

THE HIGH COURT

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

RECORD NO.: 2018/256 MCA

BETWEEN

LUXOR INVESTMENTS LIMITED

APPLICANT

AND

WAVE POINT LIMITED

RESPONDENT

JUDGMENT delivered by Ms. Justice Tara Burns on 20th day of December, 2018

General

1. The Applicant and the Respondent are owners of two separate plots of land situate at Great Ship Street, Dublin 2. The Respondent's plot of land is bounded on three sides by the Applicant's land. Both the Applicant and Respondent intend to develop their respective sites, with planning permission having been obtained for the development of hotels on each plot. The Applicant's proposed development is far more extensive than that of the Respondent comprising a much larger ground area. The Applicant has already developed an office complex on a portion of these lands. Further, the Applicant previously developed another site in the location, namely the Radisson Blu Royal Hotel which it intends to link to the new hotel development.

2. Regarding the hotel complex which the Respondent intends to develop, the Respondent obtained planning permission from Dublin City Council in January 2017. This permission was appealed by the Applicant. However, An Bord Pleanála granted planning permission for the development, subject to certain conditions, in July 2017.

3. Paragraph 1 of the said planning permission states, *inter alia*:-

"The proposed development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended... except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to the commencement of the development and the development shall be carried out and completed in accordance with the agreed particulars."

4. Paragraph 2 of the planning permission amended the proposed development in relation to glazing and a railing. Revised plans showing compliance with these requirements were required to be submitted to and agreed in writing with the planning authority prior to the commencement of development.

5. Paragraph 3 required that details relating to the external finishes be submitted to and agreed in writing with the planning authority prior to the commencement of the development.

6. Paragraph 4 of the planning permission required that proposals for the signage on the façade of the development, including the location of a historical wall plaque, be submitted to and agreed in writing with the planning authority prior to the commencement of the development.

7. Paragraph 7 of the planning permission required that a construction management plan be submitted to and agreed in writing with the planning authority prior to the commencement of the development. The plan was required to provide details of intended construction practice for the development, including noise management measures and off-site disposal of construction/demolition waste.

8. Paragraph 8 of the planning permission required that detailed plans and particulars relating to sound proofing and other noise management requirements be submitted to and agreed in writing with the planning authority prior to the commencement of the development.

9. Paragraph 10 required that a plan relating to waste management be submitted to and agreed in writing with the planning authority prior to the commencement of the development.

10. This area of Dublin is a rich site of archaeological finds. Paragraph 6 of the planning permission dealt with the mandatory requirements in relation to archaeology conditions. Sub-paragraph (a) of paragraph 6 states:-

"Prior to commencement of development, the developer shall retain a licensed archaeologist to carry out the archaeological requirements of the City Archaeologist".

Sub-paragraph (d) of paragraph 6 states:-

"An archaeological method statement for impact mitigation including temporary and enabling works shall be agreed in advance with the City Archaeologist."

11. On 5th June 2018, the Respondent commenced works on its site. Such works involved the demolition and removal of the factory building and floor then in existence at the site. The archaeological works envisaged by the planning permission were subsequently commenced.

12. It is asserted by the Applicant that in the course of these works the Respondent committed an act of trespass onto the Applicant's lands and caused a nuisance to the Applicant arising from noise and dust pollution. In that regard, proceedings were instituted and motion papers issued seeking an interlocutory injunction restraining the Respondent from committing further acts of

trespass and nuisance.

13. As it transpired, the conditions of the planning permission referred to above, namely paragraphs 1, 2, 3, 4, 7, 8 and 10 had not been complied with by the Respondent in that the required documentation had not been submitted to the planning authority and an agreement reached prior to the commencement of work. In light of the apparent breaches of the planning permission, the motion presently before the Court was also issued by the Applicant seeking an order pursuant to s. 160 of the Planning and Development Act 2000 (hereinafter referred to as "the Act of 2000").

14. The matter was listed for hearing during the vacation sittings of the courts and was adjourned for further affidavits to be filed. Work continued at the Respondent's site throughout without, it would appear, any further alleged acts of trespass or nuisance.

15. Documentation relating to conditions 2, 3, 4, 8 and 10 were filed by the Respondent with the planning authority on 17th July, 2018. The planning authority gave an indication of its satisfaction with the documentation received from the Respondent regarding these conditions at a later stage.

16. By the time the matter came before the Court, the sole remaining condition which had not been complied with by the Respondent, was that referred to in Paragraph 7 of the planning permission, namely the requirement to submit and agree a construction management plan. A construction management plan in respect of enabling works had been submitted by the Respondent on 17th July 2018. However, this was accepted by the Respondent to be limited to enabling works and was noted by the planning authority to be only in respect of such works.

