Neutral Citation: [2017] IEHC 608

THE HIGH COURT

2016 No. 173 JR

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 17th October, 2017.

I. Overview

1. This is an application for leave to appeal the court's judgment of 2nd March, 2017, in *Dunnes Stores v. Dublin City Council* [2017] IEHC 148. Notwithstanding the court's observations in *Connolly v. An Bord Pleanála* [2016] IEHC 624, para.14, the parties remain satisfied for the court to adjudicate on this application.

2. An appeal from the judgment of a trial court usually proceeds without further regard to the trial judge, save perhaps as regards seeking that the trial judge put certain incidental or transitional arrangements in place pending such appeal. The difficulty that presents for Dublin City Council as regards bringing an appeal from the court's judgment of 2nd March last is that in s.50A(7) of the Planning and Development Act 2000, as amended, the Oireachtas has decided, it would appear with the intention of bringing early finality to planning matters (*Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102, para. 2), that no appeal shall lie from a decision, such as that of 2nd March, "*save with leave of the [High] Court which leave shall only be granted where the [High] Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken*".

3. As a consequence, it would seem, of the terms of s.50A(7), judgments that come within the scope of that provision seem now often to be claimed by would-be appellants to present with "*a point of law of exceptional public importance*", sometimes many such points. This seems something of a logical non sequitur when one has regard to the phrase (and the substance of the phrase) "*exceptional public importance*". The instinctive and logical expectation would be that points of law of "*exceptional public importance*" would not often present. But that they should so often be perceived and contended by would-be appellants to present is perhaps a more understandable sequitur when one has regard to the natural desire of a party that remains convinced of the legal correctness of its actions to seek a judgment that better favours its interests than the judgment obtained from the trial court.

4. The parties are agreed, and rightly so, that the key principles by which the within application falls to be decided are the so-called 'Glancré principles', as identified by McMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250. It does not seem necessary to re-state those principles in the text of the within judgment; it suffices to proceed by reference to them. Likewise, the court proceeds in this judgment by reference to the text of its judgment of 2nd March, rather than re-stating or summarising that earlier judgment here.

II. The Points Contended to Arise

5. Dublin City Council contends that two points of law of exceptional public importance arise from the court's judgment of 2nd March, *viz*:

> Point (1):
>
> Where a person has carried out unauthorised development which has become immune from enforcement action, what is the legal status of such development after it is so immune?
>
> and
>
> Point (2):
>
> Can a local authority, through a condition of a licence, restrict the exercise or continuation of a development which is otherwise immune from enforcement action?

III. Point (1)

6. As to Point (1), the parties will recall the court's observation, at para. 29 of its judgment that "*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.*" The court did not address the issue of the period in which the overhead front awnings were in situ. Nor was the court concerned with the status of the unauthorised development once the awnings became immune from enforcement under Part VIII of the Act of 2000. The court determined (and this is all that it was required to do) that the awnings were unauthorised development due to the fact that no planning permission had been obtained for them. The court then decided the case on the undisputed fact that the awnings did not have planning permission. The issue of immunity from enforcement was not before the court and does not arise from the decision of the court. Moreover, the court cannot but note in passing that, in any event, the legal status of unauthorised development that is without planning permission after the limitation period has passed is now well-settled law: it remains unauthorised development. (See, *inter alia, Dublin County Council v. Mulligan* (Unreported, High Court (Finlay P.), 6th May, 1980)) and *Wicklow County Council v. Fortune* [2012] IEHC 406, the latter judgment clarifying any (if any) lingering doubt that then continued to present as regards the

effect of the seven-year limitation period with respect to enforcement proceedings under the Act of 2000). As to the issue raised in submission by Dublin City Council concerning the constitutionality of the 'illegal but immune' status of unauthorised development once the limitation period for enforcement has passed, that issue, it seems to the court, was, to borrow a colloquialism, 'put to bed' in *Central Dublin Development Association v. Attorney General* [1970] 109 ILTR 68, Kenny J. there rejecting the claim that the system concerning planning permission for land development and the retention of unauthorised development represents an unjust attack on property rights.

IV. Point (2)

7. As to Point (2), this derives from para. 40 of the court's judgment, where the court states, *inter alia*:

> *"[I]f 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."*

8. The Council considers the foregoing text to raise a question of exceptional public importance, *viz*. whether a person may be required to forego some benefit such as an immunity under one particular code (in this case planning control) in order to obtain a benefit under a different code (in this case furniture licensing). But all the court asserts in the above-quoted text is the uncontroversial freedom of persons to seek a licence or not, which licence may or may not come with conditions (with the logical corollary that a licensing authority must judge by reference to the applicable legal code what, if any, conditions may be imposed). Freedom of action is not a matter of legal controversy. Neither in the context of Condition 26 (the net condition with which the court's judgment is concerned) nor more generally does the court see any point of law, let alone a point of law of exceptional public importance, to arise from the observation that persons are free to seek a licence or not, which licence may or may not come with conditions, with the relevant licensing authority having to gauge by reference to relevant statute what (if any) conditions may be imposed.

V. Conclusion

9. The court considers that its decision of 2nd March last does not raise the contended-for points of law of exceptional public importance. It therefore respectfully declines to grant the leave to appeal now sought of it.