

R
THE REHABILITATION INSTITUTE

.V.

THE RIGHT HONOURABLE THE LORD MAYOR ALDERMAN AND
BURGESSES OF DUBLIN

Judgment of Mr. Justice Barron delivered the 14th day of
January, 1988

The premises No. 1 Northbrook Road were purchased by the Plaintiff Institute in the Spring of 1964. From the time of this purchase until the premises were sold in the year 1983 the premises were used in conjunction with No. 30 Leeson Park for the purposes of the Institute. These purposes included the assessment, training and placement of the handicapped. On the 1st of October 1964 being the relevant date for the purposes of the Local Government (Planning and Development) Act 1963 the use of the premises on the ground floor was as administrative offices for the raising of funds for the Institute together with a kitchen and canteen. On the first floor there was an administrative office and two other rooms which were used for secretarial training. The top floor contained the offices of the placement officers.

These particular uses did not continue in the same parts of the building during its occupation by the Plaintiff Institute. The secretarial training moved to the top floor, later to the ground floor and later again to other premises. The location of particular offices likewise moved from time to time. After the secretarial training was moved from the first floor it was taken over for the purpose of training the

handicapped in clock and watch repair. This continued until the premises were sold. During the entire period that the Plaintiff Institute owned these premises the main administrative offices of the Institute were centred in No. 30 Leeson Park and to some extent the two premises were used as if they were one entire block.

The premises were put up for sale in February 1983. The conditions of sale warranted that the premises had been used as offices prior to the operative date of the Local Government (Planning and Development) Act 1963 and contained an undertaking to satisfy the Planning Authority that such use was in accordance with the Planning Acts. The Planning Authority object that the first floor had been used as a workshop and training area and that accordingly use for offices would constitute a development for which permission would be required. Since the Plaintiff Institute contended to the contrary it was agreed to refer the issue to An Bord Pleanala for its determination. By an Order made on the 24th June 1985 An Bord Pleanala declared that use of the first floor of the premises as offices constituted a development which was not an exempted development.

These proceedings are brought by way of appeal from that Order. The Defendant takes a preliminary point that the proceedings ought to have been brought against An Bord Pleanala and that no cause of action has been disclosed against them. The reference to An Bord Pleanala was under the provisions of Section 5 (1) of the Local Government (Planning and Development) Act 1963. By virtue of the provisions of Section 14 of the Local Government (Planning and Development) Act 1976 such a reference is now brought to An Bord Pleanala.

By subsection (2) an appeal from any such decision lies to this Court. An Bord Pleanala is in no sense a party to the reference. Its sole function is to decide the matter or matters brought before it. Rules of Court might have provided that on any appeal An Bord Pleanala was to be made a party or was to receive notice of the proceedings. However, no such rules have been made. In the absence of such rules it seems to me that the appropriate parties to the appeal are the same parties as appeared on the reference before An Bord Pleanala. The essence of the present proceedings is a dispute between the parties to these proceedings as to the authorized use of the first floor of the premises No. 1 Northbrook Road, Dublin. In my view the proceedings are properly constituted.

It is common case that there has never been any planning permission in respect of the use of any part of these premises. The question accordingly is whether or not the disputed use is an unauthorized use within the meaning of that term as defined by Section 2 of the 1963 Act. An unauthorized use is 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." Before a use can therefore be an unauthorized use for the purposes of the Act it is essential to establish:

- (1) A use which commenced after the 1st October 1964 and
- (2) That such use was a material change of use from the use which preceded it.

It is essential therefore in the present instance to ascertain what, if any, changes of use there have been since

the 1st October 1964. Much of the evidence was directed to establishing a change of use of the first floor of the premises from use for the purpose of secretarial training to use for the purpose of a clock and watch repair workshop. This it was contended was a light industrial use and so a material change of use amounting to a development for which permission would have been required.

