THE HIGH COURT
COMMERCIAL

2004 No. 18985 P

BETWEEN

THE ADROIT COMPANY AND GRANBRIND LIMITED

PLAINTIFFS

AND
THE MINISTER FOR ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

DEFENDANT

Judgment of Mr. Justice Kelly delivered the 17th day of December 2004.

Introduction

1. The first set of building regulations made under the provisions of the Building Control Act 1990 came into operation on 1st June, 1992. Part M of those regulations dealt with the provision of access for disabled people in buildings to which the regulations applied. Part M did not apply to dwellings.

2. The 1991 regulations were revoked by the Building Regulations 1997. Part M of those regulations also dealt with the provision of access for disabled people. Part M of those regulations expressly did not apply to dwellings.

3. A change to the regime of non-applicability of part M to dwellings was brought about by the coming into force of the Buildings Regulations (Amendment) Regulations 2000. These regulations require in general that all new dwellings should provide for access for people with disabilities as specified in the regulations. The position is therefore that the 2000 regulations apply to dwellings where the works commence on or after 1st January, 2001. There is, however, an exemption. It is contained in article 4 (2) (a) (i) of the regulations of 2000. It is with that exemption that this case is concerned.

4. The exemption provides that the regulations of 2000 shall not apply to works which commence on or after 1st January, 2001, where, in the case of dwellings, the works are the subject of a planning application made on or before the 31st day of December, 2000, for planning permission or approval pursuant to the Local Government (Planning and Development) Acts 1963 to 1999 and where substantial work has been completed by the 31st day of December, 2003.

5. The plaintiffs contend that they fall squarely within the terms of this exemption whilst the defendant takes the opposite view.

6. It is necessary to look at the factual background in order to see how this dispute arises.

The Facts

7. On 1st April, 1999, the first plaintiff lodged an application with Fingal County Council for planning permission. The permission was sought in respect of a development to be carried out on a phased basis for the construction of 1,520 dwellings. Those dwellings were made up of houses, apartments and duplex units in 18 clusters. The development included a local centre as well as associated infrastructure and site development works. These included roads, footpaths, parking spaces, open spaces and amenity areas together with the necessary physical infrastructure for water, electricity, gas and telecommunications supply. The development was to be carried out on lands which formerly were part of the James Connolly Memorial Hospital at Blanchardstown, Dublin 15.

8. Fingal County Council decided to grant planning permission for the proposed development. That decision was dated 31st May, 1999. The permission was granted subject to conditions.

9. The decision of Fingal County Council was upheld on appeal by An Bord Pleanála. The decision of An Bord Pleanála is dated 6th December, 1999 and bears reference number PL O6F. 11820, (the permission). The permission provided that the period during which the development might be carried out should be one of ten years from the date of its order. An Bord Pleanála so decided having regard to the nature and scale of the development. The term of the permission is thus twice the normal period of five years.

10. Subsequent to the permission, a number of further planning applications for modifications and/or amendments to the development authorised were made to Fingal County Council. Planning permission was granted by that council in respect of such applications. Each of the subsequent planning permissions contained a condition requiring full compliance with the permission save and insofar as it was modified and/or amended by the subsequent permissions.

11. Development on foot of the permission commenced on or about the 1st February, 2000. To date, 888 dwellings out of the total of 1,520 have been constructed. That construction has taken place in 10 of the 18 clusters of dwellings envisaged in the permission.

12. A floor area certificate is required in respect of a new dwelling where a first time buyer seeks exemption from stamp duty on the purchase of that dwelling. Such certificates were provided by the defendant in respect of the dwellings which had been completed in clusters 1 to 9. Subsequent to an application by the plaintiffs for such certificates in respect of the dwellings constructed in cluster 10, an official from the guarantee section in the defendant's department, a Mr. Connolly, carried out an inspection. He inspected some of the blocks constructed in cluster 10, which were at roofing stage. In the course of that inspection he indicated to the plaintiffs that the remaining dwelling units (other than those in cluster 10) to be constructed on foot of the permission would have to comply with part M of the Building Regulations 1997, as inserted by article 6 of the Building Regulations (Amendment) Regulations, 2000. That was confirmed to the second named plaintiff by a letter of 26th February, 2004.

13. The letter insofar as it is relevant reads:-

> "It was also noted that there are a large number of dwellings not yet constructed. The planning permission for this development was granted in 1999. Therefore, all dwellings not substantially complete by 31 Dec. 2003 must comply with the current part M of the Building Regulations. Please ensure that all such dwellings are constructed in compliance with part M."

