

THE HIGH COURT

2009 226 MCA

In the Matter of the Planning and Development Acts 2000 to 2006

And In the Matter of an Application Pursuant to Section 160 of the Planning and Development Act 2000

Between:

AMPHITHEATRE IRELAND LIMITED

Applicant

AND

HSS DEVELOPMENTS and HSS trading as THE MANSFIELD GROUP

Respondents

Judgment of Mr. Justice Hedigan delivered the 22nd day of October, 2009.

1. The Applicant herein is the owner and operator of Ireland's largest entertainment venue, The 02.
2. The Respondents are the owners and operators of the Citywest Hotel and associated facilities, including a convention centre, near Saggart in Dublin.
3. The Applicant seeks injunctive relief against the Respondents pursuant to section 160 of the Planning and Development Act 2000 ("the 2000 Act").

Background

4. The facility at Citywest which is owned and operated by the Respondents consists of a large hotel, apartments, a convention centre and function rooms, a leisure centre, two golf courses and other facilities including a retail outlet and sits on an overall area of 380 acres. On or about 10 November 2003, the Respondents were granted planning permission by South Dublin County Council (hereinafter "the Council" or "local authority" or "planning authority") for the development of a convention centre on the Citywest site. Some facilities already existed on this site.
5. On foot of this grant of permission, the Respondents commenced works on the convention centre. However, in or about 20 April 2004, An Bord Pleanála (hereinafter "the Board") refused permission for the convention centre on appeal, thus rendering the development by the Respondents unauthorised. The Respondents sought retention permission for the convention centre and permission to complete it in or about 8 February 2005 which application was again refused by the Board on or about 26 May 2006.
6. The Respondents made a further application for retention of a revised convention centre on or about 24 April 2007. An Environmental Impact Statement (EIS) accompanied this application. The public notice of the planning application, and the application itself, stated that the application was for full planning permission for the development of a convention centre/function room to be used in conjunction with the existing uses and facilities of the existing hotel.
7. Permission was granted by the Board on 18 July 2008 subject to twenty conditions. In the decision, the Board set out its reasons and considerations in deciding to grant permission. It referred, *inter alia*, to "the existing and permitted development and the established uses of the Citywest Complex". It further stated:- "It is considered that the retention and completion of the development, subject to compliance with the conditions set out below, would not seriously [affect] the amenities of the area or of property in the vicinity and would be acceptable in terms of traffic safety and convenience...In deciding not to accept the Inspector's recommendation to refuse permission, the Board had particular regard to the improved public transport facilities and the scale of the facility in relation to existing development permitted on the site."
8. For the purposes of this application, Conditions 3 and 4 of the Board's planning permission are most relevant. Condition 3 states:- "The proposed convention centre shall be used solely as a convention centre/function room and shall not be used for public concerts." The reason given for this condition is:- "Such use did not form part of the development as applied for and as described in the public notice and the Board is not satisfied that such a use would be acceptable in terms of traffic management and residential amenity."
9. Condition 4 states:- "The maximum number of patrons within the convention centre complex shall not exceed 4,161 persons at any one time (that is, the development the subject of this application and the existing conference facility taken together). Prior to recommencement of development, the developer shall enter into a legally binding agreement with the planning authority under Section 47 of the Planning and Development Act 2000 in this regard." The reason stated for this condition is:- "To ensure that the associated traffic movements associated with events in the complex do not unduly impact on the carrying capacity of the road network in the area (including national roads) and that car parking is adequate."
10. In respect of the required s.47 agreement, the Respondents wrote to the planning authority on 3 February 2009 and enclosed a draft agreement. The planning authority has yet not responded to the Respondents regarding the draft

agreement. There is an annotated version of the agreement on the Council's files which contains proposed amendments and expresses some concerns of the Council.

