THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 687 J.R.]

BETWEEN

BARTH O'NEILL, DUNBOY GREENER HOMES LIMITED AND DUNBOY CONSTRUCTION AND PROPERTY DEVELOPERS LIMITED
APPLICANTS

AND

KERRY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. In 2004, the applicants commenced the construction of a large housing estate at Páirc Chumin, Clashnagrance, Kilcummin, Killarney, Co. Kerry. The development remains unfinished. Counsel for the applicants Mr. John J. Morrissey B.L. tells me that the applicants will say that in 2005 they began storing "*things related to building"* on the undeveloped part of the site.

2. In or before July 2015, the respondent council received representations from third parties expressing concerns regarding an unauthorised change of use of the site from residential to commercial use, involving the unauthorised placement of truck trailers or containers on site.

3. The council then issued warning letters to the applicants on 22nd July, 2015, stating that it had come to their attention that unauthorised development might be taking place on the site. The second named applicant complains that a warning letter was delivered to it addressed to "Dunboy Greener Homes" rather than "Dunboy Greener Homes Limited".

4. The applicants replied on 13th August, 2015, making essentially three points. Firstly, that enforcement action in relation to unauthorised change of use was time-barred. I might observe that any such allegation, even if legally open to the applicants (a matter disputed by the council), would turn on the evidence and would, therefore, go to the merits of any planning enforcement action as opposed to its legality, and is therefore not a matter for judicial review. In this regard, I would respectfully disagree with the views to the contrary of Mr. Garrett Simons S.C. as expressed *in Planning and Development Law* (2nd ed.) (Dublin, 2007) pp. 297-299. The merits of the notice as to the 7-year rule or any other factual determination that is a condition precedent can be revisited in any criminal proceedings for non-compliance but are not within the ambit of judicial review. In fairness to Mr. Simons he presciently accepts that "*many [judges] would baulk at having to undertake the fact-finding role necessary*" on his suggested approach to judicial review in this context (p. 299).

5. The second point made by the applicants was that the allegation of unauthorised development was "*vexatious".* This is an entirely spurious and unstateable point. Either the applicants are carrying on unauthorised development or they are not. Any citizen is entitled to bring concerns in relation to such matters to the attention of the local council. In doing so they are doing no more than fulfilling a civic duty that rests on all citizens to safeguard the natural and built environment (see my judgment *in O'Mahony Developments Limited v. An Bord Pleanála* [2015] IEHC 757), as well as engaging in the active citizenship participation in the overall planning process that is encouraged by national, international and European law (such as the Aarhus Convention and implementing directives and legislation). The validity of a complaint regarding unauthorised use does not depend on absence of an ulterior motive on the part of the complainant.

6. In correspondence, the applicants relied on the decision of the High Court in *Sean Quinn Group Limited v. An Bord Pleanála* [2001] 1 I.R. 505, in relation to abuse of process. That decision and the doctrine in relation to abusive litigation, has no application whatsoever to the issue of planning complaints. It is limited to circumstances where individuals commence legal action in the courts of a vexatious nature. A complaint that a person or entity is carrying out unauthorised development is a valid complaint which may be acted on by the council quite independently of any inquiry into the motivation of the person making the complaint. Indeed, it is of no small relevance to the present application that they have never asserted that they had permission to carry out the development. They are essentially saying that the council is too late to enforce the planning law against them. They have provided no answer to the council's contention that a time limit does not apply to a condition to enforcement of a condition in a planning permission, which is the situation here.

7. Furthermore, Birmingham J. in *Taaffe v. Louth County Council* [2013] IEHC 314 held that an anonymous planning complaint was valid (para. 13). This is inconsistent with the notion that the motive of the complainant is relevant.

8. The third response made by the applicants in correspondence is that they had ameliorated the visual impact. That is, of course, all well and good, but does not address the issue of unauthorised development.

9. In the light of the attitude set out in the applicants' response, which is in the circumstances tantamount to an admission that the applicants are carrying out development without authorisation, the council issued enforcement notices dated 22nd October, 2015, requiring the applicants to cease the use of the site for a commercial business related to insulation or any similar use by 30th October, 2015, and remove from the site all materials, machinery, containers and other identified items by 23rd December, 2015. Again, complaint is made as to the omission of the word "Limited" from the name of the second named applicant.

Substantial Grounds Test

10. It was not altogether clear to me from the applicants' submission whether they accepted that the "substantial grounds" test, as opposed to that of arguable grounds applied to this application. However, it is evident from s. 50A(3)(a) that of the Planning and Development Act 2000, as amended, that the court cannot grant leave under s. 50 of that Act unless it is satisfied that "*there are*

substantial grounds for contending that the decision or Act concerned is invalid or ought to be quashed". The scope of s. 50 is wide, and by virtue of subs. (2)(a), includes *any* decision made or act done by a planning authority, a local authority or the board in the performance or purported performance of a function under the 2000 Act. The issue of an enforcement notice was an act purporting to be done under s. 154 of the 2000 Act, as appears on its face. Therefore, the substantial grounds test applies.