14. On 4th March, 2004, the plaintiffs' planning consultant wrote to the defendants setting out why the plaintiffs considered that part M did not apply to dwellings yet to be constructed on foot of the permission in clusters 11 to 18 inclusive. The letter stated that new dwellings to be constructed by the plaintiffs on foot of the permission were entitled to the benefit of the exemption from compliance with part M provided in article 4 (2) (a) (i) of the Building Regulations (Amendment) Regulations 2000. The reason for such entitlement

was because work on such dwellings commenced after the 1st January, 2001, were the subject of a planning application made before the 31st December, 2000 and substantial work had been completed by 31st December, 2003.

15. There was also a dispute between the parties concerning the issue of floor area certificates in respect of cluster no. 10 but certificates were issued by the defendant in respect of those housing units and the dispute and this judgment is concerned only with dwellings envisaged for clusters 11 to 18.

16. On 30th August, 2004, the defendant set out his position as to why he considered that dwellings to be constructed in such clusters must comply with the provisions of part M. The letter insofar as it is relevant reads as follows:-

> "It is noted that this large scale housing development is covered by a 10 year planning permission, due to expire on 5 December, 2008 *(sic)*.
>
> The Department has carefully considered the important issue raised in these cases regarding compliance with part M (Access for People with Disabilities) of the Building Regulations, 1997 as amended in 2000; and is advised that the legal position is as set below *(sic)*.
>
> The planning and building codes are quite separate. The core relevant legal provisions in this case are contained in the Building Regulations (Amendment) Regulations 2000 (S.I. No. 179 of 2000)
>
> Article 4 (1) of S.I. No 179 of 2000 provides that, subject to Article 4 (2), the amended Part M shall apply to works where the works commence *on or after 1 January 2001*. It is understood that the works on the new dwellings covered by the current floor area compliance certificate application(s) will have commenced after 1 January 2001.
>
> Article 4 (2) provides that S.I. No 179 shall not apply in the case of dwellings, where the works commence on or after 1st January, 2001 and where –
>
> > (1) application for planning permission or approval is made on or before 31 December 2000 and
> >
> > (2) substantial work has been completed by 31 December 2003.
>
> It is understood that works on the new dwellings covered by the relevant floor area compliance certificate applications had neither been commenced nor substantially completed by 31 December 2003.
>
> 'Substantial work has been completed', for building regulations purposes, is defined in Article 3 (4) of the Building Regulations (Amendment) Regulations 2002 (S.I. No 284 of 2002) in the following terms:
>
> > 'For the purpose of these Regulations, "substantial work has been completed" means that the structure of the external walls of the house or flat has been completed.'
>
> By virtue of Article 1 (2) of S.I. No 284 of 2002, the amending Regulations and the Building Regulations 1997 [as amended] are construed and cited together as the Building Regulations 1997 to 2002.
>
> You are requested to submit plans for current applications".

17. An impasse has thus been arrived at. The plaintiffs contend that they fall within the exemption created in article 4 (2) (a) (i) of the Regulations of 2000 in respect of the dwellings which will be built in clusters 11 to 18 and the defendants disagree with that contention.

The Question

18. The parties agreed that there are just two issues which fall for determination in this action. By agreement, I was asked to try the first of these which can be resolved by answering the following question:-

> Is the term "substantial work has been completed", contained in article 4 (2) (a) (i) of the Building Regulations (Amendment) Regulations 2000, referable to works carried out on individual dwellings commenced after January 1st, 2001, or to works carried out on foot of planning permission PL06F.11820 as a whole?

Statutory History

19. The Building Control Act 1990 (the Act) is the statutory source for the regulations in suit. The long title to the Act recites that it is:-

> "To provide for the establishment of building control authorities and the making of building regulations and building control regulations and to provide for matters relating to the construction of buildings and to provide for other matters connected therewith".

The Act defines "building" as:-

> "Includes part of a building and any class or classes of structure which are prescribed by the Minister to be a building for the purposes of this Act".

It defines "works" as:-

> "Includes any act or operation in connection with the construction, extension, alteration, repair or renewal of a building".

Section 3 of the Act empowers the Minister to make regulations which are referred to as "building regulations".

Subsection 11 of s. 3 provides:-

> "Building regulations may exempt, in whole or in part, from all or any of the provisions of such regulations such classes or description of buildings, services, fittings or equipment as may be specified in the regulations, including classes of descriptions of buildings, services, fittings or equipment in any area specified in the regulations".

20. In exercise of the powers conferred on him by s. 3 the Minister made the Building Regulations of 1991. Part M of those regulations provides for access for disabled people but expressly provides that that part is not to apply to dwellings.

