DUBLIN CC v TALLAGHT

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O'Higgins C.J.
Hederman J.
McCarthy J.

THE SUPREME COURT

282/1981

IN THE MATTER OF SECTION 27 OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1976

AND

IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF THE COUNTY OF DUBLIN

BETWEEN:

THE COUNTY COUNCIL OF THE COUNTY OF DUBLIN

Applicant

AND

TALLAGHT BLOCK COMPANY LIMITED

Respondents

JUDGMENT delivered the 17th day of May 1983 by

HEDERMAN J. New dis

This is an appeal from an Order of the High Court of the 14th November 1981 pursuant to Section 27 of the Local Government (Planning and Development) Act, 1976, restraining the appellants, their servants and agents (i) from carrying out any unauthorised development on lands occupied by them at Firhouse Road, Tallaght

in the County of Dublin, (ii) restraining them from carrying out any unauthorised use of the said lands and (iii) ordering them, their servants or agents forthwith to remove from the said lands the materials, machinery and structures specified in the Order.

The evidence comprised an affidavit of Clair Baxter on behalf of the respondents and an affidavit of Patrick MacSweeney on behalf of the appellants. The trial Judge permitted the appellants to adduce such oral evidence in the High Court as they thought fit and heard the evidence of Francis G. Galvin, Managing Director of the appellant company and Robert Farrer the appellants' accountant. The appeal relates to a site located in the Dodder Valley in an area designated by the Planning Authority as one of high amenity.

The facts as found by Costello J. can be summarised as follows:-

By lease dated 24th August 1974 lands at Firhouse Road, Tallaght County Dublin were demised to a director of the appellant company. These lands were formerly occupied by Firhouse Concrete Company Limited a company manufacturing concrete blocks from the middle of 1964 until it ceased to carry

on business after it went into liquidation in January 1965. The lands in question covered an area of over 8,000 square yards.

By a further lease of 24th August 1974, lands adjoining the above lands were demised to the same director and these latter lands covered an area of in excess of 3,170 square yards.

The appellant company had been allowed to occupy the lands in 1973 prior to the execution of these leases.

By a lease dated the 27th March 1974 further adjoining lands comprising an area in excess of 2,810 square yards were demised to the same director. Finally by lease dated 13th September 1976, still further adjoining lands comprising an area in excess of 2,810 square yards were demised to the same director of the appellant company.

From approximately 1954 to 1960 a company known as Dublin Concrete Blocks Limited manufactured concrete blocks on portion of the above mentioned lands, but from 1965 until 1973 no manufacturing of concrete blocks or any similar activity had been carried out on the lands used by the appellants for the manufacturing of concrete blocks.

When the appellant company commenced developing their business in 1973, there were two concrete slabs on the lands

comprising a total of 2,460 square yards.

In 1973 the appellants laid a concrete slab measuring approximately 8,500 square yards on the lands. In addition concrete fencing consisting of 9 foot concrete posts was erected around both areas. A large concrete mixing plant was installed and by October 1973 when the premises were visited by a Planning Inspector of the respondents a cement silo was in the process of being erected.

On the 26th October 1973 the respondents wrote to the appellants pointing out that no Planning Permission had been granted for the development, that the development constituted a breach of the 1963 Planning Act, asking that the development should cease and that all plant, equipment and machinery be removed from the site. To this letter the appellants replied on the 30th October 1973, saying the letter came as a complete shock "since a block yard has existed on the site for many years", and again on the 14th November 1973 the appellants' engineer, Mr. MacSweeney wrote pointing out that "The concrete block-making plant was established here early in 1964 and was

operational from 25th June 1964 onwards i.e. prior to and subsequent to the 1st October 1964", and in addition made the case that the appellants' plant was "exempted development".

The 1963 Act came into operation on October 1st 1964, the appointed day for the whole State, and at this stage of the judgment I should say this Court is bound by the findings of Costello J. that no manufacturing of concrete blocks had been carried out on any of the appellants' lands from 1965 until 1973. This contention by the appellants in the letter of 14th November was not accepted by the respondents and on the 4th June 1974 they served an Enforcement Notice on the appellants and on the Ground Landlord pursuant to Section 31 of the 1963 Act. The Notice was not complied with and no proceedings were issued by the respondents within the six months period. The trial Judge held that notwithstanding the failure of the respondents to proceed further on foot of the said Notice the appellants were not led to believe that their contention had been accepted by the respondents.

By the 22nd April 1977 a further concrete slab measuring 230 ft. by 110 ft. had been laid, a new concrete post and wire fencing measuring 6 ft. 6 inches had been erected around a large

area on the appellants' site, concrete blocks were being stored on this concrete slab. In May of 1977 the respondents wrote to the appellants pointing out that the new development was "unauthorised development and was an extension of the unauthorised development which had been carried out on the site". On the 6th May 1977 the appellants replied and stated that their architects would be in touch with the respondents. On the 13th July 1977 the respondents again wrote to the appellants repeating their complaints and warned that unless the site was restored to its original use by the 18th August 1977, the respondents would avail of the new powers granted by the Local Government (Planning and Development) Act, 1976. This letter was acknowledged on the 14th July 1977 and by a further letter of 18th July 1977 from the appellants' architects a meeting was sought to resolve the problem.

