

APPROVED



NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

[2023] IECA 331
Court of Appeal Record Number: 2022/251
High Court Record Number: 2021/987 JR

Costello J.
Pilkington J.
Butler J.

BETWEEN/

ALAN LYNSKEY

APPELLANT

- AND -

MAYO COUNTY COUNCIL

RESPONDENT

-AND -

FRESCOBOL HOLDINGS LTD

NOTICE PARTY

JUDGMENT (*ex tempore*) of Ms. Justice Butler delivered on 17th day of April 2023

1. This is the appellant's appeal against a decision of Bolger J. dated 17 October 2022 granting him the entire of the relief he sought in judicial review proceedings against a decision of Mayo County Council made on 1 September 2021. That decision is recorded in a minute and purports to declare the roads in phase 1 of the Rath Dubh housing estate in

Swinford, County Mayo to be public roads pursuant to s.11 of the Roads Act 1993. The circumstances in which an applicant is entirely successful in judicial review proceedings and yet appeals that decision are unusual to say the least.

2. At the heart of this appeal is the fact that the trial judge made her order based on grounds E5, E6 and E19 of the statement of grounds whereas the appellant believes she should have also made her order on some or all of the other grounds pleaded by him. To understand how the High Court came to make the decision in that form, it is necessary to appreciate the background to these proceedings.

3. The appellant is the owner of the common areas in phase 1 of the Rath Dubh estate which are contained in Folio 45885 having purchased the same from the developer of that estate, Balford Construction. The notice party is the owner of what is described as phase 2 of the Rath Dubh estate. There is clearly a dispute between the appellant and the notice party in relation to the entitlement of the occupants of phase 2 to use a roadway passing over phase 1 to access the public road. That is a private law matter which is not capable of resolution by way of judicial review and is not the subject matter of this appeal nor of this decision.

4. On 23 March 2021, Mayo County Council gave notice of its intention to declare the roads and footpaths in phase 1 public roads under s.11 of the Roads Act 1993. A period was allowed for the public to make submissions, which period expired on 7 May 2021. The appellant made a detailed submission on 6 May 1991 in which he pointed out that he was the owner of the Folio in which the roads the subject of the proposed declaration are contained, but that neither he or his predecessor-in-title had dedicated them for public use. He also pointed to previous attempts by the residents of phase 1 to have the roads taken in charge and to the interests of the notice party in securing the right of access to phase 2 over the roads in question. The fundamental aspect of his submission was that a public right of way must exist before a road can be taken in charge.

5. An engineer on behalf of the council prepared a report in the form of a memorandum to the councillors because the making of such a declaration is a reserved function. That report is dated the 26 August 2021. The appellant complains that his submission is misrepresented in this report, that the report does not consider whether the road was of general public utility and that it proceeds on the basis of erroneous legal advice to the effect that Mayo County Council was under statutory obligation to take the development in charge under s.180 of the Planning and Development Act once the majority of owners of the houses within the development had requested that this be done

6. At a meeting of Mayo County Council held on 1 September 2021 that report was presented to the elected members following which the counsellors voted in favour of a motion. The text of the motion is that “*an order be made to declare roads on attached schedule to be public roads in accordance with s.11 of the Roads Act 1993 as amended*”. Thereafter, on 22 November 2021, the appellant instituted judicial review proceedings by filing a statement of grounds. In that statement of grounds, he sought a single substantive relief at para. D1 and I quote:

“An Order of Certiorari by way of application for judicial review quashing the decision of the Respondents to make an order to declare the roads and footpaths in the housing estate known as Rath Dubh (phase 1) in the townland of Rathscanlan, Swinford, County Mayo to be Public Roads in accordance with Section 11 of the Road Acts 1993 as amended which decision was made on the 1 September 2021.”

Thereafter 17 grounds were set out at section E of the statement of grounds upon which this relief is sought, and I will return to these in due course.

7. The application for leave to apply for judicial review was moved on an *ex parte* basis by the appellant before Meenan J. on 17 January 2022. Rather than grant leave at that stage, Meenan J. acceded to a request from the notice party to be joined as a notice party and

directed that the respondent and the notice party be put on notice of the application. He directed the appellant to serve a notice of motion seeking leave to apply for judicial review to be made returnable for 22 March 2022. At this point some confusion appears to have arisen because rather than serving a notice of motion seeking leave to apply for judicial review as directed by Meenan J., the appellant served a notice of motion seeking the substantive relief of *certiorari*.

