

LAMBERT v LEWIS

1982 No. 1007 M.C.A.

DOCUMENTS COLLECTION
THE HIGH COURT



IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACTS 1963 AND 1976

AND

IN THE MATTER OF AN APPLICATION OF CHRISTINA LAMBERT PURSUANT TO SECTION 27 OF THE 1976 ACT

BETWEEN:-

CHRISTINA LAMBERT

Applicant



-and-

PATRICK LEWIS AND JOSEPH KIELY

Respondents

Judgment of Gannon J. delivered the 24th day of November 1982.

This application for an order pursuant to Section 27 of the Local Government (Planning and Development) Act 1976 restraining the alleged unauthorised use of premises at the rear of the Applicant's residence in Dun Laoghaire raises for determination questions arising from the extension by regulations made by ministerial order of the statutory exemptions prescribed by the Oireachtas. Neither the authority to extend legislation by action of the executive in the form of ministerial order nor the validity

of the order or regulations is questioned. The application before the court requires no more than an interpretation of the exemption regulations in Statutory Instrument number 65 of 1977 as applied to the circumstances pertaining to the parties to this application.

Mrs. Lambert, the Applicant, lives in the house at the eastern end of a terrace of private dwellings on the southside of Oliver Plunkett Road, Dun Laoghaire. Mr. Kiely, the second Respondent, is the owner of the shop and residence at the west end of a terrace of shops with residences on the southside of Oliver Plunkett Road. Between the two there is a narrow entrance to an open yard which is not a public place but is used only by persons having access to buildings in the nature of sheds to the rear of the terrace of shops. Mr. Lewis, the first Respondent, is the occupier under a weekly tenancy from Mr. Kiely of sheds directly behind the residences of Mrs. Lambert and Mr. Kiely which I will refer to as "the subject premises." Mr. Lewis is by occupation a carpenter living at Ashlawn Park, Ballybrack and he uses the subject premises as a workshop for assembling furniture, joinery, and the general business of woodworking as a self-employed carpenter. The tools and equipment he uses in the subject premises consist of a "Mini-Universal"

woodworking machine located on a small workbench and contains a ten inch saw, a planer, and a spindle moulder. Under his tenancy agreement he has been furnished with that workbench and machine and also with a flash door, a Normac lathe, a set of turning tools, grinding stones, callipers, cramps, G clamps and an electric iron. He also uses his own portable Black and Decker drill and a portable router. His tenancy agreement dated the 26th of July 1978 provides for a term of fifty two weeks from the 7th of July 1978 and thereafter from week to week and describes the property let as:-

"workshop at rear and garage situate at 129 Oliver Plunkett
Road Dun Laoghaire County Dublin."

The agreement contains the following covenant:-

"(j) to use the premises as a woodworking workshop and for no other purpose whatsoever and not to do or allow to be done any act or thing which shall be or be likely to become a nuisance, danger or annoyance to the landlord or to any adjoining occupier and in particular to fit effective suppressors to all television, radio and other electrical equipment, and not to permit any music or musical instrument or wireless or television

receiving set to be operated after 11.30p.m. or before 8.30a.m. and not to allow any sale or auction to be held in the premises."

Mrs. Lambert complains that the use by Mr. Lewis of the subject premises is and has been a cause of nuisance to her by noise and fumes and dust. She has discovered that there is no permission under The Local Government (Planning and Development) Acts for the use of the subject premises and that two applications on behalf of Mr. Lewis to the Planning Authority have been refused. The application number 11. 469/81 dated 17th July 1981 for:-

"retention of use as joinery workshops the garage and outhouse at the rear of 129 Oliver Plunkett Road Monkstown Farm Dun Laoghaire County Dublin"

was refused for the following reasons namely:-

"the use of the subject premises as a joinery workshop is contrary to the proper planning and development of the area as it is located in an area which is zoned in the development plan for primarily residential use. The proposed development would seriously injure the amenities of the area."

An appeal from such refusal was made out of time and on that ground

was rejected by Bord Pleanala. The second application number 12. 053/82 dated 5th of April 1982 was for:-

"retention of use of joinery workshops two houses at rear of
129 Oliver Plunkett Road Monkstown County Dublin."

was refused by the Planning Authority for the following reasons:-

"the subject development is contrary to the proper planning
and development of the area as it is located in an area
which is zoned primarily residential in the development
plan."

Mr. Lewis says that this refusal is under appeal with Bord Pleanala.