On the 3rd August 1977 the appellants' architect met officials on behalf of the respondents. At this meeting the architect accepted that the development complained of in the letter of May 1977 from the respondents was an unauthorised development and also gave an undertaking, later confirmed in writing, that the appellants would apply to retain the development. This they in due

course did.

The appellants were refused retention by the Planning Authority on 21st October 1977 and on appeal the refusal was confirmed by An Bord Pleanala on the 14th June 1978. Notwithstanding this decision, the appellants failed to remove this unauthorised development and contended that no unauthorised development had occurred. On the 7th December 1977 the respondents again wrote to the appellants warning that an application would be made for an Order pursuant to Section 27 of the 1976 Act prohibiting the continuance of the unauthorised use of the land.

A planning inspector on behalf of the respondents visited the site on the 14th April 1978 and found a new concrete slab was being laid. It was approximately 3,720 square yards in area. A cement silo was lying on the slab and a retaining reinforced concrete wall 34 ft. long by 11 ft. high by 1½ ft. thick had been sought for the laying of the slab or the construction of the wall. A director of the company, Mr. Galvin, informed the Inspector that the new slab was replacing an old slab and that it was intended to erect a cement silo on the new slab and to use it for block making. He also informed the Inspector it was

the intention to extend the slab still further to meet the retaining wall and to place a bin in that area to hold the sand and aggregates used in the manufacture of blocks. The area west of this new slab had been cleared of top soil and Mr. Galvin informed the Inspector that a further slab would be laid on the cleared area for the stacking of concrete blocks when manufactured. Mr. Galvin also contended that the work being carried out was 'replacement'.

On the 11th May 1978 the Inspector again visited the appellants' site, and saw that the concrete slab had been increased considerably and the retaining wall had been heightened. In addition two brick compounds were under construction. No permission had been sought or granted for this further development. On the 6th July 1978 the respondents wrote to the appellants asking that the stacking area and fencing which had been the subject of the appeal, be removed.

On the 14th July 1978 the engineer for the appellants Mr. MacSweeney (who had been re-engaged in March of that year after a two year period) acknowledged receipt of the letter and said

"that as it has now transpired the full facts in relation to the above matter were not put before the County Council and An Bord Pleanala", and indicated he expected to be in a position to deal with the matter in August 1978. No further correspondence was received by the respondents from Mr. MacSweeney.

On the 20th March 1979 when the Inspector again visited the site a cement silo and batching/mixing plant had been erected on the enlarged concrete slab. Mr. Galvin told the Inspector that this latest development was "exempted development". On that, and subsequent visits to the site, the Inspector for the respondents saw the following new items on the site:- two separate units had been erected on the south/east corner of the slab, at the southern end of the slab was a large circular storage tank on two supporting walls and two bins which contained sand and gravel. A conveyor belt led from under the holding bins to the silo and batching/mixing plant. On completion the two separate units already referred to were used as a workshop and canteen. The workshop had been re-constructed and measured 24 ft. wide by 40 ft. long by 12½ ft. high, and the canteen measured 11 ft. wide by 20 ft. long by 7 ft. 4 inches high. Also erected was a "Portakabin"

measuring 28 ft. long by 10 ft. wide by 8 ft. 8 inches high and consisted of two offices and a reception area. On the 29th January 1980 the compound contained precast lintels, decorative paving slabs, bricks, etc. and two fuel tanks had been placed on top of the flat roofed building on the eastern boundary. Costello J. found that the storage of the major work carried on and manufactured by the appellants "is quite clearly visible from the public road adjacent to the curtilage of the appellants 'industrial building'"

Section 27 of the Local Government (Planning and Development) Act, 1976 provides that where:-

(a) A development of land being development for which a permission is required under Part IV of the principal Act, or being carried on without such a permission, or

(b) An unauthorised use is being made of the land, the High Court may prohibit the continuance of the development or unauthorised use.

"Unauthorised use" in Section 27 of the 1976 Act is to be read in conjunction with the definition of this phrase in Section 2 of the 1963 Act which it defined as meaning, in relation to land, use commenced on or after the appointed day, the change in use being a

material change and being development other than development the subject of a permission granted under Section 26 of this Act or "exempted development".