Since the sale the premises have been used as offices. It is this use which the Defendant contends is a development and in this it has been upheld by An Bord Pleanala. The Plaintiff's case is that, even if it can be established that the premises were used as a clock and watch repair workshop, use for office purposes was the use on the relevant date and so the present owners may revert to it. Reliance is placed upon the provisions of Section 31 (9) of the Local Government (Planning and Development) Act 1963:

" (9) Nothing in this Part of this Act shall be construed as requiring permission to be obtained thereunder for the use of any land for the purpose for which it could lawfully have been used under this Part of this Act if the development in respect of which an enforcement notice is served had not been carried out."

It is contended that this provision permits an owner when an enforcement notice has been served in respect of an unauthorized use to revert to the preceding use if that use was lawful. If such preceding use was not lawful, then the provision is of no assistance. In Young .v. The Secretary of State for the Environment 1983 2 All E.R. 1105 there had been a succession of uses of the premises. There had been a lawful use for food processing followed by an unlawful use as a

laundry. This use was subsequently changed to use for the purposes of the business of an insulating contractor. An enforcement notice was served in respect of this use. The owner of the premises contended in pursuance of a like provision to that contained in Section 31 (9) that he was entitled to revert to use of the premises for food processing. It was held that this could not be done since the provision only permitted reversion to the immediately preceding use and as this was unlawful the premises could not be used without obtaining the necessary planning permissions. Applying this principle to the supposed present circumstances it would mean that the present users could revert to use of the premises as a clock and watch repair shop, if that was a lawful use, but not to any earlier use. They could not revert therefore to use for secretarial training or, if the Plaintiff is correct in its contention that such use is equivalent to office use, to office use.

In my view this line of argument is immaterial. The entire premises must be considered as a whole since at no time did the Plaintiff Institute ever purport to treat any part of those premises as separate units. They used the premises to achieve the purposes of the Institute, which was the assessment, training and placement of the handicapped. In the main the use of the premises was for administration. Insofar as it was used to train the handicapped, it does not matter whether that training was in secretarial skills or watch and clock repairing skills. Substantially they were pupils who were being trained to take their place in the field of employment.

While different aspects of the Institute's affairs were

carried out in different parts of the building, there was no overall plan which required any one of these aspects to be carried out in any specific room or rooms. The Institute used the entire of the building in a manner which it found convenient. The fact that watch and clock repairs produced some revenue does not in my view alter the essential nature of the use of the premises as I have described it.

This overall use remained the same so long as the Plaintiff Institute occupied the premises. Since then the premises have been used solely for office purposes. Two questions emerge:

- (1) Is this a different use;
- (2) If it is, is it a material change of use.

There is unfortunately no definition of office use in the planning code. The appropriate dictionary definition of office is a place for the transaction of business, and also applied to the room in which the clerical work of an establishment is done. In this sense, the building was largely used as an office since it was used for the transaction of business which included a measure of clerical work.

In G. Percy Trentham .v. Gloscestershire Co. Co. 18P and C.R. 225, a farmer sold part of his lands together with the farmhouse and farm buildings to a firm of civil engineering contractors. When used as a farm, the farm buildings were used partially to house livestock and partially to house farm machinery. The purchasers used these latter buildings for the storage of building materials, plant and equipment. The planning authority claimed that this was a material change of use and required them to terminate it. The contractors contested the matter claiming that the relevant farm buildings

should be considered separately for planning purposes. They further contended that when so considered their use was no different from the use made of such buildings by the farmer from whom they had purchased them. It was held by the Court of Appeal that a use did not attach to the farm buildings as such, but that their use was merely ancillary to the use of the farm. It was further held that in considering whether there had been a material change of use, the unit to be considered was the area in which particular activity was carried on, including uses which were ordinarily incidental to or included in the activity. On the facts, it was held that there had been a material change of use. In Wipperman .v. Barking London Borough Council 17P and C.R. 225, there was a plot of land in respect of which over the relevant time there were three successive periods of different use. It was used first for the storage of fencing materials in the open, storage of building materials in huts and the parking of a caravan which was lived in. In the next period, the caravan was no longer on the land. In addition to the storage of fencing and building materials, the site was used for car breaking and the storage of car parts. In the final period, this latter use was discontinued, the site being used for the storage of fencing materials and vehicles both being used in the occupier's business.

