

THE HIGH COURT

[2005 No: 51 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL) PROVISIONS ACT 1961

BETWEEN

DUNDALK TOWN COUNCIL

COMPLAINANT/RESPONDENT

AND
BILL LAWLOR

DEFENDANT/APPELLANT

Judgment O'Neill J. delivered the 18th day of March 2005.

1. This is a case stated by District Judge Flann Brennan a judge of the District Court assigned to District Court area of Dundalk, District No. 6, in which he poses two questions as follows for the opinion of the High Court:

(a) whether I was correct in law in determining that the period of time set forth on the said Enforcement Notice satisfied the requirement of s. 154 of the Planning and Development Act of 2000 and

(b) whether I was correct in law in determining that the requirement in the said Enforcement Notice to "return site to its previous condition" satisfied the requirement of s. 154 of the Planning and Development Act 2000.

Background

2. By notice entitled "Enforcement Notice pursuant to s. 154 of the Planning and Development Act 2000" and dated 21st October, 2003, the complainant/respondent Dundalk Town Council (hereafter "the Council") required of the defendant/appellant (hereafter "Mr. Lawlor") that certain things be done at a property known as Soldiers Point, Lower Point Road, Dundalk.

3. The notice was in the following terms:

"Dundalk Town Council (hereinafter called the Planning Authority) is the planning authority for the town district of Dundalk in which is situated at the land described in the First Schedule hereto.

The planning authority has decided pursuant to s. 155 of the Planning and Development Act, 2000 to issue this Enforcement Notice in respect of the development described in the second schedule hereto.

As no permission has been granted for the said development, you are hereby required to cease the said development.

You are hereby required within a period of immediately commencing on the date of the service of this notice on you to take the steps specified in the third schedule hereto.

You are hereby warned that if within the period specified under paragraph 4 above or within such extended period (not being more than six months) as the planning authority may allow, the steps specified in the third schedule hereto to be taken or not taken, the planning authority may enter upon the land and take such steps including the removal, demolition or alteration of any structure, and may recover any expenses reasonably incurred by them in that behalf.

You are hereby required to refund the planning authority the costs and expenses set out in the Fourth Schedule hereto, being the costs and expenses reasonably incurred by the planning authority in relation to the investigation, detection and issue of this Enforcement Notice including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisors and the planning authority may recover these costs and expenses incurred by it in that behalf.

You are hereby warned that you may be guilty of an offence if you do not take the steps specified in the third schedule of this notice within the period specified by paragraph 4 of this notice or within such extended period (not being more than six months) as the planning authority may allow.

FIRST SCHEDULE – DESCRIPTION OF LAND

Soldiers Point, Lower Point Road, Dundalk.

SECOND SCHEDULE – DESCRIPTION OF DEVELOPMENT

Unauthorised site development works.

THIRD SCHEDULE – PARTICULARS OF STEPS TO BE TAKEN

Cease all excavation site clearance works and return site to its previous condition.

FOURTH SCHEDULE – DETAILS OF COSTS INCURRED BY PLANNING AUTHORITY

85 EURO

Dated this 21st day of October, 2003."

4. The notice was served on Mr. Lawlor and by a letter dated 26th October, 2003, addressed to the Planning Officer of the Council, he said the following:

"Re: Notice received under Planning and Developmental Act 2000.

As secretary of the above group, I refer to your letter to me dated 26th October, 2003, enclosing an Enforcement Notice, and I would respectfully request clarification of its contents.

For our part, we are not aware of having carried out any work whatsoever in breach of any of the provisions of the Planning and Development Act 2000.

Yours faithfully."

5. There does not appear to be any response to this letter.

6. Instead the council caused a summons to be issued against Mr. Lawlor, in which the complaint is as follows:

"WHEREAS a complaint has been made to me that you the said defendant on the 10th November, 2003 at premises, Soldiers Point, Lower Point Road, Dundalk within the County of Louth, within the court area and district aforesaid did knowingly fail to comply with the requirement of a Enforcement Notice dated 21st October, 2003, and served upon you on 21st October, 2003, pursuant to s. 154 of the Planning and Development Act, 2000 and in contravention of s. 154 of the Planning and Development Act, 2000."