8. On 19 May 2021 at a hearing before Meenan J., counsel for Mayo County Council indicated that the Council was not opposing the application for judicial review and would concede *certiorari* of the decision in the terms expressed at para. D1 of the statement of grounds and on the grounds E5, E6 and E19. It is not entirely clear whether there was prior communication of this but there was certainly subsequent communication between the parties in relation to the form of this order. The suggestion made by Mayo County Council was not acceptable to the appellant. Consequently, Meenan J. assigned a hearing date pointing out to the appellant the costs consequences of proceeding with his application for judicial review at a point in time where the respondent had already conceded it.

9. The matter then came before Bolger J. for hearing on 17 October 2022. She stated in her judgment, and I quote:

“Mr. Lynskey sought an Order for Certiorari on the grounds set out at paras. 1 to 21 at para. E. Some of these grounds relate to legal public law obligations pursuant to s.11 mainly grounds 5, 6 and 19 and as identified by the applicant at ground 4 the breach of s.11 is the essence of this case. There are further grounds which are largely matters of evidence in relation to what happened. Those seem to me to be grounds set out at paras. 7-13 and paras. 11-18.

There are other grounds mainly at paras. 14 and 20, which relate to the applicant's view of private law rights in relation to his property as provided by law. He then proceeds to comment that the order of certiorari is a public law remedy that must be grounded on public law rights and obligations. These proceedings cannot be used to declare private law rights that have not been pleaded and very possibly couldn't have been properly engaged in the proceedings. So, on that basis I am going to make an order of certiorari in the terms of para. D of the statement of grounds quashing the respondent's decision declaring roads and footpaths in the housing estate of Rath Dubh (phase 1) in the townland of Rathscanlan, Swinford, Co. Mayo to be public roads in accordance with Section 11 of the Roads Act which decision was made on 1st September 2021 and I am making that order in reliance on grounds E5, E6 and E19 of the statement of grounds."

10. At a subsequent point she explains to Mr. Lynskey directly *"I had decided that I would make the order in the terms that the Council advised you back in May that they would consent to. I am not prepared to identify the grounds that you wanted me to identify because I am satisfied that they relate to private law rights so in those circumstances (...)"* and she proceeds to deal with the question of costs.

11. The appeal that has been brought by the applicant effectively raises two grounds of appeal, one dealing with the substantive issues and the second dealing with the way in which the High Court judge dealt with the costs of the application.

12. The first ground of appeal is that the trial judge erred in law when she found the respondent's decision to disregard s.11(1)(b)(i) and 11(1)(b)(iv) of the Roads Act (as amended) when deciding to declare the roads and footpaths in the housing estate known as Rath Dubh (phase)1 as public roads was not unlawful. This ground of appeal is completely misconceived. The trial judge was identifying the clearest basis upon which the appellant

was entitled to relief and then proceeding to grant that relief. While she does not accept that she would grant relief on the other grounds, she does not engage with them substantively nor refute them.

13. In judicial review once an order for *certiorari* has been granted the impugned decision is quashed, it becomes a nullity and is no longer of any legal effect. Quashing it on additional grounds does not change the legal effect of the relief which has been granted. The trial judge manifestly did not make a finding that Mayo County Council's decision to disregard the two sub-paragraphs of s.11(1)(b) invoked by the appellant was, and I quote, "*not unlawful*". Something which is "*not unlawful*" is lawful and the trial judge would not have granted an order of *certiorari* if the decision was lawful. The very grant of an order of *certiorari* indicates an acceptance on her part that the decision was unlawful for the reasons which are reflected in paras. E 5, E6 and E19 of the appellant's statement of grounds.

14. The essence of the applicant's case (now the appellant) before the High Court was that Mayo County Council had not complied with s.11(1)(b) of the Roads Act 1993 and, in particular, had not complied with two sub-paragraphs, the first being sub-paragraph (i) which requires that the council be satisfied that the road is of general public utility and the second is sub-paragraph (iv) which requires that the roads authority consider any objections or representations made to it under para. (iii) and which have not been withdrawn. By conceding paras. E5, E6 and E19, the Council was accepting that it could not establish that it had satisfied itself that the road was of general public utility nor that it had considered the representation made to it by the appellant.

15. The essence of the case on appeal is that the High Court should have granted *certiorari* also on ground 4, ground 20 and ground 21 of the statement of grounds. In the course of oral argument, the appellant addressed ground 4 and ground 21 but did not make an argument

on ground 20 which is covered in his written legal submissions. I will deal with each of these grounds in turn.

