

THE HIGH COURT

CASE STATED

[2015 No. 1973 SS]

BETWEEN:

DUBLIN CITY COUNCIL

COMPLAINANT

-AND-

BENQUEUES LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 25th day of July, 2016.

Introduction

1. This is a Case Stated from the District Court regarding whether a direction to acquit should be given in a prosecution for a criminal offence, namely a breach of a planning condition.

2. This Court concludes that Dublin City Council issued an Enforcement Notice which accused the respondent of a breach of a planning condition (namely, the use of a premises principally as a restaurant, rather than as a bar) in terms which were different from the planning condition (since the Enforcement Notice stated that the respondent failed to serve alcohol only with food) and which alleged breach did not in fact amount to a breach of the planning condition. The Enforcement Notice also obliged the respondent to take steps (namely to serve alcohol only with food) which were not necessary to remedy the alleged breach of the planning condition. The Summons was issued on the basis that the respondent had failed to take these steps, even though these steps were not necessary to remedy the alleged breach of planning. On this basis, the Court finds that the Enforcement Notice and the Summons were flawed and that the prosecution based on them should not proceed and so a direction to acquit should be given.

Factual background

3. The following is an extract from the Case Stated signed by Judge John O'Neill on the 1st February, 2015:-

"Facts

1. The Respondent is the owner of a Café and Restaurant premises known as The Bad Ass Café and situate in Temple Bar, Dublin.

2. On the 16th day of December, 2013, the Respondent's Planning Permission Planning Register Reference Number 2199/13 granted permission for the proposed development (Retention Permission is sought for the retention of interior works carried out, comprising the installation of a new bar, counter, space dividers, wall cabinets, stall risers, column and wall cladding, floor, ceiling and wall finishes to ground floor and new bar, counter and wall mounted cabinets to first floor) in accordance with the said plans and particulars based on the reasons and consideration under and subject to the conditions. The Planning Permission was conditional and in particular Planning Condition Number 2 required compliance with the following:

2. (a) This permission solely authorises the retention of the internal works to the proposed development described in the documentation submitted with the planning application (register reference number 2199/13) and appeal. No permission is granted for a change of use of this Protected Structure from its primary use as a restaurant to that of a public house.

(b) Any use of the bar areas for the sale and consumption of alcohol shall be strictly ancillary to the principal use of the premises as a restaurant.

(c) No permission is granted for the erection of any external signage advertising the restaurant premises or any alcoholic beverage. Reason: In the interest of clarity having regard to the nature of the development for retention permitted

3. On the 24th day of July 2014, an Enforcement Notice was served by the Complainant alleging breach of Planning Condition Number 2 and it stated in particular the following:

Take notice that Dublin City Council being the Planning Authority for the area comprising of the City of Dublin having considered in exercise of the power conferred on it by section 154 of the Planning and Development Acts 2000-2013 and of every other power in that behalf it enabling,

HEREBY REQUIRES

Full compliance with Condition 2 of planning permission granted by An Bord Pleanala (Reference PL. 29s.242458) under Planning Register reference No. 2199/33 by;

I. The cessation of the sale of alcohol other than in conjunction with or ancillary to a meal being consumed on the premises.

II. The removal of the three illuminated projecting signs (two advertising 'Guinness' and one advertising 'Heineken') from the Crown Alley façade of the building.

4. The prosecution came for hearing before Judge John O'Neill on the 1st day of July 2015 and Mr. Paddy Keogh, Enforcement Officer, on behalf of the Complainant gave evidence before the Court. Mr. Keogh accepted in evidence that his qualification was that of an Architectural Technician, not a planner or a fully qualified architect. Mr. Keogh indicated that at the time of his inspection about twenty patrons were disbursed throughout the premises and that about half of them were eating and half were drinking and some were sitting at the bar. He stated that subsequent inspections were made without him consuming anything but that he saw people having alcohol without food. Mr. Keogh gave evidence that he inspected the subject premises on the 25th April 2014 at it was the basis of this inspection that he recommended that an Enforcement Notice be served. His evidence was that he was asked if he wanted to order food but that he refused and requested a glass of Guinness. He indicated that he was served with a glass of Guinness. In his evidence Mr. Keogh indicated that his basis for recommending that an Enforcement Notice be served was because he was served a drink without ordering food."

Analysis

4. There are eight questions listed in the Case Stated for the consideration of this Court. Counsel for Dublin City Council advised the Court that questions 1 to 7 in the Case Stated, which seek this Court's instruction on whether a direction to acquit should be issued, were moot, since the District Court Judge had in fact refused to issue a direction in the case. This claim on behalf of Dublin City Council that the District Judge did in fact refuse to issue the direction in this case, was not disputed by the respondent.

5. Counsel for Dublin City Council also stated that there was common case between the parties regarding the only other question, question 8, since both parties were of the view that the respondent was not disentitled to a direction on grounds that it should have judicially reviewed the Enforcement Notice. On this basis, nothing more need be said in relation to this question.

6. In these circumstances and in light of the right of this Court to reformulate questions posed by a District Court Judge, as is clear from the case of *National Authority for Occupational Safety & Health v. O'K Tools Hire & Sales Ltd* [1997] 1 IR 534, this Court takes the view that in the interests of the most efficient use of court resources and to deal, as efficiently as possible, with the cloud of a criminal trial hanging over the respondent, the best way to address this matter is by answering one key question:

Should a direction to acquit be granted in this case on the basis of the evidence as set out in the Case Stated?

7. The essence of this case is that the criminal offence of which the respondent is accused is a breach of Condition 2 of the planning permission granted on the 16th December, 2013, which states that:-

"(a) This permission solely authorises the retention of the internal works to the proposed development described in the documentation submitted with the planning application (register reference number 2199/13) and appeal. No permission is granted for a change of use of this Protected Structure from its primary use as a restaurant to that of a public house.