21. The 1991 regulations were revoked by regulations made in 1997. They came into operation on 1st July, 1998. Part M of those regulations again dealt with access for disabled people but expressly excluded the application of that part to dwellings. "Dwelling" was defined as meaning a house or flat forming a separate unit of residential accommodation.

22. The Building Regulations (Amendment) Regulations 2000, came into operation on 1st January, 2001. The principal object of these regulations appears to be to require all new dwellings to conform to the provisions of Part M of the 1997 regulations. Rather than saying that in clear terms however the regulations bring it about by providing under article 4 (1) that subject to sub-article 2 the regulations shall apply to works where the works commence on or after 1st January, 2001. Article 6 then provides an amendment to Part M by altering M5, which formerly provided that Part M should not apply to dwellings. Why such a cumbersome way of bringing about the desired result was adopted is not clear. In any event, it is accepted that the provisions of Part M apply to works which commence after 1st January, 2001 subject to the exemption in suit.

23. The exemption relied upon by the plaintiffs is that which is contained in article 4 (2). Article 4 (2) states:-

> "These Regulations shall not apply to works which commence on or after the 1st day of January, 2001, where –
>
> (a) in the case of dwellings, where the works are the subject of –
>
> (i) a planning application made on or before the 31st day of December, 2000 for planning permission or approval pursuant to the Local Government (Planning and Development) Acts, 1963 to 1999 and where substantial work has been completed by the 31st day of December, 2003; or
>
> (ii) a notice pursuant to the provisions of Part X of the Local Government (Planning & Development) Regulations, 1994, (S.I. No. 86 of 1994) which has been published on or before the 31st day of December, 2000 and where substantial work has been completed by the 31st day of December, 2003;
>
> and
>
> (b) In the case of all other buildings, where a Fire Safety Certificate under the Building Control Regulations, in respect of the works or buildings, has been granted before the 1st day of January, 2001 and where the works commenced between the 1st day of Januray, 2001 and 31st day of December, 2003.

24. As is clear from the facts which I have already set forth the permission which is being operated by the plaintiffs permits the construction of 1,520 dwellings. The application for such permission was made before 31st December, 2000 and 888 dwellings have been constructed on foot of it leaving a further 632 to be built. The plaintiffs contend that this places them within the terms of the exemption whereas the defendant's argument is that each individual dwelling which did not have substantial work completed by 31st December, 2003, is now subject to the provisions of Part M.

Interpretation of Delegated Legislation

25. The canons of construction which apply to the interpretation of acts of Parliament are no different to those applicable to delegated legislation of which the regulations in suit are an example. There is, however, one difference which is reflective of the fact that such legislation has not actually been made by Parliament but rather pursuant to a power to make such legislation conferred by it. The principle is summarised in Bennion, Statutory Interpretation, 4th Ed.,(2002) at page 215 as follows:-

> "There are various types of delegated legislation, but all are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it".

26. This proposition must be borne in mind in attempting to interpret the exemption contained in article 4 of the regulation in suit.

Building Control

27. It appears clear that the legislature in passing the Act of 1990 sought to put in place the machinery whereby building regulations and building control regulations might be made within its framework. It did not concern itself with detailed provisions of such regulations but left them to the relevant Minister.

28. It is however a statute with penal consequences. Section 16 provides that any person who contravenes any requirement of the Act or of any order, regulation or notice under the Act shall be guilty of an offence. Section 17 sets out the penalties for such offences. So, apart from any civil remedies that might be available, it is clear that a failure to comply with the regulations made under the Act may make the guilty party amenable to the criminal law. Such being the case it appears to me that the dictum of Henchy J. in Inspector of *Taxes v. Kiernan* [1981] I.R. 117 at 122 is applicable. He said:-

> "Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck and Sons v. Priester* (at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* (at p. 649) and Lord Denning M.R. in *Farrell v. Alexander* (at pp. 650 – 1)".

29. That approach was followed by the Supreme Court in Mc*Grath & Ors. v. McDermott (Inspector of Taxes)* [1998] I.L.R.M. 647. In the course of his judgment Finlay C.J. said:-

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to consideration of the purposes and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable".

30. It has been suggested that the decision of the Supreme Court in *D.P.P. (Ivers) v. Murphy* [1999] 1 I.R. 98 is a departure from this approach in relation to the construction of penal and revenue statutes. It does not appear to me that that is so. In the course of her judgment Denham J. said (at 111):-

> "The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take".