11. The Applicant became aware that the Respondents were intending to host an entertainment event, Disney on Ice at the Citywest convention centre in or around 27 December 2009 to 3 January 2010. Disney on Ice is a theatrical ice-skating show for young children. It features figure skaters dressed as Disney cartoon characters in performances that derive their music and plot from elements of various Disney shows. The music for the show is pre-recorded. The promoters of Disney on Ice had initially approached the Applicant's venue, The 02, with a view to holding the event there on those dates. However, it had ultimately decided not to book The 02 for the Disney on Ice event and it appears that the dates in question have now been provisionally allocated by The 02 to promoters of other events.

12. The Applicant wrote to the Respondents and the Council to express its view that hosting Disney on Ice in the convention centre was in breach of the conditions of the permission granted by the Board. It sought undertakings from the Respondents that they would not breach the permission. The Respondents confirmed that they proposed to host Disney on Ice but contended that hosting such an event was permitted by the terms and conditions of the Board's planning permission.

13. A warning letter from the Council to the Respondents issued on 11 August 2009 in respect of the possible unauthorised development. The Respondents replied by letter of 13 August 2009, setting out their view that the proposed hosting of the Disney on Ice event at Citywest fell within the terms and conditions of the planning permission. The Respondents submitted that the use of the convention centre to host Disney on Ice fully complied with Condition 3 of the Board's permission as it is a public performance and not a public concert.

14. On 19 August 2009, the Council wrote to the Respondents stating that it had considered all aspects of the matter and that there would be no further enforcement action in relation to this matter at this time. The Applicant's solicitors were informed by the Council of this decision by letters dated 26 August and 7 September 2009.

15. In these proceedings, the Applicant complains that (1) the proposed use of the convention centre is in breach of the restrictions on use of the centre contained in Condition 3 of the Board's planning permission; (2) that the Respondents have failed to comply with Condition 4 of the Permission; and (3) that the Permission was granted in breach of European Community law and cannot validly be relied on for any development by the Respondents.

Submissions of the Applicant

16. Mr. McCullough SC appeared on behalf of the Applicant and Mr. Rory Mulcahy BL made submissions in reply to the Respondent. Counsel for the Applicant submitted that the uses permitted to Condition 3 are limited to use as a convention centre or function room only. Condition 3 expressly prohibited one particular use, public concerts. The Disney on Ice show constituted a "public concert" within the meaning of Condition 3 and any ordinary member of the public would consider the Disney on Ice show to be precisely the type of event specifically excluded by Condition 3. The show consisted of a number of performers performing a combination of music and dance to a particular theme. It was clear that the restriction in Condition No. 3 was because of the concerns of the Board in relation to residential amenity and traffic management. It was submitted that the hosting of the Disney on Ice show had the potential to give rise to precisely the same planning concerns as any other concert, and that there is therefore no planning basis for distinguishing between Disney on Ice and other public concerts.

17. Mr. McCullough submitted that even if the Disney on Ice show was not a "public concert", it was unquestionably neither a convention nor a function and was not amongst the uses permitted by the permission, particularly Condition 3 thereof. It was further submitted that the Respondents were required by Condition 4 of the permission to enter into a legally binding agreement with the planning authority pursuant to section 47 of the 2000 Act. It appeared that no such agreement had been concluded, and therefore the Respondents had commenced development in breach of Condition 4 and remained in breach of this Condition.

18. Mr. McCullough acknowledged that the Court has broad powers in relation to the type of order that it may make pursuant to section 160 of the 2000 Act. The Court has a certain discretion as to whether to make any Orders at all, even in the event that it determines that unauthorised development is taking place (or proposed). It was submitted that there were no factors which might justify the Court in refusing relief in respect of the Respondent's proposed unlawful use. Mr. McCullough submitted that the Court should have regard to the history of the development of the convention centre which commenced without any valid permission. He further submitted that the Respondents had been on notice since November 2008 that the Council considered that the permission by the Board contravened European Community law, in light of the decision of the European Court of Justice of 3 July 2008 in Case C-215/06, *Commission v Ireland*. While the fact that more than eight weeks had passed since the grant of the permission prevented this Court from making any determination as to its validity, it was a factor which the Court should have regard to in the exercise of its discretion.