17. The relief sought by the Applicant at the hearing of the motion, no longer was that the works be enjoined pursuant to s. 160 of the Act of 2000, but rather that an order be made directing the Respondent to file a construction management plan as required pursuant to paragraph 7 of the planning permission. This was a relief which had in fact been sought at paragraph 2 of the Notice of Motion herein.

Section 160 of the Act of 2000

18. Section 160 of the Act of 2000 provides, *inter alia*:-

"(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High 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;

(c) that any development is carried out in conformity with-

(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject..."

19. Section 161 of the Act of 2000 provides, *inter alia*:-

"The Court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay -

...

(b) Where the person is the subject of an order under section 160, to the planning authority or to any other person as appropriate, the costs and expenses of the action, measured by the court."

Preliminary Objection

20. By way of preliminary objection, Counsel on behalf of the Respondent argued that the Court had no jurisdiction to make an order in the terms now sought as such an order was in the nature of a quia timet injunction which was not permitted pursuant to s. 160 of the Act of 2000.

21. I do not agree with Respondent in this regard. The power of the court pursuant to s. 160 of the Act of 2000 is extremely wide and quite clear. Where an unauthorised development has been, is being or is likely to be carried out or continued, the court has power to require a person to do anything which it considers necessary to ensure that the unauthorised development is not continued and that a development is carried out in conformity with a planning permission, or any condition which the planning permission is subject to. Requiring a developer to comply with a condition of its planning permission is clearly envisaged by the section in a situation where there is an unauthorised development. Accordingly, I am of the view that I have jurisdiction to make the Order sought by the Applicant should I be satisfied that an unauthorised development has been or is being carried out.

"Unauthorised Development?"

22. The question which I have to determine therefore is whether the development which is being carried out by the Respondent is an unauthorised development in light of the fact that conditions imposed by the planning permission have not been complied with.

23. "Development" is defined in s. 3 of the Act of 2000 as "the carrying out of any works on, in or under land or the making of any material change in the use of any structures or other land." "Works" are defined in s. 2 of the Act of 2000 including "any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal....". "Unauthorised development" is defined in s. 2 of the Act of 2000 as "in relation to land, the carrying out of any unauthorised works... or the making of any authorised use". "Unauthorised use" is defined in s. 2 of the Act of 2000 as meaning "in relation to land being a use which is a material change in use of any structure or other land and being development other than exempted development or development which is the subject of a permission granted under Part IV of the Act of 1963... being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject". "Unauthorised works" are defined in s. 2 of the Act of 2000 as meaning "any works on, in, over or under land...being development other than exempted development... or development which is the subject of a permission granted under Part IV of the Act of 1963... being a permission which has not been revoked and which is carried out in compliance with that permission or any condition to which that permission is subject."

24. Counsel for the Applicant argues that the work which has taken place to date falls within the definition of "works" and "development" within the meaning of the Act of 2000 and that therefore such work clearly requires planning permission. While the Respondent has such planning permission, the Applicant asserts that the Respondent has not complied with the terms of the planning permission by virtue of its failure to lodge and agree the already referred to required documentation with the planning authority prior to the commencement of the development.

25. Counsel for the Respondent argues that the Respondent is not in breach of the conditions of the planning permission. A number of grounds are relied on to advance that argument:-

- that despite the clear wording of the planning permission to the effect that certain matters (including the construction management plan) were required to be submitted to the planning authority and agreed with them prior to the commencement of the development, the Respondent could not do this because it had not served a commencement notice in accordance with the Building Regulations signalling its intention to commence works;
- that the practise in the industry is that developments of this nature and in this area are conducted in a phased manner.
- that from a practical perspective, it could not devise a construction management plan until the archaeological investigations had been concluded as it was unknown what these investigations would reveal and how the project could then proceed.

26. Dealing with these arguments in sequence, I do not accept the Respondent's assertion that a commencement notice must be served before a construction management plan is lodged. There is no legislative requirement that that be the case which is completely logical. A commencement notice signals the intention to start works. This is separate and distinct to a construction management plan which is a blueprint for how the construction is to be managed. This argument in reality feeds into the broader argument made by the Respondent that this development was being conducted in a phased manner as is the norm, it is asserted, in developments of this nature.

27. While it may well be the industry norm for phased development to take place in developments of this nature, that does not mean that it gives the Respondent's actions a validity which appears to offend the planning permission in this case. Accordingly, while I note that it is asserted that phased development is the norm and that there is no challenge to the affidavit evidence in this regard, it is not a matter which I will have regard to should I find that the planning permission did in fact require the construction management plan to be submitted and agreed prior to the commencement of the works.

28. With regard to the argument that a construction management plan could not be properly devised until the ground situation was known, I do not see this as an attractive argument either. Clearly a plan must be envisaged. Should the excavation reveal a situation where the plan devised does not meet the realities on the ground, then an amended construction management plan could clearly be lodged.

