APPROVED **[2021] IEHC 174**

THE HIGH COURT

2020 No. 262 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

AND IN THE MATTER OF AN APPLICATION

BETWEEN

WATERFORD CITY AND COUNTY COUNCIL

APPLICANT

AND

CENTZ RETAIL HOLDINGS LIMITED
CENTZ STORES 7 LIMITED
ICE COSEC SERVICE LIMITED
NAEEM MANIAR
CENTZ STORES 8 LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 March 2021

INTRODUCTION

1. This judgment addresses an application to revisit certain findings made in an earlier written judgment delivered in these proceedings on 16 December 2020.

2. The background to the application to revisit the earlier judgment is as follows. These proceedings were instituted pursuant to section 160 of the Planning and Development Act 2000 ("***the PDA 2000***"). Waterford City and County Council ("***the planning authority***") sought to restrain the carrying out of unauthorised retail development at three premises within its functional area.

3. The application for the planning injunction was heard on 14 December 2020, and a written judgment delivered on 16 December 2020 ("***the principal judgment***"). The principal judgment had been approved and posted on the Courts Services' website on the same date: it bears the neutral citation [2020] IEHC 634. The planning authority's application was successful.

4. As appears from the terms of the principal judgment, the orders were intended to have immediate effect. The court directed that the unauthorised retail use cease from midnight on 16 December 2020, and that certain unauthorised signage be removed within 72 hours of that date.

5. The only issue which remained outstanding was costs. The parties were requested to correspond with each other with a view to agreeing the position on costs. It should be explained that the costs issue was complicated by the fact that the respondents had been successful in an earlier application to set aside an interim order. The costs of that earlier application had been reserved, and fell to be dealt with as part of the final costs order in the proceedings.

6. The parties reached agreement on the issue of costs and the matter was listed before me on 15 February 2021 for the purpose of making an order on consent. Shortly before that listing, however, one of the respondents notified my registrar that he intended to apply to have certain findings in the principal judgment revisited.

APPLICATION TO REVISIT PRINCIPAL JUDGMENT

7. Mr. Maniar, the fourth named respondent, has requested that two aspects of the principal judgment be revisited. Mr. Maniar is a director and the group chairman of the companies which had operated the three retail premises the subject-matter of the application for a planning injunction under section 160 of the PDA 2000. Mr. Maniar has confirmed that,

at all material times, he was represented by the solicitor having carriage of the proceedings on behalf of all of the respondents, and by counsel retained by her. Indeed, it appears that Mr. Maniar was the person giving instructions on behalf of the corporate respondents. Mr. Maniar swore seven affidavits in the proceedings on behalf of himself and the corporate respondents.

8. It is only since the delivery of the principal judgment that Mr. Maniar has parted ways with his former legal representation. The application to revisit the principal judgment has been pursued by him as a litigant in person.

9. The application has been listed before me twice (on 15 February 2021 and 22 March 2021, respectively). At the direction of the court, Mr. Maniar filed a written submission dated 19 February 2021 setting out the basis for his application. Mr. Maniar confirmed at the subsequent directions hearing on 22 March 2021 that he did not require a further oral hearing on the application.

10. None of the other parties to the proceedings support the application to revisit the principal judgment. Counsel on behalf of the corporate respondents indicated to the court that it has been explained to Mr. Maniar, by his former legal representatives, that all of the respondents had been afforded a proper opportunity to adduce affidavit evidence and to present their case at the hearing on 14 December 2020.

11. The planning authority's position is that it is ultimately a matter for the court as to whether it accedes to the application. However, the planning authority explains that it is anxious to avoid the necessity of having to incur additional costs, and to avoid any delay in the drawing up of the final orders. The planning authority filed short written submissions on 11 March 2021 for the assistance of the court.

12. The two aspects of the principal judgment which Mr. Maniar seeks to have revisited are as follows. The first is the description of his affidavit evidence as "evasive". The second

concerns his joinder to the proceedings as a respondent. I will address each of these issues presently. Before turning to that task, however, it is necessary first to consider the nature of the jurisdiction to revisit a written judgment.

JURISDICTION TO REVISIT OR REOPEN JUDGMENT

13. The planning authority, in its written submissions, has very helpfully referred me to the judgment of the Court of Appeal in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63. The Court of Appeal confirmed that a court of first instance does have jurisdiction, prior to the order envisaged by the judgment having been drawn up and perfected, to revisit an issue decided in a written judgment. The Court of Appeal posited the following test. The High Court, if asked to revisit an issue already decided in a written judgment, must be satisfied that there are "exceptional circumstances" or "strong reasons" which warrant it doing so. The principle of legal certainty and the public interest in the finality of litigation dictate that such a jurisdiction must be exercised sparingly.

14. The Court of Appeal went on to explain that these considerations apply with even greater force to the decision of an appellate court, which is normally to be regarded as final and conclusive. The Court of Appeal made extensive reference in this regard to the judgment of O'Donnell J. in *Nash v. Director of Public Prosecutions* [2017] IESC 51. In particular, part of the following extract from his judgment is cited with approval.