19. In the course of his submissions, Mr. McCullough relied in particular on the following authorities: *Readymix (Eire) Ltd. v Dublin County Council* (Unreported, Supreme Court, 30 July 1974); *Re XJS Investments Ltd.* [1986] I.R. 750; and *Morris v Garvey* [1983] I.R. 319.

Submissions of the Respondents

20. Mr. Conleth Bradley SC appeared on behalf of the Respondents. He submitted that the application was both misconceived and unmeritorious. The Applicant was artificially attempting to characterise Disney on Ice as a public concert for the sole purpose of preventing it from taking place at the Citywest complex. Mr. Bradley submitted that the planning permissions granted in favour of the Citywest complex did not prohibit the Disney on Ice function taking place.

21. Mr. Bradley referred the Court to a number of authorities in this jurisdiction concerning the interpretation of planning documents. It was clear from this jurisprudence that planning documents are to be construed in their ordinary meaning as it would be understood by members of the public without legal training unless such documents, read as a whole, necessarily indicate some other meaning. However, the words of a condition of a planning permission will frequently need to be interpreted according to their context.

22. Mr. Bradley submitted that the relevant context here included the prior decision of the Council of 30th November 2007 in respect of the Citywest development. The Council's decision included a condition which stated that the convention centre shall be solely used as a convention centre and shall not be used for public performances/concerts nor as a

function room. The reasons given for this condition were "in the interest of traffic management and residential amenity." In contrast, the Board's decision allowed use of the convention centre as a convention centre/function room. It removed the prohibition on "public performances" whilst retaining the prohibition on "public concerts." Mr. Bradley also referred to other aspects of the Board's decision which referred to the existing uses and facilities of the existing hotel. The existing uses included the hosting of events of a similar nature to Disney on Ice, in particular "Lord of the Dance" and "The Spirit of Christmas." Other such events included the receptions attendant upon the All-Ireland football and hurling finals, the All-Ireland Irish Dancing Competitions, and the Fianna Fail and Fine Gael Ard-Fheisanna.

23. Mr. Bradley acknowledged the discretionary jurisdiction of the Court in assessing a section 160 application. In exercising that discretion, the Court should have regard to the fact that the planning authority was aware of the matters complained of and had not pursued enforcement action. He further submitted that the public interest was in favour of allowing the Disney on Ice shows to take place at Citywest.

24. With regard to the alleged breach of Condition 4, Mr. Bradley submitted that the Respondents had met their obligations under this Condition by submitting a draft s.47 agreement to the Council. This Condition related to the permitted numbers at the convention centre and the Respondents had abided by this. He submitted that the Applicant's complaint in this regard should have been directed at the planning authority. By raising it in the course of s.160 proceedings, the Applicant was attempting to make a collateral challenge which the Court should not permit. This argument was supported by section 50 of the 2000 Act which provides that a person shall not question the validity of a decision or act other than by way of an application for judicial review. Mr Bradley argued the same applied to the submission of the applicants with regard to the decision of the European Court of Justice in *Commission v Ireland* cited above.

25. In the course of his submissions, Mr. Bradley relied in particular on the following authorities: *Re XJS Investments Ltd.* [1986] I.R. 750; *Kenny v Dublin City Council* [2009] IESC 19; *Grimes v Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409; *Sweetman v Shell E&P Ireland Ltd. and Others* [2006] IEHC 85; *Leen v Aer Rianta cpt* [2003] 4 I.R. 394; and *In re Comhaltas Ceoltóirí Eireann* (Unreported, High Court, Finlay P., 3 December 1977).

