Neutral Citation: [2017] IEHC 148

THE HIGH COURT

2016 No. 173 JR

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

Between:

DUNNES STORES

Applicant

– and –

DUBLIN CITY COUNCIL

Respondent

– and –

TACULLA LIMITED

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 2nd March, 2017.

I. Background

1. Dunnes Stores is an unlimited company that operates a number of clothes, homeware and grocery stores. Perhaps its most prominent Dublin City premises is its anchor store in the St Stephen's Green Shopping Centre on the north-west corner of St Stephen's Green. The store can be entered via an entrance to the shopping centre on South King Street; some of the display-windows of its store also front onto that street.

2. Taculla Limited is a limited liability company that operates a public house and eatery known as *Harry's on the Green* that is situate at Unit B3A of St Stephen's Green Shopping Centre; the unit is entered via an entrance on South King Street.

3. South King Street is a public road within the meaning of s.2(1) of the Roads Act 1993, as amended. Section 254 of the Planning and Development Act 2000 contains a mechanism whereby a person may apply to a planning authority for a licence to permit the erection, construction, placing or maintaining of an apparatus or structure on the public road. Regulation 201(b) of the Planning and Development Regulations 2001, as amended, provides that "tables and chairs outside a hotel, restaurant, public house or other establishment where food is sold for consumption on the premises" are among the structures requiring a licence under s.254. Section 254(9) makes clear that any person who erects, constructs, places or maintains an apparatus or structure on a public road without a licence or otherwise than in accordance with the terms of a licence granted under s.254 "*shall be guilty of an offence*".

4. In the past a Mr Boland, an officer of Taculla Limited, was granted a licence under s.254 that was effective from 27th June, 2014, to 26th June, 2015, titled a "*Licence for Tables and Chairs outside a Hotel, Restaurant, Public House or other Establishment where Food is Sold for Consumption on the Premises*", and which licensed the placing outside *Harry's* of some 12 tables and 24 chairs in two screened areas measuring 28 square metres. There were 29 general conditions attaching to the licence, including a condition that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*." Central to the within proceedings is the fact that for a long period, most likely a period in excess of seven years, Taculla has had a couple of overhead front awnings that can be winched forwards and backwards, at the election of Taculla, to provide a protective canopy for on-street patrons of *Harry's* as the weather demands.

5. The manner in which *Harry's* has operated the on-street part of its business has for some time been a matter of irritation to Dunnes. A particular irritation arising is that the just-described awnings, when open, block certain window-displays that Dunnes uses to attract the custom of pedestrians who pass along South King Street. There is also a more general concern about an alleged more pervasive want of compliance with such street furniture licences as the Council has issued thus far to Taculla. Dunnes has been sufficiently vexed by alleged past breaches of the street furniture licence provisions that, on 10th October, 2014, it sent an e-mail to Dublin City Council which stated, *inter alia*, as follows:

> *"…We have an issue with our Stephen's Green store in that a neighbouring tenant…Harry's Bar has a street licence allowing them to put tables and chairs on the pavements outside their premises. We have no issue with this if he actually complied with the restrictions in the licence that the council have given him, but they seem to do whatever they want on the street without any consideration for the impact on our business….We are about to launch our Christmas marketing campaign and intend to invest considerably in our window displays. The impact of this will be lost on South King Street if the activities of Harry's Bar are not curtailed. I understand that the licence is an annual licence and would be obliged if you could let me know when it is up for renewal as we would want to object to renewal as this problem has been going on for some years. I believe that your colleagues in Planning did initiate proceedings against Harry's Bar under the enforcement regulations but then dropped them because of concerns that they could not prove that the breach had been going on for over 4 years and a deemed planning consent may exist….".*

6. This e-mail met with the following response that issued from Dublin City Council on 17th October, 2014:

> *"…Harry's Bar was inspected on October 16th and found to be outside their licensed area by approximately 2m in length and 1m in width. They were found to have 14 tables instead of the licensed 12, however premises will sometimes change their table arrangement and use smaller tables in order to accommodate an extra table or two, this is not an issue for this department. Harry's Bar will be notified that they are in breach of their licence and advised that the licence will not be renewed should they continue to breach their licence conditions. Their licence is due for renewal on June 26th 2015….".*