29. Counsel for the Applicant submits that had a construction management plan been prepared, the trespass and nuisance issues which he alleges have been caused to the Applicant, would not have arisen. It seems to me eminently sensible in a development of this nature, located in a tight land space, in the middle of the city centre with occupied premises in its vicinity together with heavy traffic in that area, that a construction management plan should be directed by the planning authorities to be put in place and operational from the beginning of the development

30. Accordingly, that brings me back to the central question – has an unauthorised development occurred as a result of the failure of the Respondent to lodge the construction management plan together with the other documentation (which was filed after the works commenced and these proceedings were instituted) prior to works starting at the site.

31. The wording of the planning permission is clear and unambiguous. The matters referred to at Paragraphs 1, 2, 3, 4, 7, 8 and 10 clearly required that further documentation be lodged with the planning authority and agreement reached in relation to same prior to the development commencing. Failure to do this obviously means that development carried out is not carried out in compliance with the planning permission and accordingly is unauthorised development. Case law regarding conditions of this nature interpret such conditions in a similar manner. The Supreme Court, in *Conroy v. Craddock* (Unreported, Supreme Court, 31st July 2007) stated at p. 11 of its judgment, in relation to such a condition: *"It goes without saying that there has been a breach of condition 5 in the sense that no plans were submitted before the commencement of the development"*.

32. However, the terms of the planning permission itself do not envisage a phased planning compliance process. The "development" in respect of which the planning permission is granted is not sub-divided into archaeological and new build development. In fact quite the opposite is the case:-

- Paragraph 6(a) of the planning permission requires a licensed archaeologist to be retained *"prior to the commencement of development"*. Had phased development been intended to be authorised by An Bord Pleanála, to cover an initial phase of demolition and archaeological investigative works, one would imagine that this would have been stated in clear terms rather than referring to the *"commencement of the development"*. This is obviously a term of art which an Bord Pleanála is intimately aware of. Accordingly, the "development" permitted on foot of the planning permission includes the initial phase of demolition and archaeological investigations.
- The construction management plan envisaged by the planning permission at paragraph 7 requires, amongst other things, that details of off-site disposal of construction/demolition waste be set out. Accordingly, the construction management plan, directed to be lodged prior to the commencement of development, is required to deal with the demolition waste which is obviously the fruits of the initial demolition works carried out at the site. No differentiation is made within that condition regarding the stages of development.

33. Accordingly, the terms of the planning permission itself envisages all works at the site – demolition works, archaeological investigation together with the new development, as being part of the development authorised pursuant to it rather than authorising a phased development.

34. Hence the work carried out at the site by the Respondent is unauthorised development as the terms of the planning permission have not been complied with.

35. In light of that finding, I am ordering that a construction management plan be filed by the Respondent by 31st January 2019 so as to ensure that the development is carried out in conformity with the planning permission pertaining to that development and in particular, paragraph 7 thereof.

Costs

36. With regard to the issue of costs, while it is apparent that several conditions were not satisfied prior to the development commencing, it is clear that the case law establishes that there can be belated compliance with a pre-commencement condition. By 17th July 2018, albeit as a result of the present proceedings, the Respondent was in compliance with all of the conditions of the planning permission bar paragraph 7 relating to the construction management plan. It is also clear that the Respondent intended to file such a plan as part of its phased development process and indeed intended to comply with all conditions in the course of the development.

37. The planning authority do not appear to take issue with the approach of the Respondent which perhaps is no major surprise in light of the affidavit evidence that developments of this nature proceed on a phased development basis. This is particularly evidenced by the letter from the Council dated 19th September 2018 which confirms that the details submitted by the Respondent in relation to paragraph 7(1) of the planning permission are in respect of enabling works only and are in partial compliance with the paragraph. No request is made for further documentation nor is any warning issued in respect of non-compliance with the planning permission.

38. Obviously the development intended to be carried out by the Respondent must not encroach on the rights of the Applicant. If that situation arises, the Applicant has legal avenues which it can pursue. Indeed, the Applicant has already instituted plenary proceedings in relation to alleged acts of trespass and nuisance which it asserts were committed by the Respondent against it. While reference to these alleged acts are relevant to the s. 160 application, their relevance is limited to establishing the interest which the Applicant has in instituting such proceedings. They are not designed to limit or prohibit such acts.

39. Accordingly, while I have made a finding that there was an unauthorised development at the site and have ordered compliance with the planning permission, I am making no order as to costs having regard to the limited order which was ultimately sought by the Applicant and made by the Court; the compliance by the Respondent with all bar one condition of the planning permission by the time the matter came before the Court for hearing; the stated intention of the Respondent to comply with all conditions; the practise of compliance on a phased basis in the industry and the attitude of the planning authority to the non-compliance.