The Applicable Law

26. Section 160(1) of the Planning and Development Act 2000 provides that:-

"Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

27. Section 160 allows for a variety of orders to be made by the Court. It is noteworthy that there is no *locus standi* requirement under section 160, which expressly provides that an application may be made by the planning authority or by any other person, whether or not that person has an interest in the land. This element of s.160 was discussed in *Leen v Aer Rianta cpt.* [2003] 4 I.R. 394 where the applicant brought a s.160 application in respect of unauthorised development at Shannon airport. McKechnie J. stated, at 401:- *"...the motive of the applicant in bringing these proceedings is highly questioned. It is said that his true purpose is unrelated to valid planning reasons and that his sole desire was to use any means possible to prevent Shannon airport from being available to transit troops from the United States of America on their way to Iraq and the Gulf. Whether or not this is so is, in my view, not relevant to his standing to bring these proceedings..."*

28. The onus of proof rests on the Applicant in s.160 proceedings to satisfy the Court that there has been unauthorised development and also that the Court should exercise its discretion to make an order: see, for example, *Sweetman v Shell E&P Ireland Ltd. and Others* [2006] IEHC 85.

29. In order to determine if the Disney on Ice show constitutes unauthorised development, as contended by the Applicants, it is necessary to interpret the planning permission for the convention centre, in particular Condition 3 thereof. The principles in relation to the interpretation of planning documents were helpfully summarised by the decision of the Supreme Court in *Re XJS Investments Ltd* [1986] IR 750, at 663 where McCarthy J. stated:-

"Certain principles may be stated in respect of the true construction of planning documents:

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsman [sic] and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

30. The recent decision of the Supreme Court in *Kenny v Dublin City Council* [2009] IESC 19 illustrates that the interpretation of a condition of planning permission may require reference to its context in the planning process. Fennelly J. stated (at page 7 of the judgment):-

"...an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal

interpretation...

A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context...

The principle does not resolve the problem which, as I explain later, arises in respect of Condition No. 2, namely that the condition is, itself, contradictory or, at least, ambiguous. The Gregory case shows that the court does not confine itself to a purely literal interpretation of a condition. It will seek to ascertain its true meaning from its context in the planning process."

31. It is thus clear from these authorities that the task of the court is to interpret planning documents in light of the ordinary meaning of the words used, as would be understood by an ordinary member of the public with no specialist knowledge. Where the words used are unclear or ambiguous, the court should have regard to the context in which those words are used. Although extrinsic evidence is generally not permitted to aid in the interpretation of planning permission (see *Readymix (Eire) Ltd. v Dublin County Council* (Unreported, Supreme Court, 30 July 1974), it is often the case that the permission itself incorporates other documents, typically by reference to the plans and particulars submitted with the application, and these must be considered in interpreting the permission.

32. The courts in this jurisdiction have consistently held that the nature of the remedy under s.160 (and its equivalent under previous legislation, s.27 of the Local Government (Planning and Development Act, 1976)) is a discretionary one: see, for example, *Stafford v Roadstone Ltd.* [1980] I.L.R.M. 1. The case must be determined on the basis of the individual facts and circumstances surrounding it. In *Leen v Aer Rianta cpt.* [2003] 4 IR 394, McKechnie J. considered this discretion in the context of an injunction sought in respect of unauthorised development at Shannon airport. He stated (at p.410 and p.414):- "*In deciding whether to grant an injunction in this case, and if so, on what terms, there are certain matters to which particular attention must be given. These include:-*

(c) the conduct, position and personal circumstances of the applicant;

(d) the question of delay and acquiescence;

(e) the conduct, position and personal circumstances of the respondent;

(f) the public interest, to include:-

(i) as part of that interest, the business, commercial and tourist activities conducted at the airport and in the wider general area and

(ii) as members of the public, those who derive any employment benefit, either directly or indirectly, from the airport's overall operation as well as persons in the wider community and those who avail of or utilise the respondent's facilities...