7. By 11th June, 2015, Dunnes was back onto the Council again. In a letter of that date, Dunnes wrote to Mr Aidan Walsh in the Street Furniture Unit of Dublin City Council, complaining again about alleged breaches. This letter drew attention to Dunnes' retail business, noted that the window displays in Dunnes' premises play an integral part in attracting customers into its St Stephen's Green store, and asserted that it was unacceptable that *Harry's* should be allowed to erect unauthorised structures to block customer's sight lines to the store windows along South King Street. The letter is notably forceful, at points almost directional in tone, stating, *inter alia*, as follows:

"In your email correspondence [of 17th June, 2014]…you acknowledged that the licensee was in breach of their Street Furniture Licence and advised that the licence will not be renewed should they continue to breach their licence conditions. As the Licensee clearly continues to operate its Street Licence in clear and blatant breach of the terms of its Licence, it is obvious that the breaches are so fundamental, numerous and continuous that the Street Renewal Licence must not be renewed by Dublin City Council on 26th June 2015….

Action Required

This is an extremely important issue for our business as the continued breach of licence coupled with unauthorised development (i.e. signage and canopy) along South King Street, in respect of which we call on Dublin City Council to issue appropriate enforcement action. This has escalated to a level that it is adversely impacting on our business operations and cannot be allowed to continue.

As a key retail stakeholder in Dublin City paying very substantial commercial rates we expect our complaint to be acknowledged and for the Council to put in place measures to rectify this situation within a reasonable timeframe.

We insist that the Street Licence is not renewed as the licensee has failed over the last 12 months to demonstrate a willingness to comply with the licence conditions….In fact, it is difficult to identify any condition in the Licence that has been properly complied with, which makes a mockery of the statutory framework under which this scheme operates. There are so many breaches of the conditions in this case that this Street Licence is not suitable for renewal and in light of these documented breaches any renewal would be grossly negligent on the part of Dublin City Council and not consistent with your stated approach to this problem. We would also draw your attention to your email…dated 17th October 2014 in which you stated 'Harry's Bar will be notified that they are in breach of their Licence and advised that the Licence will not be renewed should they continue to breach their Licence conditions. Their Licence is due for renewal on June 26th.' Clearly there have been continuous and material breaches of the Street Licence since October 2014 and so in the circumstances the only rational decision is to follow your own stated approach and refuse to renew the Street Licence for Harry's on the Green on 26th June….".

8. A flurry of correspondence now ensued. On 16th June, 2015, Dublin City Council wrote to Dunnes indicating that enforcement procedures had been initiated. On 2nd July, Dunnes wrote to indicate that notwithstanding the expiration of the most recent street furniture licence, *Harry's* continued to trade on the street-side. On 7th July, a holding letter issued from the Council. On 13th July, Dunnes' solicitors wrote to Taculla and Mr Boland seeking a written undertaking that the unauthorised use of the road would cease. On 14th July, Taculla's solicitors wrote denying the alleged breaches and asserting that any legal proceedings would be resisted vigorously. On 16th July, proceedings for injunctive relief under s.160 of the Planning and Development Act 2000 were commenced by Dunnes and came before the High Court (Noonan J.) on 31st July, 2015.

9. In advance of the just-mentioned hearing date, affidavits filed on behalf of Taculla admitted that *Harry's* had both exceeded the permitted licensed area space and erected associated temporary furnishings in contravention of the licence. Thus in an affidavit sworn by Mr Christy Leonard, a director of Taculla, on 25th July, 2015, it was stated that the contraventions aforesaid "*were intended to be temporary measures which usually coincided around very favourable weather conditions where there was considerable demand by customers to be seated outside. I acknowledge, however, that what was intended to be simply temporary extensions of the seated areas became routinely erected and that the placing of large parasols within that area did, in hindsight, have the effect of obscuring some of the windows at the Applicant's retail outlet.*"

10. When the s.160 proceedings came before the High Court on 31st July, 2015, Taculla, through Mr Leonard, filed a further affidavit which indicated that as of that date he had received confirmation that the street furniture unit of the Council had drafted an order confirming the renewal of the street furniture licence and back-dating same to 27th June, 2015. On that occasion, Mr Leonard gave an undertaking to the court on behalf of Taculla "*not to place any apparatus or thing on the public road known as South King Street in connection with the operation of the public house known as 'Harry's on the Green' unless it is within the scope of the terms and conditions of a licence for same having been granted by Dublin City Council pursuant to Section 254 of the Planning and Development Act 2000 (which would confer exempted development status) or the terms and conditions of a grant of planning permission and/or pending further order of this Honourable Court*."

