Neutral Citation [2016] IEHC 724

THE HIGH COURT

[2016 No. 173JR]

IN THE MATTER OF SECTION 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 16th December, 2016.

I. Overview

1. The court is currently at hearing in the above-titled judicial review proceedings. By notice of motion of 2nd November last, Dunnes Stores has sought, *inter alia*, an order granting Dunnes Stores liberty to cross-examine Mr Aidan Walsh, of Dublin City Council, on his affidavit of 23rd May, 2016. This judgment addresses the issues raised by that application.

II. Background Facts

2. Taculla Limited has held an intoxicating liquor licence in respect of Unit B3A, St Stephen's Green Centre, South King Street, Dublin 2, since in or around December, 2010. The premises are known as 'Harry's on the Green' and operate as a public house. The premises are located within the Stephen's Green Shopping Centre and are entered via an entrance on South King Street. Dunnes Stores operates a department store from the Stephen's Green Shopping Centre and is the anchor tenant in that shopping centre.

3. Dublin City Council has from time to time granted Taculla Limited a licence pursuant to s.254 of the Planning and Development Acts to place street furniture on South King Street in connection with Taculla's public house business, subject to a number of specific and general conditions. The most recent licence in this regard was granted on or about 11th February, 2016 (the 'Licence'). General Condition 26 of the Licence conditions states that "*Side awnings or front awnings may only be used to cover the licensed area where planning permission has been granted".*

4. On 21st January, 2016, Taculla's solicitors wrote to Dublin City Council seeking confirmation that "*Condition 26 of the Street Licence is not being infringed by [Taculla if it]…uses the front awning taking into account that Dublin City Council were satisfied that the awning has been in existence for over six years*". The letter was replied to on 22nd January, 2016, by Dublin City Council in the following terms:

> *"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 the 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".*

5. Dunnes contends that: as a matter of law, the last-quoted statement is not correct; the impugned awning structure does not have planning permission; and absent such planning permission, the use of same in conjunction with the Licence contravenes General Condition 26.

6. The Dublin City Council official who signed the letter of 22nd January, 2016, and who also swore the verifying affidavit in the within proceedings, is Mr Aidan Walsh. Dunnes now seeks an order granting it liberty to cross-examine Mr Walsh for the below-quoted reasons offered in the affidavit of Mr Tom Sheridan, the Company Secretary of Dunnes:

> *"14. Mr Walsh's letter* [of 22nd January] *clearly indicates that the Notice Party could use the awnings in conjunction with the Licence without contravening General Condition No. 26 on the basis that there was no requirement to apply for planning permission for the awnings in place for more than seven years. However, in this verifying affidavit, Mr Walsh changes his position significantly by suggesting that the awnings in question are not covered by General Condition No. 26 at all, on the basis that the awning is* an 'overhead awning' *which* 'may be contrasted with awning to the front and/or side which entirely enclose the licenced area'. *This has introduced a fundamental issue into the case, as clearly if Mr Walsh is correct, the position set out in his letter is incorrect….*
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> *15. The decision-making process leading to the sending of* [Dublin City Council's]*…letter of 22 January 2016 and the basis upon which Mr Walsh came to his decision is thus clearly relevant and is not addressed in Mr Walsh's affidavit. It goes to the* bona fides *of the* [Council's]*…position and, accordingly, is a matter on which* [Dunnes]*…seeks to cross-examine Mr Walsh in order to ascertain the decision-making process and the matters considered by Mr Walsh in reaching his decision to send the letter and the contents thereof.*
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> *16. With regard to the status of the awnings as 'illegal but immune'….Mr Walsh refers to an Enforcement Notice which the Respondent served on* [Taculla]*…in the respect of the awning seeking its removal from the façade of the premises. He deposes at paragraph 21 of his affidavit that District Court proceedings for non-compliance with the Enforcement Notice were struck out on 17 June 2014. Mr Walsh does not explain the circumstances in which the proceedings for non-compliance with the enforcement notice were struck out, i.e. whether the matter was struck out by agreement or whether the Court actually determined the matter. As Dunnes Stores was not party to those proceedings and the letter given by Mr Walsh…places heavy emphasis on the 'illegal but immune' status of the awnings as a reason why their use*

does not offend General Condition No. 26, this is a matter on which [Dunnes]…*seeks to cross-examine Mr Walsh.*

