THE HIGH COURT

JUDICIAL REVIEW

2018 No. 633 JR

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

Between

DUNNES STORES (LIMERICK) LIMITED AND DUNNES STORES UNLIMITED COMPANY

Applicants

-And-

LIMERICK CITY AND COUNTY COUNCIL

Respondent

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 18th Day of January, 2019

Nature of the Case
1. This is a ruling on a motion by the applicants for a stay on an appeal currently before An Bord Pleanála pending the determination of these judicial review proceedings. The first applicant is the appellant in the appeal to the Board. The application for a stay is opposed by the respondent Council. The Board is neutral as to whether or not a stay is granted.

The substantive Judicial Review proceedings
2. In the substantive judicial review proceedings, the applicants are seeking (i) an order quashing a decision of the Council to enter a certain property owned by them on to the Vacant Sites Register pursuant to s. 6 of the Urban Regeneration and Housing Act 2015, and (ii) various related declarations to the effect that the decision to do so was *ultra vires,* void, of no legal effect, unreasonable and irrational, in breach of fair procedures, natural and constitutional justice, and that the Council had failed to give adequate reasons for its action. Further, the applicants seek a declaration that the decision was unlawful on the basis that it was made in bad faith for an ulterior and/or improper purpose, namely of acquiring the property for the purpose of developing a civic and cultural amenity centre according to the Council's economic and spatial strategy incorporated into the Limerick City Development Plan 2010-2016.

3. I note that the applicant was granted leave to bring the judicial proceedings on the 30th July, 2018 and that the test for obtaining leave was the "substantial grounds" test applicable to planning cases.

4. Chronology of Events
5. The applicants are the owners of a site located at Sarsfield Street in Limerick City. Each respective applicant owns a different part of the site. In 2008, they closed a shopping centre which had been open for business on the site. They continued to maintain the property and tend to its upkeep.

6. In 2010 the property was subsequently zoned under the Limerick City Development Plan 2010 "to provide for the protection, upgrading and expansion of high order retailing, in particular comparison retailing, and a range of other supporting uses in the City Centre retail area." This development plan and the zoning of the site remained in force following a decision of the Council which was taken in September 2014 pursuant to Section 28 of the Electoral, Local Government and Planning and Development Act 2013.

Notices under the Derelict Sites Act, 1990

7. By letters dated the 28th March, 2013, the Respondent council served notices pursuant to s. 29 of the Derelict Sites Act 1990 (hereinafter "the Act of 1990") on two directors of the applicants, Mr. Francis Dunne and Ms. Margaret Heffernan, but not on the applicant entities themselves.

8. On the 17th April, 2013 the respondent proceeded to serve further notices, pursuant to s. 8(2) of the Act of 1990, of their intention to enter the site onto the Derelict Sites Register. Again, these notices were served on the directors and not on the applicant entities themselves.

9. On the 24th April, 2013 the applicants' solicitor responded in some detail, stating the correspondence had been passed on from the addressee-directors to the entities. This response requested that the Council provide information on a wide variety of matters. The response went on to complain about the fact that the addressee-directors, who possessed no legal interest or estate in the properties, were contacted under threat of penal and criminal sanction, and it asserted that the applicants had suffered reputational damage through a determination of dereliction of which they had no notice. It was suggested that the notice period given was contrary to the requirements of the Act of 1990. It was further suggested that it appeared that the Council was independently preparing plans and developing proposals in respect of the properties which has not been referred to in the notices or the correspondence. The letter concluded with a series of demands for undertakings as to the site and acknowledgement of error on the Council's part within 7 days of the letter, and that failure to comply would lead to the issuing of proceedings in order to quash the notices.

10. On the 17th May, 2013, the Council replied, indicating that they were withdrawing the previous notices and that "new notices are being issued to the Company at its registered address and to the secretary of the Company at its registered address". On the 16th May, 2013 this fresh notice was served on the first named applicant in respect of the property, together with a request for particulars relating to the applicants' interests in the property within 21 days.

11. On the 6th June, 2013, the applicants' solicitors wrote again, taking issue with several aspects of the notice. On the 26th July, 2013, they wrote again and said that the property was not derelict, and attached photographs of the property in order to demonstrate this fact.