16. In relation to ground 4, the appellant's argument appears to be that by not expressly reciting ground E4 the trial judge was not accepting that the decision of Mayo County Council was unlawful. I have already explained that the granting of an order for *certiorari* by itself is an indication that the decision to which it relates was unlawful. The very fact that no reference is made to ground E4 neither adds to nor takes away from the grant of *certiorari* in respect of that decision. Therefore, there is no basis for contending that the High Court judge erred in law by not also including ground E4 as a basis for the grant of relief.

17. In relation to para. 20 which was not, as I said, dealt with in oral argument but which was dealt with in the written submissions, that proceeds on the basis that the effect of the decision was to create a public right of way over the appellant's property and that the respondent acted *ultra vires* in doing that because it materially impacted on the value of the appellant's land. This is premised on the lack of a pre-existing right of way or public right of way over his land. In this regard I accept the submission made on behalf of Mayo County Council that the statutory process is not determinative of pre-existing rights. The High Court judge was correct not to decide the issue on the basis of the effect that the invalidly conducted process might have had on the value of the applicant's property nor indeed on the effect that it might have had in what is clearly a dispute between two neighbouring landowners.

18. In respect of para. 21 of the statement of grounds, as I noted in the course of argument, this is very curiously crafted. Insofar as it refers expressly to ss. 11(1)(b)(i) and (iv), it adds nothing to para. 19 upon which the High Court judge has already expressly granted relief. Insofar as it refers to Article 28A.2 of the Constitution, there is a general principle of judicial

restraint whereby courts do not decide matters based on constitutional arguments if they can be fully disposed of without engaging in those constitutional arguments. It may be that this paragraph is intended to suggest something else, but it is not entirely clear to the court what that might be. Therefore, I do not think that the trial judge could be held to have erred in law in not identifying any of those grounds as additional grounds upon which she granted the relief which she granted the applicant.

19. Insofar as the appellant makes an argument that Mayo County Council was not entitled to oppose any of the grounds pleaded in his statement of grounds because they have not filed a statement of opposition, that argument is unfounded. When the matter was before Bolger J. it was still an application for leave to apply for judicial review, although the applicant may not have fully appreciated this distinction. The confusion arose because, as I have earlier indicated, notwithstanding the fact that Meenan J. directed that the appellant put the respondent and the notice party on notice of the application for leave to apply for judicial review, the notice of motion which was served appears to be one seeking the substantive relief.

20. The respondent is not obliged to file a statement of opposition or an affidavit at the leave stage when put on notice of such an application by the High Court. The respondent is certainly entitled to explain to the court the basis of a concession of the judicial review which has been sought. The respondent is entitled to concede judicial review at the leave stage and is entitled to identify any concerns in relation to grounds on which it is not expressly conceding the leave sought. Therefore, I do not find that the trial judge erred in allowing the respondent to approach the matter in the way in which she did nor in the consequences that had for the order of costs which she made.

21. I note that there is a notice of cross-appeal filed by the respondent relating to the fact that the High Court order did not expressly recite that the leave was being granted on the

basis of grounds E5, E6 and E19. It is clear from the transcript which I have quoted that those are the grounds upon which Bolger J. relied and indeed are the only grounds upon which she granted the relief. Normally, it would not be necessary that this be expressly recited in an order, particularly an order that is made on consent and ordinarily the respondent would not ask that the High Court order be corrected to reflect this but, in circumstances where the initial concession of the proceedings by the respondent was not accepted and there has been two subsequent hearings, in order to avoid further confusion I would agree to amend the High Court Order to expressly recite that the relief has been granted on the basis of grounds E5, E6 and E19 of the statement of grounds.

22. I also propose to amend the High Court order to expressly reflect that the application before the Court on that date was the application for leave to apply for judicial review and not the application for *certiorari* itself.

23. That brings me to the second of the two grounds of appeal which is a contention that the learned judge erred in law when she ordered the respondent recover against the applicant the costs of the proceedings since 19 May 2022. Again, one of the arguments made by the appellant in relation to this ground is that as the respondent had not filed a statement of opposition it was not effectively properly before the court and therefore should not have been entitled to any costs. However, the High Court had directed that the respondent be put on notice of the application for leave thereby conferring upon the respondent the entitlement to appear on the leave application.

24. The appellant was clearly warned by Meenan J. when he declined to accept the concession which had been made by the respondent that he was at the risk of having costs awarded against him if he proceeded with his application for judicial review. The concession made by the respondent would normally obviate any additional costs being incurred after 19 May 2022. The fact that the appellant would not accept that concession meant that the matter

proceeded before Bolger J. and additional costs were incurred. In those circumstances, I cannot see that the trial judge erred in awarding the appellant his costs in the form of outlay and expenses up to that date and in awarding the respondent its costs from that date.

25. Therefore, I reject this ground of appeal also.