17. At paragraph 41 Mr Walsh's affidavit, he states that the letter of 22 January 2016 was not purporting to relieve any obligation on the Notice Party to comply with General Condition No. 26, 'but was simply a clarification that the awning does not infringe the same. Such letter was equally not a variation of the license granted to [Taculla]'….[Dunnes] *seeks to cross examine Mr Walsh on this issue, which would appear to entirely overlook the circumstances in which the letter was written, being a response to a letter from* [Taculla's]…*solicitors drawing attention to the undertaking which had been given on behalf of the Notice Party in related proceedings pursuant to Section 160 of the Planning and Development Act 2000* 'not to place any apparatus or thing on the public road 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'. *The letter from the Notice Party's solicitors specifically sought clarification as to whether General Condition 26 would be infringed if the existing 'front awning' were used, given that it had been in existence for over 6 years.*

18. There could be no doubt in the circumstances that the Notice Party was seeking direction from the Council that the use of the current awnings would not breach General Condition 26 and that same would prove extremely important to it in answer to any application that the Applicant might decide to bring alleging contempt of the undertaking in the Section 160 proceedings as a result of the use of the awnings in conjunction with the Licence. Thus, for Mr Walsh to assert in his verifying affidavit that his letter was anything less than a clear indication the Respondent was of the view that the Notice Party could use the existing awnings with the Licence without breaching General Condition No 26 would appear to be extremely disingenuous in the circumstances. Cross-examination is therefore required to ascertain the precise circumstances in which the letter came to be written and the reasons therefor. It should be noted in this regard that there is no Chief Executive's Order in relation to the issuing of the letter, which would normally set out the reasoning behind the giving of same….

20. I say and believe that the within affidavit addresses why cross-examination is required….[W]*hilst I acknowledge that the application is made in close proximity to the trial, I am advised that the cross-examination will…be limited to the areas set out above and will not unduly delay the trial, where the issues are fairly net….I am advised that no possible prejudice could befall* [Dublin City Council]…*in tendering Mr Walsh as a witness for cross-examination. In this regard, it should be noted that the Section 254 licensing process is extremely arcane, with no public notice provisions. The matter is even more opaque with regard to the circumstances of the giving of the letter under review in the present case, with no apparent chain of documentation available to assess the basis for the letter or whether, for example, Mr Walsh obtained legal advice before issuing same."*

7. There is much in the above-quoted text that is in dispute between the parties. The text is quoted merely to illustrate why Dunnes considers that it ought now to be allowed to cross-examine Mr Walsh.

III. Some Applicable Case-Law

8. Among the cases to which the court has been referred is the decision of the High Court in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369, in which O'Donovan J. observes, inter alia, as follows:

> *"In my view, it is axiomatic that, when in the course of applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of fact between the deponents of those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits. However, while it seems to me that, where it is debatable as to whether or not the cross examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross examination, at the end of the day it is within the discretion of the court as to whether or not such a cross examination should be directed and that discretion should only be exercised in favour of such a cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine. That appears to me to be the import of a statement of Keane C.J. in the course of an unreported judgment of the Supreme Court delivered on the 15th day of December, 2003, in a case of* Holland v. The Information Commissioner *and represents the current jurisprudence in that behalf in this country."*

9. A trio of points immediately arises from the foregoing. First, the decision in *Seymour* appears significantly to expand the number of instances in which cross-examination will be permitted from those that traditionally were allowed – though whether the decision of the Supreme Court in *Holland* affords a reliable basis on which to ground the conclusions reached in *Seymour* is an aspect of matters to which the court turns later below. Second, the court must admit to some doubt whether it is appropriate to allow cross-examination if the matters in dispute can adequately be dealt with by way of submission. Third, it is worth noting, as Delany and McGrath, observe, in *Civil Procedure in the Superior Courts* (3rd ed.), at para. 20-91, "[A] *court is not obliged to accept evidence given on affidavit even if the deponent is not cross-examined if there is conflicting evidence given on affidavit or orally that the court accepts. However, where there is a conflict of evidence on affidavit and the deponents are not cross-examined, the court may resolve the issues of fact against the party that bears the onus of proof."*

10. Turning to the decision in *Holland v. The Information Commissioner* (Unreported, Supreme Court, Keane C.J., 15th December, 2003), the Supreme Court decision on which the judgment in *Seymour* is grounded, it is perhaps notable that *Holland* involves a notably brief *ex tempore* judgment of Keane C.J. for the Supreme Court, which judgment issued on the same day as the hearing of Mr Holland's appeal and does not involve any consideration of applicable case-law. So although the Supreme Court's decision is binding precedent and deserving in any event of the natural respect that falls to be afforded to all utterances at Supreme Court level, it does not appear to the court that the decision in *Holland* was intended by the Supreme Court to be understood as a comprehensive exegesis on whether and when cross-examination on an affidavit ought to be (or not to be) allowed. Indeed, it is notable that the learned authors of Civil Procedure in the Superior Courts (3rd ed.), point, at para 20-88, to O'Donovan J.'s judgment in *Seymour*, not to *Holland*, as "[t]*he leading authority on the circumstances where cross-examination on an affidavit will be permitted…".*