11. A new licence issued to Taculla on or around 31st July, 2015. Whereas the previous licence permitted the placing of 12 tables and 24 chairs in two specific areas, totalling 28 square metres, the licence which issued on or around 31st July, 2015, permitted the same number of tables and chairs in a single screened area measuring 28 square metres outside *Harry's*. The licence was again granted subject to various general licence conditions, including the condition that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*." The significance of this condition is that, already by this time, and it seems for a period in excess of seven years, overhead front awnings had been in use at *Harry's*, with the result that the seven-year time limit on enforcement proceedings (pursuant to s.157 of the Act of 2000) came to bear.

12. On 18th January, 2016, a letter from the Council to Dunnes' solicitors indicated that an application had been received to reduce the area covered by the street furniture licence from 28 square metres to 24 square metres. It was stated that the application had been submitted on 26th November, 2015, and was "*currently being processed*". With regard to the overhead front awnings, the letter indicated that it had been "*the subject of an investigation by the Council's planning department. An enforcement notice was served on the owners of the premises but had to be withdrawn subsequently as there was evidence to the effect that it was in situ for in excess of 7 years and therefore outside the period in respect of which enforcement action could be taken*." Notably, the letter did not state that the overhead front awnings had planning permission; instead it, quite correctly, stated that because the awning appeared to have been in situ for in excess of seven years, no enforcement proceedings could be brought. (Taculla and the Council sometimes refer to one awning; it appears from the photographic evidence before the court that there are in fact two overhead front awnings, though it may be that they are raised and lowered together; nothing in any event turns on this point).

13. On 11th February, 2016, Dunnes became aware that the Council had issued a fresh licence to Taculla on or around that date, permitting the placing of 12 tables and 24 chairs in two screened areas measuring 24.4 square metres. This licence was back-dated to 27th June, 2015 and had a one-year lifespan to 27th June, 2016. As with the previous licences, this licence came subject to various general conditions, including the usual condition that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*."

14. An inspection of the Council's planning file undertaken by Dunnes' planning consultant around the time the fresh licence was issued yielded the discovery that Taculla's solicitors had sent a letter of 21st January, 2016, to the Council's Planning Enforcement Department which stated, *inter alia*, as follows:

> *"We…note that you have met with our client on a number of occasions recently regarding the Awning attaching to our client's property and also in relation to the terms and conditions of the Street Licence that issued from Dublin City Council for our client's premises.*
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> *Our client has instructed that he has been advised by your offices that no issue arises in relation to the existence of the awning from a Planning point of view and that same has been dealt with to the satisfaction of the Local Authority.*
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> *To this extent and based on our client's Court Undertaking we would be obliged if by way of clarification for the Courts if you might confirm that Condition 26 of the Street Licence is not being infringed by our client…[if] he uses the front awning taking into account that Dublin City Council were satisfied that the awning has been in existence for over 6 years".*

15. This last letter was responded to by letter of 22nd January, 2016, from the Council to Taculla's solicitors stating as follows:

> *"Condition 26 of the General Licence Conditions for the placing of tables and chairs outside a public house states that side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted. In the case of Harry's Bar the awnings are on their own private property and were placed there by a previous owner. These awnings have been in place for more than seven years, therefore the owners of Harry's Bar are not required to apply for Planning Permission, and the use of the awnings complies with the conditions of their street furniture licence."*

16. On 25th February, 2016, Dunnes' solicitors wrote to the Council, noted that Condition 26 of the street furniture licence provided that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*", referred to the just-quoted exchange of correspondence and then continued, *inter alia*, as follows: "*Condition 26 clearly provides that the awnings may only be used where planning permission has been granted. As you are well aware, the fact that the awnings may be in place for in excess of 7 years does not equate to a grant of planning permission and as a result we call upon you to immediately retract your letter* [i.e. the letter of 22nd January, 2016, from the Council to Taculla]". No retraction followed; instead the within application commenced by way of an ex parte motion on 11th March, 2016.

