

IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1963 to 1982

AND IN THE MATTER OF THE PREMISES OF 70 BEECHWOOD AVENUE, DUBLIN

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

BETWEEN:

THE RIGHT HONOURABLE THE LORD MAYOR  
AND ALDERMEN AND BURGESSES OF DUBLIN

Applicants

and

GERARD SULLIVAN

Respondent

Judgment delivered on the 21st day of December 1984 by Finlay P.

This is an application pursuant to Section 27 of the Local Government (Planning and Development) Act, 1976 (the 1976 Act).

- (a) for an Order prohibiting the continuance by the Respondent of an unauthorised use of the premises at 70 Beechwood Avenue as a multiple dwelling or in any other manner other than a single dwelling unit,
- and presumably as an alternative remedy,
- (b) an Order pursuant to the same Section prohibiting the use by the Respondent of the premises as a structure comprising 5 dwellings and restraining intensification of the use of the premises beyond such extent of use of same as may be shown by the Respondent to have been regularly in operation on or before the 1st October 1964.

The matter was heard before me on affidavit and on the Exhibits referred to in the affidavits and two main issues arose. With regard to the claim for an injunction restraining the use of the premises in an

manner other than as a single dwelling unit, it was contended on behalf of the Respondent that the Applicants had failed to discharge the onus of proving that an admitted change of user from a single dwelling unit to a multiple dwelling unit had occurred after the material date under the Local Government (Planning and Development) Act, 1963 namely the 1st October 1964. On this issue, it was contended on behalf of the Applicants that the onus lay on the Respondents of establishing that any change of user had occurred on or before the 1st of October 1964 and that they had failed so to establish.

The issues thus raised are, in my view, two separate issues, one being an issue of law consisting of the interpretation of the Acts of 1963 and 1976 and the second being an issue of fact having regard to that interpretation arising on the evidence before me. I will first deal with the issue of law.

#### Legal Issue of Onus of Proof

In support of his contention on behalf of the Applicants that the onus of establishing the date on which these premises were first used or dates on which they were used as a multiple dwelling rested on the Respondent, Mr. Connolly relied firstly on the Queen's Bench decision of Nelsovil Ltd. and Others .v. The Minister for Housing and Local Government reported at 1962 1 W.L.R. 404. That case, however, dealt with a procedure different from the procedure with which I am here concerned, namely, being an appeal by a citizen to the Minister from an enforcement order served on him based on grounds that he was entitled to exemption. Somewhat obviously the format of that procedure led to a conclusion that the onus of establishing the grounds of exemption rested upon the appellant.

Mr. Connolly, however, also referred me to an unreported decision of Gannon J. delivered on the 24th November 1982 in an application under Section 27 of the 1976 Act between Lambert, Applicant and Lewis and Kiely.

Respondents. That was a case in which the Respondents sought to justify a change of user which had undoubtedly taken place in the premises subsequent to the 1st of October 1964 on the grounds that it came within the Regulations as a statutory exemption. The decision of my learned colleague with which I would agree was that in those circumstances at least the Respondents seeking to justify on the grounds of a statutory exemption carried the onus of establishing that he came within the Regulations concerned.

In this case, however, the unauthorised development relied upon by the Applicants is an unauthorised change of use and the issue which arises is as to whether it is a prohibited unauthorised change of use not as to whether being a prohibited unauthorised change of use it is the subject matter of a statutory exemption.

The first issue of law which arises and which is necessary to decide as a preliminary issue is, that I am satisfied, that since the remedy now being sought by the Applicants is a permanent injunction under Section 27 of the Act of 1976 which is a final remedy provided by that Section though sought as a matter of procedure by Notice of Motion, there are no grounds for admitting in support of the case made either by the Applicant or the Respondent of hearsay evidence or evidence of information and belief such as would be appropriate in the exercise of a discretion as to whether or not to grant an interlocutory application.

Secondly, I am satisfied, since the Applicants come seeking relief which would affect the ordinary property rights of the Defendant and which potentially could cause him loss that in the absence of some express provision to the contrary which does not exist either in Section 27 of the 1976 Act or otherwise in the planning code that the general position must be that it is upon the Applicants there rests the onus of proving the case

which they are making. Applying this principle to the facts of the instant case before me, it seems to me that the onus is on the Applicants to establish facts from which the Court can raise a probable inference that the premises were used at and immediately before the 1st October 1964 as a single dwelling and that that use was subsequent to the 1st October 1964 changed to a use as a multiple dwelling which still continues.

The evidence adduced on behalf of the Applicants was as follows:-

- Affidavit of Pascal J. Dunne, Planning Inspector, filed 27th July 1984,
- Affidavit of Kathleen Brennan, filed 27th July 1984,
- Affidavit of Eileen McGinley, filed 27th July 1984,
- Supplemental Affidavit of Pascal J. Dunne, filed on 19th October 1984,
- and the Documents exhibited in these Affidavits.

On behalf of the Respondent, the evidence tendered consisted of

- Affidavit of the Respondents sworn on 5th October 1984,
- Affidavit of Herbert Mulligan, Solicitor to the Respondent, sworn on 22nd October 1984, and the Exhibits therein referred to,
- And a Statutory Declaration of Philip Doyle, declared on 19th December 1973 and a further Statutory Declaration of Philip Doyle declared on 31st July 1975, both of which were amongst the Documents of Title which came into the possession of the Respondent on his purchase of the premises in 1977 and which were admitted in evidence before me without objection.

From these affidavits and documents certain agreed or uncontested facts can be clearly elucidated.

The premises consist of a two-storey semi-detached dwelling house and were purchased by one, Grace Doyle, in 1951. The said Grace Doyle who was the mother of Philip Doyle, the declarant in the two Statutory Declarations, died in the year 1973 and the premises would appear then to have been purchased by a firm known as Morgan & Co. Ltd. who sold them to the Respondent in these proceedings in the year 1977.

