

McCABE



THE HIGH COURT

BETWEEN:

JOHN McCABE

Plaintiff

and

HARDING INVESTMENTS LIMITED

Defendants

JUDGMENT of Mr. Justice Hamilton delivered the 1st day of March, 1982



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1982/No. 182P

BETWEEN:

JOHN McCABE

Plaintiff

and

HARDING INVESTMENTS LIMITED

Defendants

Judgment of Mr. Justice Hamilton delivered the 1st day of March, 1982

On the 8th day of January 1982 the plaintiff herein, John McCabe of 63 Leeson Close in the City of Dublin caused to be issued a plenary summons against the defendants, a limited liability company having its registered office at 15 Clyde Road in the City of Dublin in which he claims

A declaration that a purported grant of planning permission dated the 10th day of November 1981 to the defendant company is null, void and of no legal effect in the circumstances inter alia that:

(1) The defendant company as applicant therefor

failed to comply with the provisions of Regulation 17(a)

of the Local Government (Planning and Development) Regulations 1977.

(2) Failed to comply with the requirement that the defendants as applicants should have a sufficient interest in the property to enable them to carry out the proposed development.

(3) In the circumstances that the defendants knowingly misled the planning authority and on appeal An Bord Pleanála into believing and accepting as true when such was not the case that the defendants as applicants were possessed of freehold interest in the said land at the date of application.

(4) An injunction restraining the defendants from carrying out or taking the benefit of the said purported grant of planning permission.

An appearance to the said summons was entered on behalf of the defendants on the 13th day of January 1982 and on the 26th day of January 1982 a statement of claim was delivered on behalf of the plaintiff in which it is alleged:-

(1) On or about the 6th day of April 1981 the defendant

company made application to the Right Honourable Lord Mayor Aldermen and Burgesses of Dublin for planning permission for the erection of an office building on the site between Leeson Close and Kingram Place, Dublin.

(2) In purported compliance with the requirements of Regulation 17(a) of the Local Government (Planning and Development) Regulation (Statutory Instrument No. 65 of 1977), the defendant company stated it was the owner of the freehold interest in the said site.

(3) The defendant company was not the owner of the freehold interest in the said site on the date of the said application.

(4) By a decision dated the 25th day of June 1981 the Right Honourable Lord Mayor Aldermen and Burgesses of Dublin decided to grant planning permission as applied for subject to conditions.

(5) The Lower Leeson Street and District Residents Association and others appealed the aforesaid decision to An Bord Pleanála and after duly hearing the said appeal the said Board by a decision dated the 10th day of November 1981 decided to grant permission for the said office building subject to conditions.

(6) At all material times the defendant company represented as aforesaid when such was not the case that it was the owner of the fee-simple in the said site.

(7) The defendants failed, accordingly, to comply with the aforesaid regulation in that the defendant company incorrectly stated its interests (if any) in the said site in the application; further or alternatively the defendants did not have any interest or any sufficient interest in the said site to constitute the defendants as applicants within the meaning of the Local Government (Planning and Development) Acts 1963 to 1976; further the defendants in the circumstances knowingly misled the aforesaid planning authorities, An Bord Pleanála, into believing and accepting when such was not the case that the defendant company was an applicant within the meaning of the aforesaid Acts and that the defendant company was possessed of the fee-simple interest in the said site at the date of the said pretended application and at all material times.

The plaintiff therefore claimed in the Statement of Claim:

(a) A declaration that a purported grant of planning permission

dated the 10th November 1981 to the defendant company is null, void and of no legal effect.

- (b) An injunction restraining the defendant company from carrying out or taking the benefit of the said purported grant of planning permission.

The matter came before me pursuant to a notice of motion issued on the 25th day of January 1982 in which the defendants sought:

- (a) An order pursuant to the provisions of Order 19 rule 28 of the Rules of the Superior Courts or alternatively pursuant to the inherent jurisdiction of the Court striking out and dismissing the plaintiff's claim herein.

The facts relevant to this application are contained in the affidavit sworn by one Francis X. Woods, a director of the defendant company, on the 25th day of January 1982 and the affidavit of the plaintiff sworn on the 29th day of January 1982 and the documents exhibited therein.

Though it appears from the said affidavits that the plaintiff in these proceedings in an action entitled:-

"In the Matter of the Local Government (Planning and Development) Acts 1963 to 1976

And in the Matter of an application by Avenue Properties Limited and John McCabe

Between:

Avenue Properties Limited and
John McCabe

Applicants

and

Farrell Homes Limited

Respondents"

in conjunction with Avenue Properties Limited sought an order pursuant to the provisions of Section 27 of the Local Government (Planning and Development) Act 1976 an order prohibiting Farrell Homes Limited a building company employed by the defendants in these proceedings to erect the premises on the said site, from continuing with the development of an office block situate at Leeson Close, Dublin, I do not consider such a fact to be relevant to the issues which I have to determine on this application other than as illustrative of the plaintiff's attitude to the proposed development.