17. In passing, Taculla has suggested that since Dunnes knew (and it did know) from at least the summer of 2015 that enforcement proceedings as regards the awnings had previously been commenced by the Council and were abandoned in light of the difficulty perceived to present by virtue of what the Council understands to be the usage of the awnings for at least a seven-year period, that was the time when the 'clock started ticking' in terms of bringing judicial review proceedings within the eight-week period contemplated by s.50(6) of the Act of 2000, as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006. But while that may have been when the time started to run on some other set of proceedings, it cannot, as a simple matter of chronology, have been when time started to run as regards the objections raised now by Dunnes to the decision manifest in the later letter of 22nd January, 2016 and, in particular, to the Council's recognition therein of a positive right accruing to the benefit of Taculla in respect of the ongoing unauthorised development represented by the overhead front awnings and the continuing usage of the awnings in tandem with the street furniture licence and, in particular, Condition 26 of same.

II. Reliefs Sought and Related Issues
(i) Reliefs Sought.

18. Concerned by (i) the continued use of the awnings by Taculla which, armed with the letter of comfort of 22nd January, 2016, continued using the awnings in conjunction with the licence, fortified in such usage by the fact that the Council had decided that so to act was compatible with the terms of the licence and/or did not contravene Condition 26 attaching to the licence, and (ii) the consequent material obstruction of one of its South King Street display-windows, Dunnes issued a notice of motion on 18th March, 2016, seeking, *inter alia*, the following reliefs: (i) an order of *certiorari* quashing the decision or purported decision of Dublin City Council as communicated by the Council to Taculla's solicitors by letter of 22nd January, 2016, that the overhead awnings could be used in connection with the street furniture licence; and (ii) a declaration that the Council erred in law in deciding that the use of the said awnings did not contravene Condition 26 of the said licence.

(ii) A "decision or other act"?

19. One issue that has been raised in the within proceedings and which is usefully dealt with at this juncture is whether, in fact, the letter of 22nd January, 2016, contains, comprises or reflects a "*decision or other act*" of that date. This is an issue in the within proceedings because they have been brought pursuant to ss. 50 and 50A of the Act of 2000; and s.50(2) of that Act provides that a person shall not question "*the validity of any decision made or other act done by…(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act…otherwise than by way of an application for judicial review*".

20. In *Linehan v. Cork County Council* [2008] IEHC 76 and *MacMahon v. An Bord Pleanála* [2010] IEHC 431, the High Court indicated that the effect of this provision was to impose strict time limits on, and thus bring a new urgency to, the timing of any challenge by way of judicial review to decisions made in the planning process. The necessary promptitude, it appears to the court, has been demonstrated by Dunnes insofar as the commencement of the within application is concerned. In the more recent decision of *An Taisce v. An Bord Pleanála* [2015] IEHC 604, Haughton J. approved those earlier decisions and, at para. 64, noted the breadth of the terminology employed in s. 50(2) which refers, as mentioned, to "*any decision made or other act done*".

21. Is the court dealing in the within application with a challenge to "*the validity of any decision made or other act done*"? In principle, it would seem that the narrower the time-span allowed for a challenge by way of judicial review in a particular field, the wider the range of intermediate decisions or actions in that field that will be judicially reviewable. This is because an applicant in affected judicial review proceedings may now have to challenge in the embryonic stage a deed which previously would have been challenged as a composite element of some ultimate later decision. Indeed, the breadth of what is challengeable under the Act of 2000 appears to be recognised expressly in the text of s.50(2) insofar as it contemplates a challenge being brought to the validity of "*any decision made*" or "*other act done*". Regardless, it appears to the court that there is here in any event a decision to be challenged, being the decision, first made manifest in the Council's letter of 22nd January, 2016, to give the legal comfort sought by Taculla, such comfort being considered by Taculla to be appropriate and/or necessary for it to seek in all the circumstances presenting. The said decision effectively 'green-lighted' Taculla's continuing use thereafter of the awning in conjunction with the street furniture licence, and yielded continuing interference with the sightline from the street to those display-windows of Dunnes that sit behind the awnings.