11. I now turn to the specific grounds of challenge to examine whether any of them constitutes specific grounds for contending that the enforcement notices are invalid and ought to be quashed.

Incorrect Name of Second Named Applicant
12. The second named applicant advances the absence of the word "Limited" from its name on the enforcement notice as a reason for contending that the enforcement notice is invalid. While there may be contexts in which the precise corporate name is important, this is not one of them. In this context, the point is meritless. There can be no doubt that the notice was intended to be addressed to the second named applicant. If and when the council come to commence in court proceedings against the second named applicant, they should, of course, use its correct corporate title. If they fail to do so, that is of course not in itself fatal as the title can be corrected by order of the court, for example, under O. 15, r. 13 or O. 28 of the Rules of the Superior Courts or the corresponding provisions of the Circuit Court Rules, if the action is commenced in that jurisdiction.

13. In *Dermantine Company v. Ashworth* [1905] 21 T.L.R. 510, the omission of the word "Limited" from a bill of exchange was held to be "*an obvious error of most trifling kind"* without legal consequences in that case.

14. A minor slip in the title of the second named applicant does not provide substantial grounds for quashing the enforcement notice.

Allegation that the Council did not follow the prescribed procedure for issuing the enforcement notices
15. The statement of grounds alleges that all of the enforcement notices are invalid because in making its decision to issue the notices, the respondent did not "*conduct or have conducted an investigation to enable it to make that decision"* or "*consider the first applicant's submissions or observations"*.

16. These complaints do not reach the threshold of arguability, let alone substantial grounds.

17. The council is required by s. 153 of the 2000 Act, following the issue of a warning letter, to "*make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice*" (sub-s. (1)). Subsection (2)(a) provides that it "*shall be the duty of the planning authority to ensure that decisions on whether to issue an enforcement notice are taken as expeditiously as possible"*.

18. O'Keefe J. in *Flynn Machine and Crane Hire Ltd. v. Wicklow County Council* [2009] IEHC 285 held that there was no obligation on a council to set out particulars of its investigation leading to the issue of an enforcement notice (para. 39).

19. The investigation envisaged by s. 153 may be an extremely informal investigation and would normally be satisfied simply by visiting the site and examining its planning history against the facts on the ground. There are no substantial grounds for contending that some more formal sort of investigation is necessary. There is no basis for some form of Tribunal of Inquiry – style investigation by the council prior to the issue of an enforcement notice. That investigation can be very summary. In any event, the absence of such an investigation, even if such absence were established on the facts, which it has certainly not been in this case, would not oust the jurisdiction of the court, if invoked, under s. 160 of the 2000 Act. The applicants seek an order of prohibition on the council applying for relief under that section, a remedy the case for which is simply unstateable given that the council can apply under the section even in the absence of an enforcement notice.

20. In any event, the applicants have come nowhere to establishing that the Council failed to consider all relevant matters. The controlling authority on this issue is the decision of Hardiman J. *in G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, to the effect that a party alleging that a particular matter was not properly considered must produce evidence to that effect (see also my decision *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686). The applicants have not produced such evidence. All that is presented is mere assertion.

21. The allegation that the applicants' submissions were not considered is completely unstateable by virtue of the fact that those submissions were specifically replied to on behalf of the council by letter dated 24th November, 2015, pointing out that the lands were the subject of a previous planning application, and consequently the use of the lands was subject to the conditions set out in that decision. The council contends that there is no time limit on the enforcement of such conditions by virtue of s. 160(6)(b) of the 2000 Act. Furthermore, the allegation that the complaints were frivolous or vexatious was rejected having regard to the number and nature of the complaints.

Alleged lack of reasons to issue the enforcement notices
22. The extent of the duty to give reasons depends on its context. In *Grealish v. An Bord Pleanála* [2007] 2 I.R. 536 at 553, the Board's duty to give reasons for a decision was described as "*very light…almost minimal*". On the other hand there are different contexts where more substantial reasons are necessary.

23. In the present case, there are clear reasons set out in the recitals to the enforcement notice. That notice contains a finding that on an unauthorised range of use has been carried out at the site, that this development is not exempted development and that no permission for the development has been applied for or granted by the council in respect of the development. The council therefore issued a notice under s. 154 of the 2000 Act. The notice itself contains all of the essential reasons for its issue and no further reasons are required. There are no substantial grounds for contending otherwise.

Failure to record the decision made
24. The statement of grounds alleges that:-

> *"a decision whether to issue an enforcement notice is one of the many decisions that the respondent is expressly required to record in its register, thereby putting the public on constructive notice of the decision, the date on which it was made, and the reasons therefor."*

25. The applicants alleges that the council has failed to keep a register available for inspection by the public, and that when individual documents were sought they were:-

> *"given incomplete records, and the manner with which [the first named applicant] was dealt with by the respondent's*

servants or agent (sic) chilled further investigation."

26. The applicants also complain that they "*do not know if warning letters or enforcement notices were served on any other person, despite the fact that they have the right to know"*. They also demand the dates of any decisions to serve notices on other persons and the reasons therefore. They make the (as far as actual evidence is concerned, entirely hypothetical) case that "*if persons other than the applicants have received enforcement notices relating to the lands, that might have an effect on the first applicant's rights*".