As appears from the endorsement of claim on the plenary summons, the terms of the statement of claim and the affidavit of the plaintiff herein the grounds upon which it is sought by the plaintiff to have the

planning permission given by An Bord Pleanala to the defendants herein on the 10th day of November 1981 declared to be null and void is the alleged failure by the defendant company to comply with the requirements of Article 17 sub-article (a) of the Local Government (Planning and Development) Regulations 1977.

This said Article provides that:-

"A planning 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."

The requirements of this Article are of course, and have been held to be, mandatory.

As stated by Mr. Justice Henchy in the course of his judgment in the case of Monaghan Urban District Council .v. Alf-a-Bet Promotions Limited delivered on the 24th March 1980,

"I do, however, feel it pertinent to express the opinion that when the 1963 Act prescribes certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the

"rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or immediately in the Regulations, nominated as being obligatory may not be depreciated to the level of a direction except on the application of the de minimis rule. 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 persons 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 their application for planning permission and in purported compliance with the requirements of Article 17(a) the defendants stated that they held the freehold interest in the site, the subject matter of the application.

It is alleged by the plaintiff in these proceedings that they were not the holders of the freehold interest in the site at the date of the application or at any relevant time.

The facts with regard to the defendants' interest in the site are set forth in the affidavit of Mr. Woods sworn on the 25th day of January 1982 upon which the defendants' application is grounded.

This affidavit, which is not contradicted by the plaintiff, discloses that:-

(1) By a contract dated the 12th day of September 1980 a company called Investel contracted to sell to Fitzpatrick's, solicitors, in trust for the sum of £300,000 the premises therein described being the premises upon which the office block is being erected, in fee-simple.

(2) The contract for sale stated that the premises were held for an estate in fee-simple in possession subject as to the portion thereof delineated in blue on the map annexed to an

indenture of lease dated the 20th day of December 1948 and made between Frederick Gill of the one part and the Electricity Supply Board of the other part.

(3) By a letter dated the 12th day of September 1980 the contract in duplicate duly executed in trust by Fitzpatricks, solicitors together with a cheque in the amount of £30,000 representing the deposit was forwarded to the offices of Messrs R.A. Downes and Company, Solicitors for the vendor.

(4) In a further letter dated the 2nd day of October 1980 from Fitzpatricks, solicitors to R.A. Downes and Company a cheque in the sum of £170,000 was forwarded to the offices of R.A. Downes and Company in accordance with Condition 1 of the said contract for sale.

(5) The defendants, a decision having been made to take the assignment in their name, entered into possession of the site on the 5th day of November 1980.

(6) All the title documents were forwarded to counsel for his opinion on title and an order to draft requisitions on title.

(7) Certain problems arose with relation to the title and they were not finally disposed of to the satisfaction of the defendants' solicitors until the 29th May 1981 when the balance of the purchase money namely £100,000 was paid to the solicitors for the vendor.

The conveyance of the premises to the defendants in these proceedings is dated the 2nd day of November 1981.

Planning permission was applied for on the 6th day of April 1981, was granted by the planning authority on the 25th day of June 1981 and by the planning board on the 10th day of November 1981.

It is clear to me from a consideration of the contract for sale dated the 12th November 1980 that the defendants were entitled to a conveyance of the fee-simple in the lands the subject matter of the said contract, that on the execution of the said contract the sum of £30,000 was paid in accordance with the terms thereof and that a further payment of £170,000 was made on the 2nd October 1980 in accordance with the provisions of the said contract.

The balance of the purchase money was paid on the 29th day of May 1981 and would undoubtedly have been paid much earlier were it not

for the difficulties with regard to the title which had to be dealt with.

I am further satisfied that there was no intention on behalf of the defendants to mislead either the planning authority or An Bord Pleanala and that there was compliance on the part of the defendants with the requirements of Article 17(a) of the relevant regulations. If there was not actual compliance I am satisfied that any deviations from the requirements of the Article were so trivial, so technical and so insubstantial that, in the words of Mr. Justice Henchy, the prescribed obligation has been substantially and therefore adequately complied with.

For these reasons I am satisfied that the plaintiff cannot succeed in this action that it is vexatious and that in exercise of my inherent jurisdiction I should order that his claim be dismissed.

Sean Handley