7. This complaint came on for hearing before the learned district judge at a sitting of the District Court in Dundalk on 10th March, 2004.

8. The agreed note on the evidence heard is as follows:

"Evidence was given by Mr. Fergus Smyth on behalf of the Complainant as to his inspection of the site the subject matter of the Enforcement Notice on 24th October, 2003 and 10th November, 2003. Mr. Smyth testified that he was familiar with the site which is known as Soldier's Point, Lower Point Road, Dundalk, Co. Louth and that it was an old shipyard, which was since overgrown and was a habitat for birds.

Mr. Smyth testified further that the works referred to in the Enforcement Notice, consisted of the excavation and stripping of top soil and storing of it on site as well as the removal of some debris, which was stacked in different parts of the site concerned. Mr. Smyth agreed that the photographs attached to this note accurately show some of the works concerned. Mr. Smyth agreed that no works had been carried out after the date of the service of the Enforcement Notice. Mr. Smyth confirmed that the work had ceased on this site as all the sod had been stripped and that the work had been carried out over a weekend and the notice was served on 21st October, 2003.

Evidence was given as to the due service of the Enforcement Notice and Mr. Smyth was cross-examined on aspects of the Enforcement Notice and a letter sent to the complainant dated 26th October, 2003."

9. Thereafter counsel for Mr. Lawlor applied to the learned district judge to dismiss the summons submitting that the Enforcement Notice the subject matter of the complaint was invalid and of no effect on the grounds:

(a) the time stated in the notice *"within a period of immediately commencing on the date of service"* did not satisfy the requirement of s. 154 of the 2000 Act which required that the notice should state a *"specified period"* within which to take the steps specified in the Enforcement Notice and

(b) secondly that the requirement stated in the notice to *"return site to its previous condition"* did not satisfy the statutory requirement under s. 154 of the 2000 Act whereby it was required that the Enforcement Notice *"request such steps as may be specified in the Notice to be taken within a specified period, including where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, insofar as is practicable, the restoration of the land to its condition prior to the commencement of the development..."*.

10. Having adjourned to 5th May, 2004, to hear further submissions and thereafter to 7th July, 2004, the learned district judge refused to dismiss the summons against Mr. Lawlor and accepted the submissions that had been made on behalf of the council.

11. Arising from the foregoing, this case was stated.

12. I propose to consider the time issue first and then the issue as to whether the notice adequately specified the steps to be taken in compliance with s. 154.

13. Before dealing with these it is well to set out the relevant portions of s. 154. There are as follows:

"154-(5) An enforcement notice shall refer to the land concerned and shall-

(a) (i) in respect of a development where no permission has been granted, require that development to cease or not to commence, as appropriate, or

(ii) in respect of a development for which permission has been granted under Part III, require that the development will proceed in conformity with the permission, or with any condition to which the permission is subject,

(b) require such steps as may be specified in the notice to be taken within a specified period, including, where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, in so far as is practicable, the restoration of the land to its condition prior to the commencement of the development,...

(8) Any person on whom an enforcement notice is served under subsection (1) who fails to comply with the requirements of the notice (other than a notice which has been withdrawn under subsection (11)(a) or which has ceased to have effect) within the specified period or within such extended period as the planning authority may allow, not exceeding 6 months, shall be guilty of an offence.

S.156-1 A person who is guilty of an offence under sections 58(4), 63, 151, 154, 205, 230(3), 239 and 247 shall be liable- on conviction on indictment, to a fine not exceeding £10,000,000, or to imprisonment for a term not exceeding 2 years,

or to both, or

(b) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 6 months, or to both."

14. The questions posed in the case stated here relate to s. 154 (5)(b) as quoted in italics above.

15. The question which arises in relation to the time specified is whether "*within a period of immediately commencing on the date of service of this notice*" is capable of being construed as a "*specified period*" as stated in s. 154 (5)(b).

16. The first thing that has to be borne in mind here is that a failure to comply with an Enforcement Notice is a criminal offence. It is well settled that criminal offences must be defined with clarity and precision so that a person can know whether his conduct is or is not a commission of an offence. (see *King v. Attorney General* [1981] I.R. 233.