22. Even if the decision reflected in the letter of the 22nd was not a "decision made", and the court has just concluded that it was,

the substantive decision manifest in that letter must and does constitute some form of "other act". Either way the within application is in this respect, it seems to the court, legally proper.

23. The court does not see in *R. v. Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 A.C. *1, R. v. Devon County Council ex p L* [1991] 2 FLR 541, or *Shatter v. Guerin* [2015] IEHC 301 any reason for departing from its conclusions in this regard:

> – the *Employment Opportunities Commission* case was concerned, *inter alia*, with the reviewability of a purported decision of a Crown minister, as communicated to, and at the behest of, the Employment Opportunities Commission, that he would not introduce certain statutory amendments pursuant to European Community law. As a decision of a foreign court, the decision in *Employment Opportunities Commission* is, of course, but persuasive in an Irish court, and this Court must respectfully admit to being rather less than persuaded. It appears to it that in Employment Opportunities Commission there was an official and considered decision, in the ordinary sense of the relevant Crown minister making up his mind and communicating his considered view, at the request of the *Employment Opportunities Commission*, that it was not necessary, as a matter of the proper construction and application of Community law, to introduce certain statutory amendments. That is a decision which, in Ireland, would appear susceptible to judicial review. Regardless, the court is not in any event persuaded that a view taken in one case in another country as to the reviewability of a particular decision in circumstances radically different to those now presenting is an especially persuasive deployment of case-law: for the analogy to work one has to look at the foreign case considerably in abstracto but the observations of Lord Keith of Kinkel to which the court's attention were drawn were made very much *in concreto*.
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> – the *L* case appears to the court, with respect, not to be 'on point'. That was a case in which the solicitors for a suspected child molester, Mr A, sought assurance from a county council that it would instruct its employees to stop disseminating their beliefs, *inter alia*, to partners of Mr A, that he was a threat to children in whose households he lived. A Divisional Court held that the reply letter was not reviewable because (like ships passing in the night) the solicitors had sent a letter seeking assurance on one point and the reply letter did not deal in any way with the assurance sought. Here, by contrast, Taculla sought comfort on one point and the reply letter fully engaged with the point on which assurance was sought. *L* was also a case that occurred in the area of child sexual abuse where the Divisional Court, rightly watchful for the interests of potentially vulnerable children, held that in order fully to protect a child, the interests of an adult had at times to be subordinated to those of the child; there are no like policy factors presenting in the within case.
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> – as for the decision in *Shatter*, the facts of the within application meet the test identified by Noonan J., at para. 84, which test this Court respectfully applies. Thus there has been, as the court indicated above, a decision or act; and that decision or act affects a legally enforceable right of Dunnes in that it has effectively foreclosed any opportunity Dunnes would otherwise have had to make submissions and objections in any application for retention permission that would have ensued, in the absence of the letter of 22nd January, if Taculla had wanted to retain the overhead front awnings and also to conform with the provisions of the street furniture licence.

(iii) Seeking Clarification.

24. In passing, the court does not accept the suggestion that this is a case akin to *Dublin City Council v. Liffey Beat Ltd* [2005] 1 I.R. 478. There Quirke J. suggested that there may be a duty on local authorities to clarify the meaning of restrictive planning conditions, opining, at para. 83, that *"[W]here clarification is sought from the planning authority (or An Bord Pleanála) by a party having an interest in the property as to the nature and extent of the restriction imposed by a condition within a planning permission, then reasonable steps should be taken by the planning authority (or the board) to provide the clarification sought*." Dublin City Council contends that the within application is but an example of a clarification being sought and granted. However, it seems to the court that what is at play in the within application is a sequence of events rather different to that contemplated by Quirke J. in *Liffey Beat*. The within application does not involve a case where an ostensibly law-abiding person is merely seeking clarification from an executive body as to the effect of a particular licence condition within the context of a substantially consultative planning regime. This is a case where (a) a party that is acting on an ongoing basis in breach of the planning regime, through its continuing operation of the overhead front awnings at *Harry's* without planning permission, (b) wants the continuing additional benefit of a street furniture licence without prejudicing its ongoing ability to breach the planning regime without fear of enforcement action, (c) has elected to seek (doubtless for reasons it perceived to be necessary) a letter of comfort from an executive body, here the Council, as to the interplay between its existing immunity from enforcement and its obtaining a licence, which it freely sought and accepted, and (d) has received in return a comfort letter which manifests a decision whereby the benefits of the party's existing immunity are positively accentuated.

