to make any such connection possible, it would be necessary to extend the existing sewerage system to a point at which a connection could be made. If there be any legal obligation on the sanitary authority to provide a sewerage system where none exists, or to permit a connection to an existing sewerage system, it is not to be found in the Planning Acts. Therefore, there would not at first sight appear to be any grounds for the assumption rèferred to above. However, in this case the Court is not called upon to make any comprehensive ruling on that question.

For present purposes, it is sufficient to say that the condition as to financial contribution imposed by the Minister upon the developers must be construed as referring to a contribution towards the cost of providing a public water supply or piped sewerage faciliites in the area only if the

Council were either willing or legally bound to make such provision.

For the reasons given, I would allow the Council's appeal and discharge the order of mandamus. What the legal or practical consequences of such an order will be, I do not pause to consider. It is sufficient to say that counsel for the Council has indicated that is is sufficient for the purposes of his clients if, for the reasons underlying this judgment, the cause shown by the Council is allowed and the conditional order of mandamus discharged.

Approved
S.H.