The issue was whether the use in the final period was a material change of use from the use during the immediately preceding period. It was accepted that the relevant planning unit was the whole of the site. The case was an appeal from the Minister in which he found there was a material change of use. It was held by the Court of Appeal that this was a

conclusion which the Minister was entitled to reach on the Inspector's findings. The principles of law upon which the decision was based are to be found in the judgment of Widgery J. at pp. 229, 230. There he said:

"It seems clear to me that if nothing had occurred following the occupier's entry except the suspension of car breaking use, the storage use being maintained at its former intensity, no question of a material change of use could be said to have arisen. Merely to cease one of the component activities in a composite use of the land would not by itself, in my judgment, ever amount to a material change of use. Though what has happened here, according to the evidence, is not merely a cessation of the car breaking activity but the use of the land as a whole for storage, in other words, as the Minister has pointed out in his letter, one now has the entirety of the land used for one of the two component uses to which the land was formerly subjected.

In my judgment, as a matter of law, there can be a material change of use if one component is allowed to absorb the entire site to the exclusion of the other, but whether or not there is a material change of use is a matter of fact and degree. If the car breaking business has been so trifling as to be almost de minimis, I would have thought as a matter of fact and degree that for the area formerly used for car breaking to be taken over for storage could not amount to a material change of the use of the land as a whole. But

whether or not in the circumstances of the particular case there was a material change would essentially be a question of fact and degree."

In Sheppard .v. Buckinghamshire Co. Co. 18P and C.R. 422, residential premises were used by the United States Airforce as a signals unit. Reception and transmission of signals was carried on in the basement. The rest of the premises was used for office and administrative functions in connection with military purposes. In addition to offices, there was a lecture room, a conference room and several bedrooms used solely by Airforce personnel. When the Airforce occupation terminated, the owner of the premises sought a declaration that use of the premises for offices did not constitute development within the meaning of the Planning Acts. This declaration was granted. It was held that the primary use of the premises was for administrative purposes and that the other ancillary uses did not necessarily exclude the notion of office user as a whole. The premises were treated as being an administrative unit of some kind, and this administrative use was regarded as "use as an office for any purpose."

A number of principles emerge from these cases. First, where a use is ancillary to a main use, it is regarded as part of that use so that cesser of the ancillary use does not give rise to any question of change of use. Secondly, where there is more than one use, cesser of one of such uses may ultimately lead to a material change of use. Thirdly, whether or not it does lead to a material change of use is a question of fact.

The facts of the present case may be approached in one of two ways. If the training use is treated as being

ancillary to a general administrative use, then there was only one use of the premises. The question to be decided in those circumstances is whether pure office use is or is not a different use and, if it is, whether it constitutes a material change of use or is exempted development. If the training use is treated as a distinct use, then the substitution of office use for such use is a change of use. The only question would then be whether or not such a change of use is a material change of use.

The evidence adduced on behalf of the Defendant reflected the desire of the Defendant to keep this area of the city residential in accordance with its zoning on the town plan. There was however little evidence bearing upon the materiality of the change of use, if such there has been. Evidence was given that greater consideration would be given to the question of car-parking in relation to premises used for offices as opposed to premises used for educational purposes. But no evidence was given to indicate whether this consideration would have been material in considering the actual alleged change of use in the present case, i.e., the change of use from either general administrative purposes or educational purposes to office purposes. On balance it seems to me that the Defendant has been unable to show that the alleged change of use on the first floor amounts to a material change of use.

In my view however the question of material change of use does not arise. The premises had ceased to be residential and had acquired a general administrative use on the appointed day. This was "use as an office for any purpose". Accordingly, the present office use is not a different use to

that on the appointed day so that there has been no development. Alternatively, if the present use is to be regarded as a different use since the purpose for which the premises is used has changed, then such different use is still "use as an office for any purpose" so that permission for such different use is not required since it is exempted development by reason of the provisions of Article 12 (1) of Local Government (Planning and Development) Regulations, 1977.

There will be declarations accordingly.

Henry Warner
✓
14/1/88