(iv) Collateral Purpose?

25. It has been suggested in the within application that Dunnes' true objective in bringing its application is been to secure the collateral objective of enforcement of the planning code. In effect, what is being suggested in this regard is some form of abuse of process. The High Court considered the principles applicable in this area of the law in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716 and the court does not propose to consider those principles afresh. Suffice it to note that this case does not even get to the threshold of involving an abuse of process or the pursuit of some collateral advantage, let alone cross that threshold.

26. In the within application, Dunnes is aggrieved that the Council by way of the decision communicated in its letter of 22nd January, effectively legitimised the awnings by indicating that they could be used without contravening Condition 26, notwithstanding the absence of planning permission, and thereby conferred positive rights on Taculla. That in itself is an honestly held grievance, and it is clear from the evidence before the court that Dunnes considers a serious commercial wrong to have been inflicted upon it in this regard: Dunnes is paying high rent for its store in St Stephen's Green Shopping Centre; its window-displays are a means of attracting passing pedestrian traffic into that store; and the overhead front awnings at *Harry's* are blocking the sight line of certain window displays. A further honestly held grievance on the part of Dunnes arises from how the Council has proceeded: if Taculla wanted to enjoy the use of the awnings with the licence, it was open to it, Dunnes maintains, to make an application for retention permission; Dunnes could then have participated in that process by making submissions or observations; however, the practical effect of the letter of 22nd January, 2016, has been to deny Dunnes of that opportunity.

27. Beyond a bald assertion that the within application is being employed for some purpose other than the attainment of the reliefs now sought, there is nothing in the evidence before the court to suggest that this is so. Instead there is an entirely reasonable relationship between (a) the result intended by Dunnes and (b) the scope of the remedy sought and available. Moreover, even if there were mixed, i.e. proper and collateral, objectives underpinning the bringing of the within proceedings – and again there is nothing in the evidence to suggest that this is so – when one answers the question 'If one had regard to the legitimate purpose only,

would Dunnes have brought the within proceedings?' the answer is 'yes'. This is because in s.160 proceedings (as is clear from Mahon v. Butler [1997] 3 I.R. 369) the court cannot intervene to set aside the Council's decision. By contrast, the within application affords a legitimate mechanism whereby the impugned actions of the Council can be assailed and due relief sought. Finally, and again noting the court's overriding conclusion that there is nothing to suggest that the within application is being employed for some purpose other than the attainment of the reliefs now sought, it is important to remember that there is in any event a proper distinction to be drawn between (i) legitimate use of the court's processes which yields an incidental benefit, and (ii) the devious deployment of processes aimed at one end to secure an alternative collateral end. The court, by virtue of the just-mentioned overriding conclusion, does not have to consider whether the within application comes within category (i) or (ii); however, on the evidence before it the court entertains no doubt in any event that the within application is most assuredly within category (i).

(v) Aptness of the Within Proceedings?

28. Taculla has suggested that the within proceedings are not an appropriate avenue of relief when Dunnes has a statutory right of appeal under s.254(6)(a) of the Act of 2000 with regard to each annual granting of the street furniture licence. However, it does not appear to the court that it is a necessary bar to the granting of discretionary relief in judicial review proceedings which seek to impugn one decision before the court that an alternative avenue of relief exists in respect of some other decision that is not being challenged before the court.

III. Legal Status of Awnings and Consequences of Same
(i) Legal Status of the Awnings.

29. It appears to be common case between the parties that Taculla has no planning permission for the overhead front awnings; certainly the court has had no sight of any such permission. Whether or not the overhead front awnings have been in situ for more than seven years is not a matter on which this Court has to rule. Suffice it to note that even if they are immune from planning enforcement action, that does not suffice to transmute the overhead front awnings from unauthorised development into authorised development; they remain unauthorised development.