It would, I believe, be unhelpful, unnecessary and, in any event, probably impossible to identify what public interest considerations one must take into account in this area of the law. It seems to me that, in general, any element or feature of the public interest which arises from the particular circumstances before the court are elements or features which the court can take cognisance of when exercising its discretion under s.160."

33. One of the factors raised by counsel for the Respondents in this case was the fact that the planning authority had been informed by the Applicant of the alleged unauthorised development and, having investigated the matter, had decided to take no enforcement action. This aspect was taken into account in the exercise of the court's discretion in *Grimes v Punchestown Development Co.* [2002] 1 I.L.R.M. 409 in not granting the order sought. Herbert J. stated (at p.414) that one of the relevant circumstances was:- "*That the official watchdog that has been charged by the Act of the Oireachtas with supervising the proper planning and development of this area, though fully aware of all the matters relevant to a proper determination and fully aware of the conditions which were attached by the same planning authority to other planning applications made by Punchestown Development Co. Ltd. has clearly decided not to proceed under either s.26 or s.27 of the Act.*" A further relevant aspect of that decision is that Herbert J. took into account the potential disappointment to members of the public who had paid for tickets and would be anxious to attend the proposed concert which was the subject of the application (pp.415-416).

34. The factors set out in the authorities cited above are all clearly of relevance in determining how the court's discretion should be exercised in the present case, should a breach of the planning permission be found. In addition, this case may raise elements of the public interest for consideration on its own specific facts and circumstances.

35. In respect of the Applicant's complaint regarding Condition 4 and the requirement to enter into a s.47 agreement, counsel for the respondent submitted that this complaint should have been directed at the planning authority. It was argued that the Applicant was attempting to mount a collateral challenge, using the s.160 procedure, which the Court should reject. In this regard, the decision of this Court in *In re Comhaltas Ceoltóirí Eireann* (Unreported, High Court, Finlay P., 5th December 1977), where Finlay P. refused to permit objectors to a drinks licence contend that a planning permission was invalid, is relevant. The learned judge stated:-

"The Planning Authority is a public authority with a decision making capacity in accordance with statutory powers and duties. In my view, there is a rebuttable presumption that its acts are valid. A challenge to the validity of the acts of a planning authority can only be made by review on certiorari or by a substantive action seeking a declaration of invalidity [in the High Court]. To either form of proceeding, the Planning Authority is an essential party and it would be contrary to natural justice for a court to be called upon to adjudicate on the validity of the acts of a planning authority in a case to which they were not a party..."

The Court's Decision

36. I now turn to the application of the law as stated to the facts of the case before me. It should be noted at the outset that the fact that the Applicant may have a commercial interest in the outcome of these proceedings, as a competitor with the Citywest venue, is not in any way a bar to their having *locus standi* under s.160. Counsel for the Applicant rightly accepted that that was the case. Competitors have a legitimate interest in ensuring a level playing field in respect of the planning process.

37. The onus was on the Applicant in this case to establish that unauthorised development is in being or is proposed, and to satisfy the court that it should exercise its discretion to make an order under section 160 of the 2000 Act. The first matter complained of by the Applicant was an alleged breach of Condition 3 of the Respondent's planning permission which had been granted by the Board. Firstly, it was alleged that the Disney on Ice event constituted a "public concert" and was expressly prohibited by that condition.

38. There can be no doubt that the Disney on Ice event is of course a "public" one as it is open to all members of the public to buy tickets to attend the event. However, I cannot agree with the Applicant that the event constitutes a concert, in the manner in which that term would be understood and used by the ordinary member of the public. It is not in the nature of, say, a performance by an orchestra or a rock band. In reaching that conclusion, I am not expressing any opinion on whether the notion of a "public concert" requires the performance of live music. It is not unknown that singers giving public performances may mime to pre-recorded music. The decisive element, in my view, is that a concert, in the ordinary use of that word, would refer to an event which is primarily about the performance of songs or other music. While music may be an element of the Disney on Ice show, it is not an event where the primary motivation of the audience attending would be to hear the music performed.