31. That does not appear to me to be inconsistent with, for example, the approach adopted by the Supreme Court in *The State (Murphy) v. Johnston* [1983] I.R. 235. There, there was a reference to part (III) of the Road Traffic Act, 1968 contained in a statutory provision where it was clearly intended that the reference should have been to part (V) of the Act. Whilst the intention of the legislature was obvious it could not be brought about without an effective rewriting of the section. O'Higgins C.J. said (at 239):-

> "On the hearing of this appeal, counsel on behalf of the respondent has urged this Court to hold that, having regard to the obvious nature of the error which appears in s. 23, sub-ss. 1 and 2, of the Act of 1978, it is competent for a court or judge to read the reference to Part III of the Act of 1968 as a reference to Part V of that Act. I do not accept that submission. Whatever the reason for the apparent error may be, the reference in s. 23 sub-ss. 1 and 2 of the Act of 1978 is to 'Part III of the Act of 1968'. That reference is clear and unambiguous. To read it as being something other than it is would be, in effect, to amend the sub-sections. That is not within the competence of the Courts and cannot be done".

32. Even if the Act and regulations in suit did not create a criminal liability, it is accepted by counsel on behalf of the defendant that the approach of the Supreme Court as set forth in the case of *Kinsale Yacht Club v. Commissioner of Valuation* [1994] 1 I.L.R.M. 457 is applicable here too. In that case Finlay C.J. having quoted the passage from the judgment of Henchy J. in Inspector of Taxes v. Kiernan which I have already set forth, said (at 463):-

> "I am satisfied that this statutory provision in the 1986 Act cannot, of course, with any precise use of words be described as either a taxation or penal statute. It does, however, having particular regard to the phrase used in s. 2 of the 1986 Act that categories of fixed property specified in the schedule inserted by that Act shall be deemed to be rateable hereditaments in addition to those specified in s. 12 of the Act of 1852, constitute a platform or necessary statutory pre-condition intended to lead to 'the fresh imposition of liability' in the meaning of those words as contained in the judgment of Henchy J. I see no logical reason therefore why these statutory provisions should not receive from the court the strict interpretation referred to in that judgment".

33. The approach which therefore I propose to take to the interpretation of article 4 (2) (a) (i) is that of strict construction but having regard to the terms of the principal Act which spawned it.

Article 4 (2) (a) (i)

34. The term "works" is defined in both the parent Act and the regulations of 1997 in precisely the same terms. It includes:-

> "*Any act or operation in connection with the construction, extension, alteration, repair or renewal of a building*". (My emphasis).

35. The regulations of 2000 are to be construed along with the regulations of 1997 as one. It follows therefore that when the expression "works" is used in Article 4 (2) it must include any act or operation in connection with the construction, extension, alteration, repair or renewal *of a building*. Therefore, in the case of a "dwelling" where the works on the building are the subject of a planning application made before 31st December, 2000 and where substantial work has been completed by 31st day of December, 2003 the exemption applies. In my view the notion of "substantial work" must be applicable to the building in question and not to the work in general which has been undertaken on foot of the planning permission.

36. I am of the opinion that having regard to the statutory definition of the term 'works' that the regulations are intended to apply to any building the construction of which is commenced after the coming into force of the regulations. The exemption applies on a per building basis. The application of the regulations is not dictated by or dependant upon the quantum of work carried out on foot of the planning permission as a whole, but rather by reference to the work carried out on an individual building.

37. There is a certain initial attraction to the argument made by the plaintiffs that the term "substantial work has been completed" should be construed by reference to work undertaken on foot of the permission as a whole. But there is a flaw in this argument because it appears to ignore the statutory definition of the term "works". That definition which is contained in the 1997 regulations and the Act of 1990 demonstrates that the exemption provisions are intended to apply to a building and not to development generally permitted under the permission.

38. It follows therefore, that where the term "substantial work has been completed" appears in article 4 (2) (a) (i) it refers to the work carried out and completed on a building. That is so by reference to the definition of "works" which is contained in the regulations.

39 In coming to this conclusion I have ignored the definition of "substantial work has been completed" in the 2002 regulations which was mentioned in the defendant's letter of 30th August, 2004. Counsel for the defendant, correctly in my view, did not seek to rely on that. My decision is based solely on the 2000 regulations and in particular the statutory definition of "works". In coming to it I have adopted the approach to construction already outlined.

Conclusion

40. The question posed will be answered as follows. The term "substantial work has been completed" contained in article 4 (2) (a) (i) of the Building Regulations (Amendment) Regulations 2000 refers to work carried out on individual dwellings commenced after 1st

January, 2001 and not to works carried out on foot of the permission as a whole. Thus, the dwellings in clusters 11 to 18 must comply with Part M of the regulations.