12. It seems that this correspondence in 2013 thereby came to an end and that the site was not in fact placed on the register of derelict sites.

Council plans in respect of the property

13. In 2013, a non-statutory plan - the Limerick 2030 Economic and Spatial Plan for Limerick - was promulgated by the respondent council and advertised publicly. The plan discussed, among other things, the potential development of the applicants' site into a civic and cultural centre for Limerick City.

14. On the 26th January, 2015 the elected members of the respondent adopted Variation No. 4 to the Development Plan to include elements of the 2030 Economic and Spatial Plan for Limerick, incorporating the proposed redevelopment of the applicants' site.

The attempted compulsory purchase of the site

15. On the 30th September, 2015, an administrative officer of the respondent, Mr. James Clune, telephoned one of the applicants' employees in relation to a proposed compulsory purchase by the respondent of the lands surrounding the property.

16. In subsequent emails on the 1st October, 2015, as well as on the 20th April, 2017, the 14th June, 2017, and the 19th June, 2017, Mr. Clune stated that the object of any purchase by the Council of the property was for the redevelopment of the site in accordance with the Development Plan. The emails also included purchase offers and requests to be allowed access to the site for the purchase of valuation.

17. On the 24th July, 2017 the property agents Lisney submitted an offer on behalf of the respondents for the purchase of the site at a value of €3 million. This was not accepted by the applicants.

Service of Vacant Sites Notice

18. On the 12th January, 2018, the Council served a notice on the first applicant to the effect that the property was to be entered onto the Vacant Sites register pursuant to s. 7 of the Urban Regeneration and Housing Act of 2015, stating that it was zoned in the Development Plan to accommodate residential development. The second applicant was not served.

19. By letter dated the 7th February, 2018, the first applicant made submissions in respect of this notice, asserting that the property was not zoned to accommodate residential development and pointing out the omission of notice to the second applicant.

20. On the 3rd May, 2018, the Council sent a further notice pursuant to Section 7(1) of the Act of 2015 stating that the property was regeneration land. Again, the second applicant did not receive any such notice.

21. On the 29th May, 2018 the first applicant made a second series of submissions disputing that the property was "regeneration land" and again pointing out that the applicant had not been served.

22. On the 19th June, 2018 the respondent wrote to the first applicant enclosing a notice of the same date indicating that the property had been entered onto the Vacant Site Register pursuant to section 7 of the Urban Regeneration Act, 2015. In relation to the points raised by the first applicant in its submission the letter stated the following:-

> "In accordance with the aims and objectives of the Limerick 2030 Economic and Spatial Strategy (Variation No. 4 to the City Development Plan 2010 – 2016 extended) which incorporates physical regeneration of this part of the city centre in its masterplan and the creation of quality strategic gateways to the City Centre, making it a welcoming experience for both visitors and residents alike; the site at this key location at a bridge crossing on the River Shannon to the city centre, is vacant and idle. The site is under-utilised at this key prominent location, taking from the regeneration of Limerick city. It has been vacant and idle for the period of a year and more detracting from the character of the area."

Appeal to An Bord Pleanála

23. On the 16th July, 2018 the first respondent submitted an appeal from the respondent's decisions to An Bord Pleanála (hereinafter "the Board") pursuant to s. 9 of the Act of 2015. Among the issues on appeal is the issue of whether the Board in certain variations to the Development Plan is in compliance with its statutory obligations under the Act of 2015 and whether the property in question is "regeneration land" within the meaning of the Act.

24. On the 25th July, 2018 the applicants' solicitors wrote to the respondent seeking, among other things, confirmation of the cancellation of the property from the Vacant Sites Register by 1pm on the 25th July, 2018.

Judicial Review proceedings commenced

25. On the 30th July, 2018 the applicant obtained leave to bring the present judicial review proceedings.

26. On the 13th August, 2018, the applicants wrote to the Board referring to the appeal and the grant of leave for judicial review and requested that no further steps be taken by the Board to determine the issue until the present proceedings were concluded.

27. On the 22nd August, 2018 the Board's solicitors responded by stating that while it maintained a neutral stance to the judicial review proceedings, it would not stay its decision without an order from this Court, as it had a statutory duty under the Planning and Development Act 2000 to consider and determine appeals before it. The Board indicated that it was, however, prepared to provide 14 days' notice of its intention to determine the appeal.