Notwithstanding these applications it is contended by Mr.
Sweeney in the course of clear and concise submissions on behalf of
Mr. Lewis that no permission is in fact required as the user of the
subject premises is an exempted development in accordance with the
definition thereof in the 1963 Act as extended by the regulations
made in Statutory Instrument 65 of 1977 pursuant to sections 4(2)
and 10 of the Local Government (Planning and Development) Act 1963.
This contention requires an investigation of the history of previous
use of the subject premises prior to the commencement of the use
thereof by Mr. Lewis in 1978.

That history is given by Mr. Kiely who says that the subject premises was used between 1954 and 1959 by a carpenter named Christopher O'Shea for woodworking. Between 1959 and 1969 Joseph Cassoni who had a fish and chip shop at 135 Oliver Plunkett Road, used the subject premises as a store for potatoes which he sliced by machine in the premises. According to Mr. Kiely his father, who was a butcher, used one portion of the subject premises for the storage and cutting of beef carcasses and Mr. Cassoni used the smaller portion described as the garage for the storage of provisions, in the period from 1969 to 1971. By an agreement dated the 12th of February 1971 Michael Reynolds took a letting for a four week period and thereafter for successive four week periods from Mr. Kiely of the premises described as "garage at rear of 129 Oliver Plunkett Road Dun Laoghaire County Dublin" subject to a covenant on the tenant's part in the following terms:-

"(j) to use the premises as a store only for his own use and not for the purpose of any business and for no other purpose whatsoever and not to do or allow to be done any act or thing which shall be or be likely to become a nuisance, danger or annoyance to the landlord

or to any adjoining occupier and in particular to fit effective suppressors to all television, radio and other electrical equipment and not to reside therein or permit the premises to be used as a dwelling and not to allow any sale or auction to be held in the premises."

By an agreement dated the 11th of August 1971, Patrick McCallig of 136 Oliver Plunkett Road, Dun Laoghaire took a letting for a four week period and thereafter for successive four week periods from Mr. Kiely of the premises described as "garage at rear of 129 Oliver Plunkett Road Dun Laoghaire County Dublin" subject to a covenant on the tenant's part as follows, namely:-

"(j) to use the premises as a store or garage only for his own use and not for the purpose of any business and for no other purpose whatsoever and not to do or allow to be done any act or thing which shall be or be likely to become a nuisance danger or annoyance to the landlord or to any adjoining occupier and in particular to fit effective suppressors to all television, radio and other electrical equipment and not to reside therein or permit the premises to be used as a dwelling and not to allow any sale or auction to

be held in the premises."

By an agreement dated the 6th of May 1976, Thomas Coffey took a letting for a period of twelve calendar months from the 1st of April 1976 and thereafter from month to month of the premises described as "store at rear of 129 Oliver Plunkett Road Dun Laoghaire County Dublin" subject to a covenant on the tenant's part in the following terms:-

"(j) to use the premises as a workshop for making furniture and pictures and as a studio only for his own use and for no other purpose whatsoever and not to do or allow to be done any act or thing which shall be or be likely to become a nuisance danger or annoyance to the landlord or to any adjoining occupier and in particular to fit effective suppressors to all television, radio and other electrical equipment and not to permit any music or musical instrument or wireless or television receiving set to be operated after 11.30p.m. or before 8.30a.m. and not to allow any sale or auction to be held in the premises and not to allow same to be used as a dwelling."

By an agreement dated the 27th of June 1977 and expressed to be for the temporary convenience of the landlord and the tenant "until tenant

obtains more permanent accommodation," Michael Kenna took a letting for a term of twelve calendar months from the 1st of May 1977 and thereafter from month to month from Mr. Kiely of the premises described as "shed at rear of 129 Oliver Plunkett Road Dun Laoghaire County Dublin" subject to a covenant on the tenant's part in the following terms:-

"(j) to use the premises as a workshop only for his own use and for no other purpose whatsoever and not to do or allow to be done any act or thing which shall be or be likely to become a nuisance danger or annoyance to the landlord or to any adjoining occupier and in particular to fit effective suppressors to all television, radio and other electrical equipment and not to permit any music or musical instrument to be operated after 11.30p.m. or before 8.30a.m. and not to allow any sale or auction to be held in the premises."

Until the letting to Mr. Lewis by the agreement dated the 26th of July 1978 no machinery was included in any of the agreements and the letting of the shed as a workshop in 1977 was for temporary convenience.