39. In the alternative, the Applicant alleged that the event was not a convention centre or function room use as required by Condition 3. It is clear, and the Respondents did not seek to argue otherwise, that it is not a convention centre use. With regard to whether it is a "function", counsel for the Applicant relied upon the definition of that word in the Shorter Oxford English dictionary as "a public ceremony or occasion; a formal or important social gathering." He cited weddings and dinners as being examples of functions.

40. In my view, the word "function" would be understood quite broadly by an ordinary member of the public in Ireland, where the word is used to refer to a fairly wide (though not unlimited) spectrum of events. In fact, it is quite a common usage to hear events such as weddings and celebratory dinners being referred to as a "private function." That suggests that there is a general understanding that there exists a separate category of "public function" which falls to be considered. However, it is evident that the word "function" carries a degree of ambiguity which I am now called upon to resolve in the circumstances of this case. In doing so, I must have regard to the context in which that word is used. It is agreed that the Board dropped the prohibition on public performances which had been included in the Council's earlier planning permission. That is evidence of an intention that public performances, other than concerts, which could be regarded as a function (or convention) are permitted. On the face of it, the planning permission itself refers to the existing development and established uses of the Citywest complex. The planning application itself stated that the proposed development was to be used in conjunction with the existing uses and facilities of the existing Citywest hotel. Evidence is before the court that the established uses included hosting of "Lord of the Dance" and "The Spirit of Christmas", events which were very similar in nature to the proposed Disney on Ice show. Having regard to this context and the above broad meaning of the word "function" and to the evidence before the court, I find that the proposed event Disney on Ice is in the nature of a public function which is all but identical to the previous events such as "Lord of the Dance" and "The Spirit of Christmas" and therefore within the existing uses of the Citywest complex. There is nothing therefore in Condition 3 which precludes the Respondent from hosting the Disney on Ice show at the Citywest facility.

41. The Applicant also complained of the failure of the Respondents to enter into a legally binding s.47 agreement, as required by Condition 4. Condition 4 is concerned with limiting the maximum number of patrons within the convention centre complex at any one time. The Respondents sent a draft agreement to the Council on 3 February 2009, but have not received any response from the Council in respect of it. An annotated version of the draft agreement, which records some concerns and proposed amendments of the Council, is on the Council's files. However, there is no issue between the Respondents and the Council concerning the essence of condition 4 and there was no evidence of any breach or potential breach of the limitation on numbers contained therein. While the Respondents may, in strict terms, be in technical breach of Condition 4, I am not satisfied that this is a ground on which relief should be granted to the Applicant under s.160 of the 2000 Act in this case. In exercising the Court's discretion in this respect, I have taken into account the fact the Council are aware of the status of the draft agreement and did not consider it necessary to take any enforcement proceedings against the Respondents at this time. I am also mindful of the public interest. While it is not, of course, as weighty a factor as that which prevailed upon the court in respect of Shannon airport in *Leen v Aer Rianta cpt* [2003] 4 I.R. 394, nonetheless there are relevant aspects of the public interest to be considered. Hosting the Disney on Ice event at Citywest will have a beneficial impact in terms of employment, the influx of people to related facilities at Citywest including the hotel, and the long-term viability of the hotel and the Citywest complex. Moreover, there is a wider public interest in terms of the enjoyment of children and families in attending this popular event during the Christmas period. However, the requirement for a section 47 agreement is a condition imposed by the Board as part of the grant of planning permission, and I trust that the local authority will return to this matter as soon as may be by indicating to the Respondent either its acceptance of the draft agreement, or the amendments which it proposes to that draft agreement. I also accept the submission of the respondents that the argument raised by the applicants based upon the decision of the European Court of Justice in *Commission v Ireland* cited above is not something that should be raised by way of a section 160 application because it is a collateral challenge to the validity of the planning permission.

42. In all the circumstances outlined, and for the reasons stated above, I must refuse the application.