28. On the 8th October, 2018 further correspondence between the applicants' and the Board's solicitors took place, with the applicants again requesting that the Board voluntarily stay a determination of the appeal pending the conclusion of the Judicial Review proceedings. The Board replied on the 11th October, 2018, again noting its duty pursuant to s. 126 of the Planning and Development Act 2000 to ensure appeals and referrals are disposed of as expeditiously as possible and stated that it would adopt a neutral position with respect to the application before this Court for a stay.

Relevant legislation

29. The Urban Regeneration and Housing Act, 2015 requires every planning authority to establish and maintain a register to be known as the Vacant Sites Register, from the 1st January, 2017 onwards. Section 7(1) provides that before entering a site on the register, a planning authority shall give written notice to the owner of the site setting out the reasons for the proposed entry and the owner may make submissions in respect of the proposed entry to the planning authority in writing within 28 days after the date of such notice. Subsection (2) provides that where a planning authority receives submissions in accordance with subsection (1) it shall consider those submissions and, if it is of the opinion that the site was a vacant site for the duration of the 12 months concerned and continues to be a vacant site, it shall enter the site on the register in accordance with s. 6 (2).The planning authority must give

written notice to the owner of a vacant site when it is entered on the register, pursuant to subsection (3). Each year from 2018, a levy is charged in respect of each vacant site.

30. Section 9 of the Act provides for an appeal to An Bord Pleanala as follows:

> (1) The owner of a site that is entered on the register under section 6 (2) may appeal against such entry to the Board within 28 days after the date of the notice given to him or her under section 7 (3).
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> (2) On an appeal under this section the burden of showing that the site, or a majority of the site, was not vacant or idle for the duration of the 12 months concerned is on the owner of the site.
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> (3) Where the Board determines that a site was not vacant or idle for the duration of the 12 months concerned or was no longer a vacant site on the date on which the site was entered on the register in accordance with section 6 (2) it shall give written notice to the planning authority who shall cancel the entry on the register in respect of that site.
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> (4) Where the owner of a vacant site appeals under subsection (1) against the entry of a site on the register the entry shall not take effect until the appeal is finally determined.
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> (5) Where an appeal under subsection (1) against an entry of a site on the register is unsuccessful or is withdrawn the entry shall be deemed to have effect from the date on which the site was entered under section 6 (2).

Submissions of the parties

The applicants

31. It was submitted on behalf of the applicants that the judicial review should take priority in time over the appeal because there had been two procedural deficiencies at first instance which would render an appeal incapable of being fairly determined, as well as a third issue (bad faith on the part of the Council) which could only be determined by the High Court and did not (because it could not) fall within the scope of the appeal to the Board. The two procedural deficiencies were said to be (1) inadequate notice (in that the second applicant had never been served with the notice) and (2) a failure to give adequate reasons for its decision. Counsel for the applicant submitted that the Council was at all times aware that the first named applicant was not the owner of the entirety of the site, pointing to the correspondence from the first named applicant to the respondent to this effect on the 7th February, 2018 and 29th May, 2018 as well as earlier correspondence in relation to the Derelict Sites Act 1990 from the 24th April, 2013 and the 6th June, 2013, all of which has been set out above. It was argued that the second applicant could not participate in the appeal because it had never been served with a notice and therefore did not fall within the terms of s. 9(1) of the Act of 2015. The allegation of bad faith was that the Council was improperly motivated in placing the property on the vacant site register in circumstances where it was clear that the Council had an interest in acquiring and developing the site. Counsel drew my attention to the inconsistency between Mr. Daly's averments in his affidavit at para. 9 that, as of April 2018, the Council were no longer interested in the site and the notice from the Council dated of the 19th June, 2018 which referenced the site's inclusion in the Limerick 2030 Economic and Spatial Strategy.

32. It was further submitted that even if the appeal was to decide that the decision of the Council should be quashed, this would leave undetermined the issue of bad faith on the part of the Council; thus, it was argued, the appeal could not comprehensively address all of the issues raised in the judicial review proceedings.

33. Counsel argued that there would be no prejudice to the Council if the judicial review was to proceed first, because if the applicants were ultimately unsuccessful, the relevant levy would be backdated.