Neither of the affidavits of Pascal J. Dunne contains any direct evidence as to the user of these premises until the year 1974 when, in pursuance of his duties as a Planning Inspector, he inspected the premises and found them set into five separate flat units.

The Affidavit of Kathleen Brennan who has lived on the same road as these premises, namely Beechwood Avenue, Ranelagh, deposes to the fact that she has been living there since 1943 and she states that the premises were used as a private single dwelling unit up and until the same were purchased by Mrs. Doyle and that she took in a female lodger in the late 1960's after her husband died. She further states in her affidavit that at one time she approached Mrs. Doyle about letting a flat to a friend of her daughter's but she declined saying that her Solicitor would not allow her to have flats in the premises.

The Affidavit of Eileen McGinley deposes to the fact that she has lived in Beechwood Avenue since 1947, firstly in one house and then in another and that she was familiar with the premises being a private residence and that it was bought by a Mrs. Doyle and that from her taking occupation in or about 1967, she kept a lodger and only one in the house and there was not at that stage let into flats but was converted into flat units by an Oliver Morgan who purchased the premises from Mrs. Doyle. She further says that the entire house was occupied by the O'Loughlin family for a number of years in or about 1950 as a single family unit.

In his Statutory Declaration of the 19th December 1973, Philip Doyle states that his late mother purchased the premises in 1951 and continued to reside in them up to the date of her death in May 1973. He further states that in 1955 his late mother made a letting of the top flat in the premises to a Mr. Kenneth Edwards for a term of one year and three months at a weekly rent of £2.10s.0d. In his further Statutory Declaration of the 31st July 1975 Mr. Doyle states that at the date of the purchase of

the premises by his mother in March 1951 the same was occupied by several tenants and in the year 1961 one flat became vacant and that his mother then went to reside in the premises where she remained up to the date of her death on 24th May 1973. He states that he is aware from examination of the Documents of Title that the premises were let to various tenants from 1933 onwards.

In his affidavit, Mr. Herbert Mulligan exhibits two tenancy agreements. The first is dated the 6th April 1951 as made between Grace Doyle whose address is stated to be Whitebarn Road, Rathfarnham and a William Scott. It is a letting of the bottom flat at Number 70 Upper Beechwood Avenue, Ranelagh consisting of three rooms, a combined bathroom and toilet, kitchenette and also fuel cellar underneath the staircase leading to the premises together with the use in common of the front and back gardens with tenants or occupiers of the top flat on a weekly tenancy.

The second Agreement is dated 18th April 1955 and is an agreement between Grace Doyle whose address is given as Windsor Road, Rathmines and Kenneth Edwards and it is a letting of the top flat consisting of three rooms, a combined bathroom and toilet, kitchenette and also fuel house at the rear of the premises together with the use in common of the front and back gardens. Clause 2 of the Agreement provides that the tenant should be permitted to erect a clothes-line in the garden at the rear of the premises in such position as may be agreed upon between the tenant of the bottom flat and himself, the tenant of the bottom flat having a similar right to erect a clothes-line. This is a letting for a term of one year and three months.

I am satisfied that the terms of these Agreements are in total conflict with the affidavits of both Kathleen Brennan and Eileen McGinley and I am driven to the conclusion that both of these Deponents are not accurate in their recollection of the dates or times at which they believe this house

was continuously in the sole occupation of Grace Doyle containing only possibly a lodger. They are equally inconsistent with the recollection of Kathleen Brennan that Grace Doyle had been advised by her Solicitor against letting a flat in the premises.

In essence, the affidavits of Kathleen Brennan and Eileen McGinley are the only direct evidence as distinct from hearsay upon which the Applicants can rely to establish that the change from a single dwelling to a multiple dwelling which on all the evidence of the case has occurred at some time in these premises occurred after the 1st October 1964. In these circumstances and placing reliance also on the Declarations of Philip Doyle I am satisfied that the Applicants have not discharged the onus of establishing a change of user after the operative date in the Act.

There remains for consideration the second point arising in this case, which is, that even assuming that these premises were on and before the 1st October 1964 used as a multiple dwelling by being let in two separate flats that the present user of them in which they are five separate flats constitutes a change of user by reason of an intensification of the sub-division of the premises.

I am satisfied on the authorities that the question as to whether an intensification of user constitutes a change of user under the Planning Code depends on proof of an element of degree. In particular, I am satisfied that as a matter of common sense, intensification of user cannot merely be established by proving the existence of separate tenancies. The evidence in this case would indicate that the premises at present consist of five separate flat units. There is evidence that the house is occupied by a total of seven person who are described as students. Again there is evidence from Mr. Dunne as the Planning Inspector of complaints he has received in regard to the house which in my view, constitute hearsay

and which I must disregard in reaching a decision on this issue. The only direct evidence with regard to the consequence of the alteration from two flats which has clearly taken place into five separate flat units is contained in Paragraph 3 of the Affidavit of Kathleen Brennan which reads as follows:-

"I say that I am concerned that the said premises should have this intense increase in occupation as increases in the number of residents in the area generally lower the character of the neighbourhood which I have known for a considerable time and diminish the value of property in the area."

This statement of opinion or belief is in my view not a sufficient discharge by the Applicants of the onus of proof which is upon them of establishing that the conversion or alteration of these premises from a premises containing two separate flats which on the accommodation described in the letting agreements could well have contained a family of four people or even five people each into five separate flat units is such an intensification of user as would constitute a change of user within the meaning of the Planning Acts. I am therefore satisfied that this application for an order under Section 27 must be dismissed.

approved.  
J. A. Friday

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