30. The foregoing involves so trite a statement of law that the court does not suffice to consider the relevant case-law or commentary in any detail. Instead it would respectfully point the reader to the long-ago decision of the High Court in Dublin County Council v. Mulligan (Unreported, High Court (Finlay P.), 6th May, 1980) (a case concerned with s.31 of the Act of 1963 and since replaced by the enforcement notice provisions in Part VIII of the Act of 2000) and to the helpful summary of the present law provided by Mr Simons in his learned text *Planning and Development Law* (2nd ed.), at para. 7.50:

> *"The fact that the limitation period has expired without enforcement action having been taken does not have the effect of making the unauthorised development lawful. It is not, for example, equivalent to planning permission having been granted by operation of law. Rather, the development enjoys a hybrid status as unlawful but immune."*

31. The only means by which the overhead front awnings at *Harry's* may be rendered lawful is through a grant of retention planning permission under s.34 of the Act of 2000. The awnings are and remain unauthorised development until such retention permission is granted (if ever granted).

(ii) Consequences of Legal Status of Awnings.

32. There is some suggestion in the pleadings that the overhead front awnings at *Harry's* are not front awnings. In reality, however, there appears to be no doubt but that the overhead front awnings are understood by all the parties to be front awnings. Thus Taculla, in the above-quoted letter of 21st January, 2016, queries the continuing use of "*the front awning taking into account that Dublin City Council were satisfied that the awning has been in existence for over 6 years*", and clearly the Council, in its reply of 22nd January, 2016, had no difficulty in recognising which "*front awning*" was being referred to in the just-quoted text or as to what comfort was being sought in respect of the continuing use of same.

33. Parties cannot in the course of everyday activity use the same term to describe the same thing, with each correctly understanding what the other means, and then come to court contending for an alternative meaning to be ascribed to that mutually understood term, which alternative meaning might be justifiable by reference to a dictionary definition and/or an expert report, but is utterly unjustifiable by reference to the previous behaviour and mutual understanding of, and absence of misunderstanding between, the parties in their everyday dealings. In the spectrum of behaviours that embraces quod approbo non reprobo and estoppel by convention, such inconsistency of action falls generally to be deprecated by the courts.

34. As the overhead front awnings are front awnings which are being used in circumstances where no planning permission has been granted, they are clearly being used in breach of Condition 26. Whether one uses the 'ordinary meaning' approach of McCarthy J. in *Re XJS Investments Ltd* [1986] I.R. 750 or the 'text in context' approach referred to by Clarke J. at para. 3.11 of his recent judgment in *Lanigan & anor t/a Tullamaine Castle Stud v. Barry & anor t/a Tipperary Raceway* [2016] IESC 46, the natural, proper and sensible reading of a condition that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*" has to be that contended for in the within application by Dunnes, viz. that the overhead front awnings at *Harry's* may only be used where planning permission has been granted, and not the alternative proposition that the overhead front awnings may only be used where planning permission (a) has been granted or, (b) alternatively, has not been granted but sufficient time has elapsed that enforcement proceedings cannot now be commenced.

35. It has been suggested by the Council that curial deference ought to be shown to the latter alternative proposition, it being the proposition that arises from a reading of the letter of 22nd January, 2016, that being a letter which, the Council claims, goes to its technical expertise. With respect, however, what confronts the court in the within application is but the interpretation of planning documentation, a task in which the courts regularly engage and which, in the within matter, whether one approaches matters via *XJS* or *Lanigan*, yields as the proper reading of Condition 26 the un-forced reading for which Dunnes contends, and not the forced reading which the Council has hitherto preferred. Even if this were an area for some curial deference, and it does not appear to the court that it is, no court can or would defer to the clearly wrong; that itself would be to do a wrong, and that no court should consciously do.