The respondent Council

34. It was submitted on behalf of the Council that the appeal before An Bord Pleanála should proceed first in line because it was a comprehensive appeal and that matters such as whether the property fell within the relevant definitions of the legislation was pre-eminently suited to the expertise of An Bord Pleanála. It was submitted that if the applicants were successful on appeal, there would be no need for the judicial review to proceed at all

35. Counsel for the respondent submitted that there was no merit or substance to the claim of bad faith and that the Council was carrying out its statutory duty under the Act of 2015 in relation to derelict sites in order to fulfil the statutory aim of incentivising beneficial use of such sites by owners/occupiers. Counsel submitted that the claim of bad faith was being deployed by the applicants in order to avoid a decision from the Board on whether or not the property in question was a derelict site and as a collateral attack on variation 6(b) of the Development Plan in circumstances where the applicants were out of time to make submissions objecting to this variation through the proper procedures.

36. On the issue of notice, counsel for the respondent submitted that the second applicant must have had full knowledge of all relevant steps because it had the same head office, directors, and secretary as the first applicant. Further, it was argued that the second applicant had a right of appeal which was not limited in any way to the person who received notice of the proposed entry, but was available to the "owner" of the property.

37. Counsel submitted that if the appeal was to proceed before the judicial review, it would likely save time and resources of the Court and the parties as the judicial review proceedings would be greatly shortened, if not rendered moot; he further submitted that judicial review ought to be considered as a remedy of last resort. Counsel went on to stress that the alternative remedy of the appeal to the Board was the appropriate remedy, relying on the authorities referred to below.

38. My attention was also drawn to s. 250 of the Planning and Development Act 2000 which it was submitted applies to service of notices under Part 2 of the Act of 2015 by virtue of s. 24 of the 2000 Act which states at subsection 7:-

> "Where the Minister or the Board is satisfied that reasonable grounds exist for dispensing with the serving or giving under this Act or under any order or regulation made under this Act of a notice or copy of an order and that dispensing with the serving or giving of the notice or copy will not cause injury or wrong, the Minister or the Board may dispense with the serving or giving of the notice or copy and every such dispensation shall have effect according to the tenor thereof."

Authorities

39. Among the authorities to which I was referred on the issue of alternative remedies was *The State (Abenglen Properties) v Dublin Corporation* [1984] IR 381, in which O'Higgins C.J at p. 393 said:-

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

40. The Council placed emphasis upon the judgment of Henchy J. in the same case where he stressed that the statutory scheme for the appealing of planning decisions was a self-contained code which should only be departed by resort to the Courts in exceptional circumstances

41. The applicants also rely upon *Eircell v Leitrim County Council* [2000] 1 IR 479 where the High Court (O'Donovan J.) said:

> "In conclusion and for the sake of completeness, I am not persuaded, although I accept that I have an inherent discretion to refuse the relief sought by the applicant herein on the grounds that there was an alternative remedy open to it which has not been prosecuted, i.e. , the right to appeal to the Minister against the decision to revoke the said grant of planning permission, to exercise that discretion in favour of the respondent. In that regard, and in light of the several authorities referred to above, I have no doubt but that I am entitled to exercise that discretion in favour of the applicant and furthermore, that is in the interest of justice that I should do so, if for no other reason than that the public at large are entitled to know that the planning authority cannot ride roughshod over principles of constitutional justice and fair procedures which, in the event that the applicant had chosen to appeal to the Minister against the decision of the elected members of the respondent to revoke the said grant of planning permission, was unlikely to have come into the public domain…"

42. In *Harding v Cork County Council & anor* [2006] IEHC 295, Clarke J. (as he then was) considered the question of when a statutory appeal would be considered an adequate remedy or not:-

> "4.12 It seems to me likely, therefore, that an appeal will be regarded as an adequate remedy in a two stage statutory or administrative process unless either:-
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> (a) The matters complained of in respect of the first stage of the process are such that they can taint the second stage of the process or effect the overall jurisdiction; or
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> (b) the process at the first stage is so flawed that it can reasonably be said that the person concerned had not been afforded their entitlement to a proper first stage of the process in any meaningful sense.
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> 14 4.13 Thus, for example, where a planning authority may be found (as O'Donovan J. found in *Eircell*) to have ridden "roughshod over principles of constitutional justice and fair procedures" it could reasonably be concluded that the applicant in that case (notwithstanding having available an appeal to the Minister) would have been deprived of the reality of any meaningful first stage. Where, however, the matters complained of are not such as would either give rise to a reasonable apprehension that the second stage would itself be tainted, have its jurisdiction removed, or were such as could be said to have deprived the applicant concerned of a meaningful first stage, then it seems to me that an appeal should, ordinarily, be regarded as an adequate remedy and this court should not entertain an application for judicial review in respect of the first stage."