The appellants' case is that on the appointed day (i.e. 1st October 1964) portion of the site was being used as a concrete block-making plant and they say that what they have been doing on the site does not constitute a material change in the use of the site; that any development is "exempted development". For this latter contention they rely on the exemptions contained in Class 16 of Part I of the Exempted Development Regulations 1967 (S.I. No. 176 of 1967) for all development up to the years 1978 to 1980 and on the exemptions contained in Class 17 of Part I of the third Schedule of S.I. No. 65 of 1977 (Local Government (Planning and Development) Regulations 1972) for the years 1978 to 1980. Further they contend that Section 5 of the 1963 Act provides for the mandatory reference of two questions to An Bord Pleanala, namely questions arising as to what is or is not (a) development or (b) "exempted development", the matter not having been referred to the Board under the provisions of Section 5, the Court on a Section 27 application cannot decide what is or is not "exempted development".

The learned trial Judge having found as a fact that no block making manufacturing or allied business had been carried out on any of the site from 1965 to 1973; held that the use of the lands on the site since 1973 has been an unauthorised use following the principles laid down in Hartley v. Minister for Housing and Local Government 1970 1 Q.B. page 413. The Head Note in the Report correctly sets out the Court's conclusions as follows:-

> "Where a previous use of land had been not merely suspended for a temporary and determined period, but had ceased for a considerable time, with no evidenced intention of resuming it at any particular time, the Tribunal of Fact was entitled to find that the previous use had been abandoned, so that when it was resumed the resumption constituted a material change of use".

I would respectfully adopt this statement as being appropriate for application to the facts as found by the trial Judge in this case. It is quite clear that on the facts as found by the High Court Judge there was a material change of use on the site of the appellants for which no Planning Permission had been sought or granted. The trial Judge further held that the intensification of use can be a material change applying the principle laid down

in Brooks and Burton Limited v. Environment Secretary 1977 1 W.L.R. page 1295. On the facts in this case he held that from 1973 to 1980 there was such an intensification of use as to amount to a material change of use.

The development work carried out on the site was for the purpose of commencing a business. At the time when the works were being carried out there was no "industrial process" being carried out on the site. Class 16 of the 1967 Regulations exempts development on lands already occupied and used by an industrial undertaker for an industrial process. In my view the trial Judge was correct in holding that it does not embrace works carried out for the purpose of setting up an industrial process. Further the trial Judge rightly held on the evidence that the development materially altered the external appearance of the premises on the site. He further held that the extending of the concrete area in 1977 and the erection of a concrete post and wire fence was an unauthorised structure within the meaning of Article 3(5)(vii) of the 1967 Regulations and was not an exempted development. The Judge also held that the works carried out between

1978 and 1980 comprised extensions to unauthorised structures or structure the usè of which was an unauthorised use, and so by virtue of the provisions of Article 11(1)(a)(viii) of the 1977 Regulations the development was not "exempted", and in my view he was fully justified in so holding. The appellants claim under Class 17 in Part I of the Schedule of the 1967 Regulations and to Class 18 in Part I of the third Schedule to the 1977 Regulations only exempts 'storage' which is within the curtilage of an industrial building of products "so as not be visible from any public road contiguous or adjacent to the curtilage". The trial Judge held that the storage of most of the appellants' products was quite clearly visible from the public road, consequently the appellants cannot claim the limited protection of this class of exemption as "storage". I further agree with the findings of Costello J. that "if an occupier of land carries out development ..... applies under Section 28 of the 1963 Act for permission to retain the unauthorised structure and is refused, then he cannot be heard to argue in proceedings instituted against him under Section 27 of the 1976 Act that permission for the development was not required".

With regard to the contention of the appellants relating to the application of Section 5 of the 1963 Act, this Court has held in the case of Cork Corporation v. Christopher O'Connell 1982 I.L.R.M. p. 525 per Henchy J. -

> "that section 27 of the 1976 Act amounts to a summary and self-contained procedure which should not be allowed to be frustrated or protracted by the utilization of the collateral procedures allowed by Section 5 of the 1963 Act".

And per Griffin J. -

> "The jurisdiction of the High Court pursuant to Section 27 is not ousted by the institution of proceedings by Section 5".

In this case the trial Judge held that the Court had a wide discretion under Section 27, and could if it thought fit, adjourn the Section 27 application so that an application under Section 5 could be brought or alternatively itself decide the issue. In his discretion he did not adjourn the Section 27 application but decided the issue himself in the interest of its expeditious determination. In my opinion this was a course that he was fully justified in adopting on the facts of this case and fully accords with the decision of this Court in Cork Corporation v. O'Connell.

As in this case, where a planning authority gives due notice of its intention to proceed against an occupier of lands for alleged breaches of the Planning Acts, the onus is on the occupier to avail with all reasonable speed of the provisions of Section 5 of the 1963 Act if he claims that the development complained of is "exempted development".

I am quite satisfied that on the facts accepted by the learned trial Judge the respondents have established that the appellants have carried out development for which a permission under Part IV of the 1963 Act was required and that an unauthorised use was and is being made of the land and that the respondents are accordingly entitled to the Orders made by the learned trial Judge.

I would accordingly dismiss the appeal.