(b) Any use of the bar areas for the sale and consumption of alcohol shall be strictly ancillary to the principal use of the premises as a restaurant.

(c) No permission is granted for the erection of any external signage advertising the restaurant premises or any alcohol beverage. Reason: In the interest of clarity having regard to the nature of the development for retention permitted."

The Enforcement Notice dated 24th July, 2014, issued to the respondent under its trading name, provides that there has been a breach of Condition 2(b) and gives the reasons for that breach in the following manner:-

"The sale of alcohol for consumption, other than in conjunction with or ancillary to a meal consumed on the premises is in breach of Condition 2(b) of the planning permission..."

The Enforcement Notice requires the respondent to take certain steps, namely:-

"The cessation of the sale of alcohol other than in conjunction with or ancillary to a meal being consumed on the premises."

8. The subsequent Summons dated 16th December, 2014 to the respondent seeks to prosecute the respondent for its failure to take the steps required under the Enforcement Notice, which steps are described as:-

"The cessation of the sale of alcohol other than in conjunction with or ancillary to a meal being consumed on the premises."

9. This Court will now consider whether in these circumstances and in light of the facts set out in the Case Stated, the District Judge should issue a direction to acquit in this case.

Decision

10. This case can be summarised by stating that Dublin City Council alleges that the respondent has committed a breach of the planning laws, by using the bar areas of its premises in a way which is not ancillary to the principal use of the premises as a restaurant, since this is what Condition 2(b) states.

11. It seems to this Court, however, that if Dublin City Council were of the view that Condition 2(b) had been breached, the correct way to proceed in this case was for there to be an Enforcement Notice regarding a breach of Condition 2(b) on the express grounds that the bar area was not being used as ancillary to the principal use of the premises as a restaurant – since this is what the condition requires.

12. This was not done. The Enforcement Notice instead stated that there was a breach of planning because alcohol was sold, other

than with a meal. The nub of this case is that selling alcohol without a meal is not a breach of Condition 2(b), since it is possible for a bar area of a restaurant to sell alcohol without a meal and for that bar area still to be ancillary to the principal use of the premises as a restaurant.

13. This should be self-evident but an example will illustrate. If a person joins a group of diners at a restaurant, having eaten already, he may decide to order a glass of wine and no food. In this Court's view, the fact that this person has been served alcohol without a meal cannot *per se* mean that the bar area of that restaurant is not being used as ancillary to the principal use of the premises as a restaurant. It follows that it is incorrect to claim that a bar area must only sell alcohol with food to every customer in order to comply with a planning condition such as Condition 2(b) in this case.

14. Just as it has been noted that the Enforcement Notice should have been differently worded regarding the breach, so too the Enforcement Notice should have been differently worded regarding the steps to be taken to remedy that breach, e.g. it might have required the respondent to increase the number of tables or whatever other steps would be regarded as usual to remedy the fact that the premises were allegedly being used principally as a bar, rather than as a restaurant. Instead, the steps under the Enforcement Notice required the respondent to cease selling alcohol other than with a meal, even though, as has been illustrated, this is not necessary for the respondent to comply with Condition 2(b).

15. When it came to the Summons, the error was repeated, since it provided that the respondent was being prosecuted for its failure to take steps (namely the selling of alcohol without a meal) which were required by the Enforcement Notice (even though those steps were not required to remedy the alleged breach of planning).

16. In light of the foregoing, it seems clear to this Court that the respondent is being prosecuted for failing to comply with the requirement of Dublin City Council to only sell alcohol with a meal, on the mistaken belief that satisfying this requirement is necessary to comply with its planning condition.

17. Since it is not, in fact, necessary for the respondent to abide by this requirement for the respondent to comply with Condition 2(b) of its planning permission, it follows that the Enforcement Notice is flawed and any prosecution and any Summons for the failure of the respondent to comply with that Enforcement Notice is also flawed.

Conclusion

18. The core of this case is that someone cannot be prosecuted for failing to take certain specified steps, if those steps are not necessary to remedy the alleged breach of planning. In this case, the taking of the steps of only selling alcohol with food is likely to lead to a remedy of the alleged breach, but crucially those steps are not necessary to remedy that alleged breach, since selling alcohol without food to some customers does not *per se* mean that the bar area has ceased to be used as ancillary to a restaurant.

19. A more clear-cut example will illustrate the principle at issue for members of the public who are alleged to have breached planning. If an individual's building fails to comply with planning because he has velux windows at the front of his house, rather than the back, but the Enforcement Notice requires him to move his gate back from the public road, which he fails to do, because he knows that his failure to do so is not a breach of planning and he knows that it is not necessary to remedy his alleged breach of planning, he cannot and should not be prosecuted for his failure to move his gate, since it is not a step which it is necessary for him to remedy the alleged breach, nor indeed is it evidence of the alleged breach. So it is, in the respondent's case, although the distinction between the steps and the breach is not as clear-cut as the velux windows and gate example. However, just as it is not necessary in that example to remedy the alleged breach of planning by moving the gate, so too it is not necessary in the respondent's case to remedy the alleged breach of planning by refusing to sell alcohol without a meal.

20. Finally, while this Court has concentrated on the flawed nature of the Enforcement Notice and the Summons, it is also true to say that the evidence which is being relied upon by Dublin City Council, namely the failure of the respondent to only sell alcohol with a meal (as well as some very cursory evidence regarding observing some people drinking, rather than eating), is not sufficient evidence of a breach of Condition 2(b), and so for this reason also, there is no basis for the case proceeding and a decision to acquit must be given.