43. I was also referred to *Sweetman v Clare County Council* [2018] IEHC 517 where the High Court (Binchy J.) lifted a stay on an appeal to An Bord Pleanála as the central complaint was that an "appropriate assessment" had not been carried out and the Board would carry one out, thus curing the defect complained of.

44. The respondent relied upon *G v DPP* [1994] IR 374, where it was said that on an application for leave to bring judicial review proceedings, it is necessary to show "[t]hat the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure." (Finlay CJ at pp 377-8) Moreover, in *Kinsella v Dundalk Town Council* [2004] IEHC 373 Kelly J. (as he then was) referred to this passage in G, stating:-

> "That decision was given in the context of ordinary or, as it sometimes called, non-statutory judicial review. The provisions of s. 50 of the Planning and Development Act, 2000 impose more stringent procedural requirements than those envisaged in G. v. D.P.P. The requirement therefore that an applicant demonstrate that judicial review is the only or a more appropriate remedy than another one available applies with at least equal if not more force to a s. 50 application. Support for that approach may also be found in s. 50(3) of the Act where it provides:-
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> 'The Board or any part to an appeal or referral, may, at any time after the bringing of an application for leave to apply for judicial review of a decision of the planning authority, apply to the High Court to stay the proceedings pending the making of a decision by the Board in relation to the appeal or referral concerned, and the Court may, where it considers that the matter is within the jurisdiction of the Board, make an order on such terms as it thinks fit.'

45. In relation to the applicants' point that the Board is unable to cure defects in the procedure of the Council at first instance or deal with the issues of motivation and bad faith raised, I was referred to *Hynes v An Bord Pleanála* [1997] IEHC 182 and *McCallig v An*

Bord Pleanála [2013] IEHC 60.

Decision

46. The issue I have to decide arises in a context where leave to argue the various matters has already been granted, and because of the nature of the case, has been granted on the basis that there were "substantial grounds" to argue the points. It is not for me to second-guess that decision, particularly in circumstances where the Council did not seek to set aside the ex parte leave order. This is not now the merits stage either; and it does not fall to me to decide the points raised on a substantive basis, although some of the submissions on behalf of the Council seemed to invite me to do so. As matters stand, the High Court has granted leave on the basis of "substantial grounds". One of these points relates to an allegation of bad faith on the part of the Council. This is not a matter which could be litigated in the appeal before the Board and therefore even if the Board decides in favour of the applicants on the legal grounds raised in the appeal, that particular issue will be left undetermined. Further, although it is a technical argument, there is the point concerning notice to the second applicant. As I interpret the legislation, it envisages that a person or body's right of appeal is premised on his or its having been served with a notice; this did not happen vis-a-vis the second applicant in the present case and it therefore seems that it would not have a right to participate in the appeal, although there must be some doubt as to whether this would make any difference to the outcome of the appeal in reality. Nonetheless, the legislation requires notice, and the Council was well aware of the position of the second applicant as it had been repeatedly told by the first applicant that the second applicant needed to be served. If the applicants are ultimately successful on this point, this is a procedural defect which cannot be cured by the appeal itself because the legislation would have shut the second applicant out from participating in the appeal, in contrast to the defects which had arisen in the *Hynes* and *McCollig* case.

47. I do not see any prejudice to the Council by allowing the judicial review to proceed first in time, and if the applicants are ultimately unsuccessful, the levy under the vacant sites legislation can, as I understand the legislation, be backdated. I accept that the Board has the expertise particularly appropriate to determining the merits of the substantive planning issues arising on the appeal, but the two particular points I have referred to (the bad faith allegation and the notice point) do not fall within those parameters and are matters which can only be determined by way of judicial review.

48. Accordingly, I propose to make an order granting the stay in this motion.