11. In *Holland*, the eponymous appellant had made a request for certain information from An Garda Síochána under the freedom of information legislation. The request was refused by the Information Commissioner and Mr Holland initiated legal proceedings. As part of the proceedings, a lengthy affidavit was filed by an investigator from the office of the Information Commissioner. Mr Holland sought permission to cross-examine the investigator in relation to the affidavit. The application was refused in the High Court and refused again on appeal, Keane C.J. observing, *inter alia*, as follows:

> "[P]*rimarily appeals under…[the Freedom of Information] Act are to be heard on affidavit and the High Court judge took the view that there was no issue of fact or conflict of fact which he could see before him which required the adduction of oral evidence or the cross-examination of Mr. Nutley on his affidavit. In the absence of any such actual controversy requiring to be resolved, the High Court judge considered that it was not an appropriate case in which he should exercise the jurisdiction given to him by the Act to order the appeal to be heard on oral evidence.*
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> *Mr. Holland, when he was conducting the appeal this morning, was again asked by the court whether he could indicate any factual controversy in relation to which the questioning of Mr. Nutley might be relevant on his affidavit and while Mr Holland is very concerned about the fact that he is, as he puts it, 'meeting a blank wall' in his attempt to find out about this Garda inquiry, I am satisfied that he has not in fact identified any factual controversy and that the learned High Court judge was perfectly correct in concluding that this was not a case in which the cross-examination of Mr. Nutley on the affidavit would be in any way necessary for disposing of the question of law which will be before the High Court when the appeal from the Information Commissioner's determination comes before the High Court.*
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> *In those circumstances, I am satisfied that the judgment delivered by him was correct and cannot be interfered with."*

12. This Court must admit that it struggles to read into the last-quoted text the establishment of an iron rule by the Supreme Court that so long as one can point to a factual controversy in affidavit evidence then the cross-examination of a deponent is a matter which the court ought to be inclined to favour. All this Court sees in *Holland* is a finding by the Supreme Court that in the absence of any factual controversy whatsoever, it was not minded to give permission to cross-examine the deponent in that case. And this Court respectfully views *Holland* as precedent that is binding to that extent only, *i.e.* that where there is no factual controversy whatsoever, then cross-examination of a deponent ought not to be allowed. That finding, as it happens, is consistent with the historical practice in these islands whereby the adducing of oral evidence in judicial review proceedings has not generally been allowed. So far as this historical practice is concerned, the court has been referred to three helpful decisions from the neighbouring jurisdiction, *viz. Cullen v. Chief Constable of the Royal Ulster Constabulary* [2003] 1 W.L.R. 1763, *Save Guana Cay Reef Association Ltd. and ors v. The Queen and others* [2009] UKPC 44 and *Bubb v. Wandsworth London Borough Council* [2012] P.T.S.R. 1011.

13. In *Cullen*, Lord Bingham, in the course of examining the law about a detained person's access to legal advice as it stood before the United Kingdom's Police and Criminal Evidence Act 1984 was enacted, noted the longstanding principle that every person at any stage of a police investigation should be able to communicate and to consult privately with a solicitor, and then observed as follows, at 1768, "[I]*n 1984 the possibility of applying for relief in judicial review proceedings already existed in cases where there was a breach of the principle. On the other hand, experience in England and Wales showed that the protection so conferred was largely ineffective, notably because cross-examination on an application for judicial review, although not exclude, was in practice rarely permitted".*

14. In *Save Guana Cay Reef*, Lord Walker, giving the opinion of the Judicial Committee of the Privy Council, observed as follows at paras. 46-47, "*The judge refused to make orders for discovery or cross-examination of some of the respondents' witnesses. He did not give reasons for his refusal, and it is regrettable that he did not give at least brief reasons. But it is apparent from the transcript that his reasons must have been that he regarded the order sought by the objectors as unnecessary and no more than a fishing expedition….*[O]*rders for discovery and cross-examination are still exceptional in judicial review proceedings, for good reason. Such proceedings are essentially a review of official decision-making, and need to be determined without any avoidable delay"*. So want of necessity, engaging in a so-called 'fishing expedition' and the need to avoid avoidable delay all appear to be grounds that the Judicial Committee would see as justifying a refusal to allow cross-examination of a deponent. Moreover, the Judicial Committee points to orders for cross-examination in judicial review proceedings as being "*still exceptional*", such proceedings being "*essentially a review of official decision-making".*

15. In *Bubb*, Neuberger M.R. giving judgment in an appeal from a decision of a county court judge under the Housing Act 1996, noted, at 1018, that the case that ran in the county court "*was effectively a judicial review*", and then proceeded to consider in more detail the issue of when oral evidence may be heard in judicial review proceedings:

> *"24 I accept that it is, as a matter of principle, open to a judge, hearing a judicial review application, to permit one or more parties to adduce oral evidence. That was made clear by Lord Diplock in his speech in O'Reilly v. Mackman [1983] 2 A.C. 237, 282H-283A. However, for reasons of both principle and practice, such a course should only be taken in the most exceptional case. As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence so as to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision. Also, if judges regularly allow witnesses and cross-examination in judicial review cases, the court time and legal costs involved in such cases will spiral.*
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> *25 In the overwhelming majority of judicial review cases, even where the issue is whether a finding of fact should be quashed on one or more of the grounds identified by Lord Bingham* [in *Runa Begum v. Tower Hamlets London Borough Council (First Secretary of State Intervening)* [2003] 2 A.C. 430], *there should be no question of live witnesses. Even the provision of further documentary evidence which was not before the original decision-maker must often be questionable….*
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> *26 In the present case, there was no conceivable ground for contending that live evidence and cross-examination… should have been received by the judge. The review was very full indeed so far as the detail into which it went in describing the relevant evidence and arguments, and this is not even one of those more difficult cases where the applicant is contending that relevant evidence has come to light since the review was concluded."*

16. It may be that there is possibly a degree of laxity in the Irish legal system, as compared with that of the neighbouring jurisdiction, which renders the adducing of oral evidence in judicial review proceedings somewhat less than "*exceptional*" in practice in Ireland, albeit that no theoretical rationale for such difference, to the extent that it arises, appears to have been offered thus far in the case-law of the Irish Superior Courts. And when it comes to the principle of matters, it is very difficult to flaw (indeed this Court accepts) the reasoning offered by Neuberger M.R. in *Bubb* and, for the reasons stated above, sees nothing in *Holland* that requires it to depart from the reasoning in *Bubb*. As mentioned above, all this Court sees in *Holland* is binding precedent that where there is no factual controversy whatsoever, then cross-examination of a deponent ought not to be allowed. The court does not see that it logically flows from that binding finding that where there is factual controversy in the affidavit evidence then a court ought to incline to allowing cross-examination of a deponent. As *Bubb* makes clear, there are "*reasons of both principle and practice*…[why] *such a course should only be taken in the most exceptional case*"; nor to the extent that any laxity in this regard arises in the Irish context does the court see any principled, pragmatic or otherwise persuasive reason as to why the sought-after cross-examination ought to be allowed in the within proceedings.

IV. Conclusion

17. Ought the court to allow the cross-examination of Mr Walsh in the within proceedings having regard to the various factors offered by Dunnes in the affidavit evidence quoted elsewhere above? It appears to the court that, for at least eight reasons, it ought not. First, it appears to the court that Dunnes has not shown that there are relevant, material conflicts of fact that would justify the court's now granting it liberty to cross-examine Mr Walsh. Second, it appears to the court that Dunnes wishes to conduct some form of roving inquiry into Dublin City Council and its dealings with Taculla as regards the impugned awning structure. Third, the court does not see in the factual position put forward by Dublin City Council during the course of the proceedings the change that is suggested by Dunnes to arise. There is an awning structure in existence, there is photographic evidence before the court regarding same; whether the awning is properly described as an overhead, front or side-awning appears to the court to be a matter of interpretation that will not be advanced through the cross-examination of Mr Walsh. Fourth, so far as Dunnes, according to Mr Sheridan "*seeks to cross-examine Mr Walsh in order to ascertain the decision-making process* [within Dublin City Council]", this appears, with respect, to be precisely the form of roving inquiry that is inappropriate when it comes to cross-examination in the context of judicial review proceedings. Fifth, as regards cross-examination on the enforcement notice and/or the decision of Dublin City Council not to pursue its prosecution of July, 2014, those are not matters challenged in the within proceedings, so the court sees no basis on which there could be cross-examination concerning same. Sixth, as regards cross-examination on the circumstances in which the letter of 22nd January, 2016, was written, and to which a reply issued, the court sees no relevant, material conflict of fact arising which would justify its now granting Dunnes leave to cross-examine Mr Walsh. Seventh, as to the argumentative assertions at para. 18 of Mr Sheridan's affidavit (quoted above), it appears to the court that such argument is properly a matter for submission. Eighth, the court is mindful in approaching the within application of the caution rightly urged by Neuberger M.R. in *Bubb* as to the general propriety and prudence of a judge permitting the adducing of oral evidence at judicial review proceedings.

18. For the reasons stated above, the court respectfully declines to grant Dunnes liberty to cross-examine Mr Aidan Walsh on his affidavit of 23rd May, 2016.