36. The Council, with respect, also appears to the court to be wrong in the assertion it makes in its letter of 22nd January, 2016, that because the awnings "*have been in place for more than seven years*" – so, at least the Council maintains – "*the owners of Harry's Bar are not required to apply for Planning Permission, and the use of the awnings complies with the conditions of their street furniture licence*." That proposition rests upon the notion that positive rights could accrue in respect of the unauthorised development represented by the awning and that notion seems both logically objectionable and legally wrong. It overlooks the fact that, as Mr Simons notes in his learned text, again at para. 7.50, "*It is important to bear in mind that although the development is*

immune from enforcement, it continues to be afflicted by certain adverse consequences because of its unlawful status". And it seeks mistakenly to construct a positive right on that unlawful foundation.

37. In this last regard, the court respectfully considers the reliance placed by the Council on such decisions as *Hartnell v. Minister of Housing and Local Government* [1965] A.C. 1134, *Hughes v. Doncaster Metropolitan Borough Council* [1990] UKHL J1213-2 and, for example, *O'Hara and McGuinness v. An Bord Pleanála* (Unreported, High Court (Barron J.) 8th May, 1986) to be misplaced. All of those cases were concerned with curtailments of existing property rights:

> – in *Hartnell*, what the House of Lords objected to was the limitations that it was sought to impose on the scope of a caravan site-owner's existing use right.
>
> – in *Hughes*, what the House brought to bear in its decision was the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.
>
> – in *O'Hara*, Barron J. was concerned to preserve intact the principle that where a right already exists a landowner cannot be deprived of it by oblique means, but only by the means set down in statute.

38. In the within application, by contrast, what is in focus before the court is an immunity from enforcement proceedings. That is not a vested property right; it is the toleration by the State of a continuing illegality, and but a qualified toleration at that. As Mr Simons notes, at para. 7.50, "*[T]he development…continues to be afflicted by certain adverse consequences because of its unlawful status*". For example, the benefit of certain classes of categories of exempted development are lost, the calculation of market value for the purposes of compensation may be affected, it may impact on an application for an intoxicating liquor licence, it may be of relevance in the context of landlord and tenant legislation, and it might be taken into account on any application for further development.

39. Cases such as *Hartnell*, *Hughes*, and *O'Hara* rightly point to the fact that vested property rights must be preserved from improper curtailments, immunity from enforcement proceedings, being but the toleration by the State of a continuing illegality, appears qualitatively different. There is no principled justification for the notion that immunity from enforcement action in respect of continuing illegality must be preserved from proper constraints sought by the executive in the lawful discharge of its legal powers and freely agreed to by the party accepting such constraints.

40. It follows from the foregoing that if Taculla freely elects (as it did) to seek the benefit of a street furniture licence to which it is not entitled and finds that the prospective licence for which it has made application will come with a general requirement as to lawful behaviour, it is free to decide not to take the licence; but if it freely elects (as it did) to take the licence subject to a requirement as to lawful behaviour, such as that contained in Condition 26, it cannot then seek to construct, in tandem with the usage of that licence, a positive right to the continuation of its illegal behaviour, in circumstances where the licence, freely sought and accepted, proscribes the very illegal behaviour in which it is sought to persist. There is no general legal principle that a person may not freely choose to place itself in a situation where at its own behest and election and by virtue of accepting, say, a particular licence that comes with a common set of conditions, it sees a diminution or qualification of some other immunity which it previously enjoyed.

IV. Conclusion

41. There is no evidence before the court to suggest that the overhead front awnings at *Harry's* are not unauthorised development. This being so, their use is precluded by Condition 26 of the licence which provides that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted*." The Council's letter of 22nd January, 2016 purports to alter that position in its assertion that "*These awnings have been in place for more than seven years, therefore the owners of Harry's Bar are not required to apply for Planning Permission, and the use of the awnings complies with the conditions of their street furniture licence*." This was, to borrow from the submissions made by counsel for Dunnes, "*a fundamental misunderstanding of the status of 'illegal but immune' unauthorised development*"". That is an error which falls to be corrected by this Court and requires to be corrected in circumstances where the Council's decision effectively 'green-lighted' Taculla's continuing use thereafter of the awning in conjunction with the street furniture licence, yielding an ongoing interference with the sightline from the street to Dunnes' display-windows. The court is therefore minded to grant the order of *certiorari* sought; by virtue of this order being granted, the separate declaratory relief sought seems to the court not to be required.