Neutral Citation Number: [2010] IEHC 310

THE HIGH COURT

2009 64 MCA

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IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION

BETWEEN

WARRENFORD PROPERTIES LIMITED

AND

NOEL FRISBY CONSTRUCTION LIMITED

APPLICANTS

AND

TJX IRELAND LIMITED T/A TK MAXX

AND

JIM TREACY

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 30th day of July, 2010

1. The applicants are the manager, operator and owner of a district shopping centre at Lisduggan in the City of Waterford.

2. The first named respondent, since 9th October, 2008, is the occupier of and trading from units formerly known as 1, 10 and 11, Butlerstown Retail Park. The second named respondent is the owner of Butlerstown Retail Park. The first named respondent is a well known brand retailer selling discounted designer fashion clothing and footwear and other goods and it carries on its business, inter alia, from the premises in Butlerstown Retail Park.

3. By an originating notice of motion issued on 2nd April, 2009, the applicants primarily sought the following reliefs:

> (i) An order prohibiting the respondents using the premises located at Unit Nos. 1, 10 and 11 of the Butlerstown Retail Warehouse Park for the sale of goods defined as comparison goods in Annex 1 of the Retail Planning Guidelines.
>
> (ii) An order requiring the respondents to operate the retail warehouse premises at Butlerstown Retail Park, Waterford, in accordance with the Planning Permissions granted and, in particular, Planning Permission Register Reference 06/522 which limits the use to that of retail warehouse park.
>
> (iii) An order directing the respondents to reinstate the units comprising Units Nos. 1, 10 and 11 as individual units and restore the premises to its existing use prior to the carrying out of the aforesaid works.

4. The proximate cause of the application made in April 2009 was the decision of An Bord Pleanála of 23rd February, 2009, on an appeal taken by the second named applicant against a declaration granted by Waterford County Council on 29th July, 2008, stating that the current use of Units Nos. 1, 10 and 11, Butlerstown Retail Park (by TK Maxx) was exempted development. In its decision, An Bord Pleanála concluded that the current retailing activity carried on by TK Maxx in Butlerstown Retail Park constituted development, being a material change of use. It also decided that the internal alterations to the units to amalgamate same are directly related to the change of use and are therefore not exempted development.

5. On the 28th May, 2009, the application was admitted to the Commercial List.

6. The second named respondent applied by way of judicial review for an order of certiorari of the decision of An Bord Pleanála of 23rd February, 2009 [2009 406 J.R.]. Those proceedings were also admitted to the Commercial List and the parties agreed to a telescoped hearing and to a hearing with a similar application for judicial review brought in relation to another unit in Butlerstown Retail Park. This application was adjourned pending the determination of the applications for judicial review.

7. In a judgment delivered on 22nd January, 2010, the High Court (MacMenamin J.) refused the applications for judicial review ([2010] I.E.H.C. 13).

8. This application was subsequently reactivated and further affidavits sworn.

Section 160

9. Section 160 of the Planning and Development Act 2000, insofar as relevant, provides:

> (1) 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 is 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.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature."

10. Section 160 and its predecessor, s. 27 of the Local Government (Planning and Development Act) 1976, have been the subject of decisions of the Supreme Court and High Court to which I was referred. Both parties referred me to the observations of Henchy J. in Morris v. Garvey [1983] I.R. 319, at p. 324:

"When sub-s. 2 of s. 27 is invoked, the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is 'necessary to ensure that the development is carried out in conformity with the permission'. An order which merely restrains the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a partially completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property."

11. Counsel for the respondents submits, I think correctly, that these observations are obiter on the facts of Morris v. Garvey. Subsequent decisions have referred to the "wide discretion" given the Court by sections 27 of the Act of 1976, and 160 of the Act of 2000, and the need to exercise it on the facts of the individual case. In Leen v. Aer Rianta c.p.t. [2003] 4 I.R. 394, McKechnie J. reviewed in depth many of the decisions, and then at p. 410 stated:

"Finally, on the generality of the discretion point it seems to me that, subsequent to Morris v. Garvey [1983] I.R. 319, the courts have tended to individualise each case and decide it accordingly, rather than to inquire as to whether the resulting circumstances fell within any of the illustrations mentioned in that judgment. For example, in some cases where there was no question of bad faith or lack of candour, injunctions issued, whereas in others relief was refused, even though the facts did not comfortably sit with the exceptions identified by Henchy J. in Morris v. Garvey."

I would respectfully agree with the above view.

12. The public interest in securing compliance with the relevant provisions in the planning code and any Planning Permission and the conduct of the parties are nearly always relevant matters to be taken into account and are matters which, on the facts of this application, are to be taken into account.

13. There is, on the facts herein, a public interest in securing compliance and also a wider public interest by reason of the National Retail Strategy and the retail strategy for the City and County of Waterford. The parent Planning Permission for the premises at issue in these proceedings (Planning Register Ref. No. 06/522) is for a retail warehouse park known as Butlerstown Retail Park. It is within the functional area of Waterford County Council, immediately outside the boundary of Waterford City Council. The Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in January 2005, define a retail warehouse as "a large single-level store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, bulky DIY items, catering mainly for car borne customers and often in out-of-centre locations". The Retail Planning Guidelines also define "bulky goods" and by distinction "comparison goods". It is the sale of comparison goods by the first named respondent which has been determined by An Bord Pleanála to constitute the material change of use and, hence, development.