27. The peroration of the statement is that:-

> *"the respondent's failure to enter whatever reasons it had for deciding to issue the enforcement notices in its register makes those decisions invalid. A decision to issue an enforcement notice that does not comply with the statutory process is irrational and unreasonable. Any such decision is invalid and the enforcement notices are void."*

28. These complaints lack merit because the applicants themselves were aware of the impugned decisions. If there were any shortcomings in entering matters in a public register, this does not create substantial grounds to argue that the notices ought to be quashed. Indeed the notion that the applicants were "chilled" from pursuing issues is almost laughable given the extent to which they have engaged in a campaign of meritless technical objection to the council's attempt to have them comply with planning law. Needless to say, the allegation in the pleadings that the applicants have been "*chilled*" in such campaign is not supported in any way by the grounding affidavit.

29. What cannot be denied is that the applicants have had notice of the warning letters and enforcement notices. These documents on their face set out dates and reasons. Even if the council should also have entered these particulars on a public register and (which I am very far from accepting) failed to do so, this has no effect on the validity of the notices or on the applicants' obligation or indeed ability to comply with them. There are no arguable grounds for contending otherwise, let alone substantial grounds. A similar approach was taken by Birmingham J. to similar objections in *Taaffe* at para. 10. Furthermore in *Flynn,* O'Keefe J. held at para. 40 that there was no obligation to set out that the council had considered statutory matters and representations and at para. 44 that there was no obligation that the manager's decision would record that the council directed reasons for the decision should be entered in the register.

Disclosure

30. In any *ex parte* application, the need to disclose all relevant matters looms large. Foremost among these is the existence and outcome of any previous court application, for reasons that are too obvious to spell out (see e.g., *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326 *per* Hogan J. at para. 24). I noted on reading the papers after reserving judgment that there is a single short reference in one of the exhibits, a letter of 29th October, 2015, to a previous judicial review application regarding an enforcement notice, which appears to be entitled *Barth O'Neill t/a Dunboy Construction v. Kerry County Council,* Record No. 2015 No. 97 J.R. No information is given as to the outcome. A search on the Courts Service database indicates that an originating statement dated 25th February, 2015 was filed and the matter was listed for mention on 23rd March, 2015, when it was withdrawn. Beyond the foregoing sources I have no further information about these earlier proceedings.

31. As a principle of general application, I would consider the existence, grounds, and outcome, of previous legal proceedings relating to the same issue to be a matter that should certainly be expressly drawn to the attention of a court in the course of an *ex parte* application. As I am refusing the application in any event it is not necessary to inquire whether this earlier application relates to the same site. If it did, I would consider that that would need to have been properly disclosed to the appropriate level of detail. In the context of a busy Monday list, full disclosure in this context normally means in the course of oral submission. In the absence of this having been done at the appropriate time to the appropriate standard of detail, I would have refused this application on this ground if the previous application related to the same site, which, as I say, it is not necessary to inquire into in the circumstances.

Judicial review of an enforcement notice

32. There are a number of cases where it is assumed rather than decided that judicial review of enforcement notices is appropriate, e.g., *Taafe, Kelly v. Leitrim County Council* [2005] 2 I.R. 404, and other cases where a view is taken that judicial review does lie. However some unease has been expressed in this regard, *e.g.,* in *Flynn* at para. 37, O'Keefe J. indicated that an enforcement notice was not amenable to judicial review unless there was a "*clear departure*" by the decision maker from the "*statutory remit"*.

33. On the other hand, in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 I.R. 669, notice parties who were affected by an enforcement notice under the Data Protection Act 1988 were allowed to seek judicial review despite the existence of a statutory appeal. There is no right of appeal against an enforcement notice under s. 154 of the 2000 Act. That would suggest that in principle such a notice can in principle be challenged by way of judicial review, although the note of caution sounded by O'Keefe J. in *Flynn* as to the need for it to be demonstrated that there has been a clear departure from the statutory remit is one that needs to be borne in mind.

34. In the present case, the applicants have not shown arguable, still less substantial, grounds for contending that the notices are invalid.

35. However it should be noted that the effect of unsuccessfully seeking leave to apply for judicial review of enforcement notices is that by litigating these issues (and indeed by extension any other legal challenge that could have been raised against the enforcement orders – see *Henderson v. Henderson* (1843) 3 Hare 100) at this point, the applicants have rendered such challenge *res judicata* as regards any subsequent proceedings such as a prosecution under the section, so any challenge to the validity of the enforcement orders on any ground that was raised in this application or could have been raised by way of judicial review cannot now be relied on by them in any other litigation.

Order

36. Having regard to the foregoing considerations, I will order as follows:-

> (i) that the application for leave to apply for judicial review be refused;
>
> (ii) that the solicitors for the applicants be directed to serve a copy of this judgment on the respondent within seven days from the date of its delivery; and
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> (iii) that, as this matter is governed by s. 50 of the Planning and Development Act 2000, and therefore as this decision cannot be appealed without leave of this court, I will list the matter further to enable the applicants to consider whether

they wish to seek leave to appeal.