17. What that means is that in construing s. 154 (5)(b) and also in construing any notice issued pursuant to s. 154, a strict construction is required i.e. the subsection in question and any Enforcement Notice must be construed in accordance with the natural and ordinary meaning of the words used and there is no scope for any kind of purposive or teleological approach.

18. Subsection (5)(b) requires that steps "*be taken within a specified period*".

19. Any period in time necessarily requires for its definition or ascertainment a beginning and an end. A fortiori a "*specified*" period must be capable of having its beginning and end clearly ascertained.

20. In my view the use of the word "*immediately*" provides a beginning to a period but does not indicate when the period ends. In other words it does not in fact create a period, it simply defines a point at which or from which something must be done but it entirely fails to describe or limit a time within which the step is to be accomplished.

21. I have therefore come to the conclusion that the enforcement notice fails to comply with the terms of sub-s. 5 (b) which requires that there be a "*specified period*." Even if this were not required by the subsection, the notice is lacking in sufficient precision, as to the time permitted for the required steps to be taken, to be the proper subject matter of criminal offence. A person served with a notice with this time provision in it, could not know even though the steps had been taken, that there had been compliance with the notice in terms of time, and hence whether he or she was free of the notice.

22. I am satisfied therefore that the notice was for the above reasons, invalid and I would answer the first question posed in the negative.

23. The next question is whether or not the particulars set out in the third schedule of the notice and in particular the part which reads "*return site to its previous condition*." is as an adequate compliance with the requirements of s. 154 (5) (b).

24. As said earlier, because the failure to comply with an enforcement notice is an offence, an enforcement notice issued pursuant to (5)(b) must with clarity and precision set out the steps that are required to be taken in the specified period. The steps can include the matters as set out, such as the removal demolition or alteration of any structure or the restoration of land to its condition prior to the commencement of the development. It is not sufficient, however, for the purposes of the notice merely to recite the phrases used in sub-s. (5)(b), such as demolition or alteration of any structure or as in this case, "*return site to its previous condition*" where the use of that kind of phraseology borrowed from the subsection, fails to clearly and precisely indicate to the person served with the notice what exactly has to be done in order to comply with the notice.

25. Counsel for the council draws attention to the phrase "*as far as is practicable*" in sub-s. (5)(b) and submits that the requirement as set out in any Enforcement Notice is not an absolute requirement, but merely obliges the person served to go as far as is practicable in restoring the site to its pre-development condition.

26. I would accept that an Enforcement Notice has to be read in conjunction with sub-s (5)(b) and hence the limitation implied in the phrase "*as far as practicable*" would be imported into every notice even though not expressly stated.

27. The inclusion of the concept envisaged by the phrase "*insofar as is practicable*", in my view make it all the more imperative that the precise steps required by the council be set out with precision and clarity because in the absence of that being done it becomes difficult to the point of impossible for a person served with the notice to know how far they must go in order to ensure compliance with an Enforcement Notice and hence the avoidance of criminal liability. If the steps required are not set out with precision and clarity a person served with a notice may find themselves having to guess or speculate as to what they must do to achieve compliance.

28. That would appear to be precisely the position in this case.

29. Prior to the carrying out of development there was a considerable amount of debris strewn about this site. Does the notice require that that debris be brought back on site and placed where it was before the development or is this not required? The notice does not provide any answer to that obvious question. Also the unauthorized development complained of was the removal of top soil and the stripping off of sod. Does the notice require that top soil be restored, and that the sod be restored or merely that the top soil be reseeded? Again the notice does not specify which of these alternate steps is required for there to be compliance with the notice.

30. I am satisfied that this notice does not set out with sufficient clarity or precision the steps that are required, having regard to the fact that failure to comply with the notice is a criminal offence; and the mere recitation of the phraseology used to describe steps in sub-s. (5)(b) of s. 154 is insufficient, in a notice such as this, which purports to ground a criminal liability.

31. Accordingly I have come to the view that on this ground also the Enforcement Notice was invalid.

32. In conclusion therefore I would answer No to the two questions raised in the case stated.