On behalf of Mr. Lewis, his Counsel, Mr. Sweeney submits that

his client is engaged in a user which falls within the class of light industrial use and that the subject premises has a history of such class of user prior to the 1st of October 1964 being the appointed day under The Local Government (Planning and Development) Act 1963 and alternatively prior to the coming into operating on the 15th of March 1977 of the regulations in Statutory Instrument 65 of 1977. For the purpose of resolving the issues in dispute on this application I find the following facts as proved, namely:-

- (a) that since July 1978, Mr. Lewis has been using the subject premises for the purpose of carrying on therein an industrial process;
- (b) that at no time prior to the 15th of March 1977 was the subject premises used as "light industrial building";
- (c) the use to which the subject premises is being put by Mr. Lewis is a material change of use relative to the use to which the subject premises had been put prior to the 1st of October 1964 and prior to the 15th of March 1977.

Because there is no existing permission granted under the Planning Acts to use the subject premises other than as an amenity contiguous or adjacent to the curtilage of a private residence in an

area zoned for primarily residential use and because the occupier Mr. Lewis has made applications for permissions for retention of use the onus lies on him to establish the facts from which the court could reasonably infer that there has been no such material change of user. This he has failed to do.

The use to which Mr. Lewis puts the subject premises is a use in the course of trade or business of a nature which comes within the definition of "industrial process" in regulation 9 of part III of Statutory Instrument 65 of 1977. The building in which he carries on the "industrial process" is not being used as an amenity of or for any purpose incidental to the enjoyment of any private dwelling house or residence as such to which it is contiguous or adjacent. For the purpose of the definition of "light industrial building" in the same regulation 9 of part III of the Statutory Instrument 65 of 1977 the subject premises could be so described only if it be established that the process carried on therein could be carried on without detriment to the amenity of the area. On this there is a conflict of evidence which could not be resolved satisfactorily from evidence on Affidavit, but there is strong prima facie evidence that there is detriment to the amenity of at least one local resident who does not have a shop or

business in the area. The evidence of the use to which the subject premises was put under the May 1976 letting is that it was used for approximately one year for "making furniture and fixtures and stone sculpting." Whether machinery, if any, was then used or not or whether it involved any detriment to the amenities of neighbouring residents is not indicated. There is no evidence to show that such use was not an "unauthorised use" as defined in section 2 of The Local Government (Planning and Development) Act 1963. In the absence of supportive evidence on such aspects it must be assumed the user of the premises at least did not involve breach of any of the tenant's covenants in the letting agreements exhibited by Mr. Kiely the landlord in his affidavit. In my view there is not sufficient evidence to support the submission that the subject premises were, prior to 15th March 1977, lawfully being used as light industrial buildings in which an industrial process was being lawfully carried on by an industrial undertaker in the sense in which these expressions are defined in the regulations of Statutory Instrument 65 of 1977. Accordingly I accept the submission of Mr. Meenan for the Applicant that the use to which the subject premises is being put by Mr. Lewis is a material change in the use of the structures and as such a development within the definition of

that term in section 3 of the 1963 Act for which, unless exempted, planning permission is required.

For Mr. Lewis, Mr. Sweeney submits that the development is an exempted development under part III of the regulations in Statutory Instrument 65 of 1977, by reference to article 10 and Class 11 in part I of the third schedule therein. Class 11 prescribes only four types of development consisting of change of use which may be exempted as provided for in article 10 and of these only (a) and (b) could be pertinent. Mr. Sweeney seeks to rely on paragraph (a) which reads as follows:-

"development consisting of a change of use:-

(a) from use as a general or special industrial building to use as a light industrial building."

He submits that this provision should be construed to include a change of use of a light industrial building from the carrying on therein of one type of industrial process to some other type of industrial process without involving the change of use of the building so as to make it a general or special industrial building. Apart from the fact that such construction does not clearly fall within the wording of paragraph (a) of Class 11 of part I of the schedule it would be inconsistent

with the other provisions which involve references to part IV of the schedule. However the most important factor is that the use from which a change is made to qualify as an exempted development under article 10 of the regulations in Statutory Instrument 65 of 1977 must not be an "unauthorised use" as defined in section 2 of the 1963 Act. The 1977 regulations relate to structures and use of structures or land as governed by the 1963 Act prior to the coming into force of the 1977 regulations. The buildings which comprise the subject premises are buildings which, according to the affidavit of David Semple, the Applicant's architect appeared to have been "originally built, designed and utilised as garages for the houses backing on to the said yard." From the plan exhibited to which Mr. Semple refers the buildings appear to be within the curtilage of the dwelling houses and intended for purposes incidental to the enjoyment of the dwelling houses as such. In my view any change of use from use for such purposes is an unauthorised use unless coming within the provisions for exempted development in either the 1963 Act or the regulations of Statutory Instrument 65 of 1977. The onus of establishing exemption falls on the Respondents. In my view they have failed to show that the subject premises are not being put to an unauthorised use. The

Applicant therefore is entitled to the relief claimed.

S.G. 19/11/82