14. It is not in dispute that the Waterford City Development Plan has a clearly defined retail strategy that includes a policy to acknowledge the city centre as the primary retail centre for high and middle order retail goods for the region and to protect and reinforce this role. Further, that a fundamental objective of the Waterford City Development Plan Retail Strategy is to protect the city centre and to ensure that the primary focus for high and middle order retail goods would continue to remain within the urban core. The continued retail trading of the first named respondent at Butlerstown has, as a matter of probability, on the affidavit evidence, an adverse impact on that strategy. Waterford County Council confirmed to Waterford City Council by letter of 5th December, 2006, that, for the purposes of Condition 22 of Planning Permission 06/522, the use of retail units in Butlerstown would be required to be within the definition of retail warehouse in the Retail Planning Guidelines.

15. Counsel for the respondents refers to the responsible manner in which both respondents approached the use of the premises by the first named respondent and, in particular, the fact that they obtained the letter of 22nd January, 2008, from Waterford County Council in which it stated, in relation to the Planning Permission 06/522,

"I wish to confirm compliance with Condition No. 22 of the Permission subject to the following:

'The general range of goods relates to carpets, household goods, luggage, gifts, travel goods, toys, fitness and sports equipment, fitness and general leisure apparel with ancillary wear and associated accessories'."

Both respondents assert that, in reliance upon that letter, the first named respondent entered into the lease and occupation of the premises considering that it was entitled to sell its retail discounted clothes and other goods. Counsel for both respondents, whilst not conceding that the Court should make an order in the terms of paragraph (i) of the notice of motion, also accepted that subsequent to the decisions of An Bord Pleanála and MacMenamin J. already referred to, that the first named respondent could not continue

indefinitely to trade, as at present, in the premises in Butlerstown. The first named respondent had, prior to the hearing before me, identified premises in the centre of the City of Waterford, and was at an advanced stage of negotiations with the landlord of a site in the Railway Square Development. It sought time to allow for the fit out of those premises if negotiations were satisfactorily concluded and, in the alternative, for an orderly rundown of its business. It referred, in particular, to its employment of fifty-two people. A period of four months was sought.

16. Counsel for the applicants disputed the entitlement to a further period of four months and drew attention to the fact that the decision of MacMenamin J. had been given in January 2010 and the adverse impact of the continued trading of the first named respondent in a general way on the applicants' shopping centre. No evidence of actual loss was adduced.

17. At the conclusion of the hearing before me on the 3rd June, I indicated that I had formed a view that I would grant an order in terms of paragraph (i) of the notice of motion and that on this aspect of the application I wished to consider the appropriate length of a stay, but that any stay would be from the 3rd June.

18. Having considered carefully all the evidence before me and the submissions made by counsel for both parties, I remain of the view that, in the exercise of my discretion under s. 160, I should make an order in the terms of paragraph (i) of the notice of motion i.e. an order prohibiting the respondents from using the premises located at Unit Nos. 1, 10 and 11 of Butlerstown Retail Warehouse Park for the sale of goods defined as comparison goods in Annexe 1 of the Retail Planning Guidelines. I have further concluded that, in the exercise of my discretion, balancing the public interest and the interests of the parties hereto, I should put a stay on the coming into effect of that order until 30th August, 2010.

19. Having regard to the above order, it does not appear to me necessary to make the order sought at paragraph (ii) of the notice of motion as it is no more than a statement that the respondents should comply with their legal obligations.

Order to reinstate

20. The third order sought is one directing the respondents to reinstate the units comprising Units 1, 10 and 11 as individual units and restore the premises to its existing use prior to carrying out the aforesaid works. It is the first part of this order which was primarily in issue between the parties and principally affects the second named respondent.

21. Counsel for the second named respondent does not dispute that the decision of An Bord Pleanála found that the internal alterations to the units to amalgamate same are not exempted development. At issue before An Bord Pleanála was s. 4(1)(h) of the Planning and Development Act 2000. This provides:

> 4.—(1) The following shall be exempted developments for the purposes of this Act— …
>
> > (h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."

22. Counsel for the second named respondent relies upon the precise terms of the decision of An Bord Pleanála in relation to this issue which is:

> "(d) that the proposed internal alterations to the units to amalgamate same are directly related to the change of use and are therefore not exempted development."

Counsel submits that this decision must be considered in the context of the Inspector's report to the Board on the appeal which, in relation to the amalgamation of the units, having referred to reliance by the owner on the provisions of s. 4(1)(h) of the Act of 2000, stated:

> "I consider that, in this instance, as all the works are internal, that they come within the scope of s. 4(1)(h)."

23. Counsel for the second named respondent submits that if the Court makes the order sought at paragraph (i) of the notice of motion prohibiting the continued unlawful use, that such use will discontinue and the first named respondent will vacate the premises. On the affidavits, I am satisfied this is so. The second named respondent accepts that any re-letting will have to be in compliance with the Planning Permission as interpreted by the High Court (MacMenamin J.) and the decision of An Bord Pleanála. He submits that the only basis for the decision of An Bord Pleanála at paragraph (d), having regard to s. 4(1)(h) of the Act of 2000, is that the internal alterations are directly related to a use not authorised by the existing permissions. He submitted that, having regard to the terms of the decision of An Bord Pleanála, it is premature to determine that reinstatement is required in advance of the cessation of the unauthorised use of the amalgamated units. He submits that to now require the second named respondent to undertake costly works to reinstate the units is disproportionate and would be punitive.

24. I have concluded that, having regard to the terms of s. 4(1)(h) of the Act of 2000, and the reason given by An Bord Pleanála for which the internal amalgamation of the units was not considered exempted development, i.e. as they "are directly related to the change of use in question", that, having made the order sought at paragraph (i) of the notice of motion, in the exercise of my discretion, I should not now make the order sought at paragraph (iii). I have reached this conclusion on an assumption that the unauthorised use will terminate in accordance with the order made at paragraph (i) of the notice of motion. I will grant the applicants liberty to apply in relation to the order sought at paragraph (iii) in the event there will be any non-compliance by either respondent with the order the Court is now making in relation to the unauthorised use.