Horne - Freeney

1982 / 60 MCA

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

BETWEEN:-

KATHLEEN HORNE

Applicant

-and-

MYLES FREENEY

Respondent

Judgment of Mr. Justice Murphy delivered the 7th July 1982.

This is an application for relief under Section 27 of the Local Government (Planning and Development) Act, 1976.

The Applicant, Kathleen Horne, resides at 97A Strand Road, Bray, Co. Wicklow. The Respondent, Myles Freeney, has for some time past carried on business as the proprietor of an Amusement Arcade under the style "Star Amusements" at his premises also situate on Strand Road aforesaid.

On the 6th day of October 1978 the Respondent lodged with the Bray Urban District Council an application for Planning Permission for the construction of new buildings to replace the then existing

Amusement Arcade. Three sets of drawings and an outline specification accompanied the application.

In proceedings entitled, "The High Court 1981, Number 2535P, In the Matter of the Local Government (Planning and Development) Act 1963 to 1976 and In the Matter of the Housing Act 1969, between, Myles Joseph Freeney, Plaintiff and Bray Urban District Council, Respondent" it was held that permission pursuant to the said Application was deemed to have been granted as of the 23rd September 1979.

In the present application the Applicant contends that the construction works at present being carried out by the Respondent to his premises are being carried out otherwise than in accordance with the permission aforesaid.

The Applicant contends that the Respondent has departed from the permission in the following respects:-

1. That the roof over the buildings is constructed of steel whereas the plans and specification on which the permission was based envisaged a concrete slab roof having a thickness of 10 inches.

2. That the ground floor of the building is so constructed that it contains 15 concrete pillars in line (making, as I

understand the evidence a total of 30 pillars) and that there are rooms constructed at the rear of the ground floor areas, whereas the layout envisaged by the authorised plans provided essentially for an open space comprising a pit for dodgem cars being 3 feet 9 inches in depth and measuring 66 feet in length and 42 feet in width.

3. The first floor does not have the toilet and other facilities provided for in the authorised plans and instead comprises an open area apparently intended for the use of dodgem cars. Indeed I infer that the Respondent has in essence decided to transpose the use intended for the ground floor to the first floor of the premises.

The Applicant drew attention to other works not yet completed in accordance with the plans lodged but I do not understand the Applicant to rely on such omissions at this stage.

As there was a clear conflict in the evidence adduced by Affidavit with regard to the nature of the roofing envisaged by the approved plans I afforded the parties the opportunity of calling oral evidence in relation to that aspect of the matter.

Having heard Mr. Michael T. Breen, the Architect who made an

Affidavit on behalf of the Applicant and Mr. Patrick Delaney, Planning Consultant who likewise swore an Affidavit in support of the Respondent's claim, I am satisfied that the documents lodged with the planning authority envisaged a roof having a thickness in the order of 3 inches and not 10 inches as Mr. Breen had believed. On the other hand it was likewise established that in carrying out the works the Respondents had substituted metal for concrete in the roof to the extent that the roof is constructed in fact of two steel sheets separated by an insulating material and having a total thickness of 3 inches instead of the reinforced concrete slab with a thickness of 3 inches as had been envisaged by the plans.

I should add that I am satisfied that the evidence given by Mr. Breen as to the thickenss of the roof as envisaged by the plans was given bona fide and that the error was in all the circumstances entirely understandable.

The issue remains whether having regard to the admitted departures from the documents lodged in support of the application it can be said that the development is being "carried out in conformity with permission granted." Prima facie this question must be answered in the negative.

The Respondent contends that all the variations from the plans constituted "the carrying out of the works to the maintenance, improvemen

or other alteration of any structure being works which affect only the interior of the structure" and as such constitute an exempted development by virtue of the provisions of Section 4 (1) (g) of the Local Government (Planning and Development) Act 1963. It is argued on behalf of the Respondent that it would be absurd to conclude that a developer was bound to adhere to plans in the first instance in the carrying out of development in those respects where he could at a later date make such changes as he thought fit without any permission being sought or obtained.

Whilst I see the force of that argument I take the view that if Planning Permission is indivisible: that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as no approval is given for the part as distinct from the whole.

Accordingly I propose to grant an injunction in the terms of paragraph 1 of the Notice of Motion prohibiting the carrying on of further development works.

The Respondent is, however, free to apply for liberty to retain the existing structure or for further permissions to authorise the

variations which have taken place. It may be that having regard to the nature of those variations and indeed the argument made on behalf of the Respondents that such permissions will be readily forthcoming. In that event the injunction now granted should be lifted and I will accordingly give liberty to the Respondent to apply to the Court in that event.