> "Litigants, lawyers, witnesses and observers can all make mistakes. Judges, even judges in appellate courts reviewing decisions for error, make mistakes; they do not mean to but they do. But they try extremely hard not to, and for the most part succeed. And in particular, they try to get the decision correct. The core and irreducible function of any court, even in cases with obvious and profound general consequences, is to resolve the issues between the parties to the litigation. The facts must be ascertained and recounted, not to provide an authoritative record of information to future generations, but to identify the issues between the parties which has given rise to the dispute. Even then it is worth recalling that while a decision is binding between the parties as to the legal consequences,

> the decision as to what occurred in the past, or prediction of what may occur in the future, is made by a person who was not, or will not be, present. Any decision in a civil case is made on evidence sometimes limited and unsatisfactory, on a balance of probabilities, and is reviewed on appeal by the standard which considers whether such findings of primary fact were open to the trial court on the evidence. It is not perfection therefore; it is, or should be, however, the best that we can do. In fairness too, although there is an established jurisdiction to set aside a judgment, it is rarely invoked and even more rarely leads to the setting aside of an order and although the court receives occasional requests to address and clarify a factual matter contained in a judgment, that too is rare.
>
> Despite the efforts of all involved, however, errors of fact can and do occur. I do not find this either surprising or ultimately troubling. For my part, I would prefer to have decisions made about me by a person conscious of the possibility of error rather than one who believed that appointment to the bench conferred a unique form of secular infallibility. Indeed, those who profess almost mystical belief in the impossibility of judicial error are most often to be found contending that even a small mistake justifies the setting aside, or even the reversal, of a judgment, and who, not coincidentally, point to just such an error in a judgment pronounced. But the legal system does not deny the possibility of mistake; rather, it recognises it and seeks to protect against it and provide a remedy if appropriate."

15. Much of the case law on the jurisdiction to revisit a written judgment is concerned with appellate courts, rather than courts of first instance. This is because a party who is dissatisfied with a judgment of first instance will typically have a right of appeal against that decision. Thus, for example, in the present case, Mr. Maniar has a right of appeal to the Court of Appeal. The grounds upon which a judgment may be appealed are much broader than the grounds upon which the court of first instance can revisit its own judgment.

16. It is only at appellate stage that the jurisdiction to revisit a written judgment assumes an especial significance. This is because an application to revisit the written judgment may be the only avenue open to a party dissatisfied with a decision of an appellate court. Such applications are rare, and even more rarely successful.

17. The following considerations appear to me to be relevant to an application to revisit a decision of *first instance* in respect of which there is an unrestricted right of appeal. The judge who is asked to revisit their own judgment should have regard to the fact that, on most occasions, the appropriate avenue of redress for a person aggrieved by a judgment is to exercise their right of appeal. The parties to litigation are entitled to assume that, absent an appeal, a written judgment, which has been approved by the judge and has been published, is conclusive.

18. A party who is dissatisfied with a written judgment should not normally be entitled to reagitate their proceedings before the court of first instance. Were this to be allowed to happen, it would, in effect, insert an additional layer of judicial decision-making, whereby a party would seek to have the judgment revisited by the trial judge, as a prelude to an appeal if unsuccessful. This would add to delay and involve the parties incurring further costs. The proceedings would, in effect, be subject to three hearings: (i) the initial hearing; (ii) the hearing of the application to the court of first instance to reopen its judgment; and (iii) the hearing of the appeal.

19. There will, however, be circumstances in which it will be appropriate to invite a court of first instance to review its own judgment. Perhaps paradoxically, an application to reopen a judgment may be appropriate where the alleged error falls at either end of a spectrum of significance. If the error is minor, and relates to a matter peripheral to the rationale of the judgment—such as, say, a mistake in the narration of events—then this is something which might legitimately be corrected by way of revision of the judgment. If the error is obvious and is very serious, and would inevitably result in a successful appeal and a remittal to the court of first instance for rehearing, then again there might be something to be said for the judgment being revisited by the court of first instance. The parties might, for example, have failed to bring a crucial statutory provision or

precedent to the attention of the judge at the initial hearing, only to do so post-judgment. It might be preferable for the court of first instance to reopen the judgment to ensure that all relevant legal principles have been addressed.

20. Between these two extremes, however, an aggrieved party will normally be expected to avail of their right of appeal rather than seek to have the judgment revisited by the court of first instance.

21. It should be emphasised that the placing of limitations on the jurisdiction of a court of first instance to reopen its own judgment is not informed by a naïve belief that judges do not make mistakes. As explained by O'Donnell J. in the passages from *Nash v. Director of Public Prosecutions* cited above, errors can and do occur. The limitations on the jurisdiction to reopen a first instance judgment are not designed to deny an aggrieved party a remedy; rather they simply restrict that remedy, in most cases, to a right of appeal. The rationale for so doing is that parties to litigation are entitled to assume that a written judgment, which has been approved by the judge and has been published, is conclusive, subject only to the invocation of a right of appeal within time.

DETAILED DISCUSSION OF MR. MANIAR'S GROUNDS

(1). DESCRIPTION OF EVIDENCE AS "EVASIVE"

22. As appears from the principal judgment, one of the grounds upon which the respondents had sought to resist the planning authority's application had been that they had acted *bona fide*. Specifically, it was submitted that it had been reasonable for the respondents to consider that retail development would be appropriate having regard to the established use of the sites. This submission was made notwithstanding the fact that, in the case of two of the three premises, no planning permission for retail use of any type had ever been granted.

23. This submission is one which had been directed to the *discretion* of the court. In effect, the respondents had asked the court to withhold relief from the planning authority, in respect of what was obviously unauthorised development, on the basis that the respondents had acted in good faith.

24. If a respondent to proceedings under section 160 of the PDA 2000 wishes to have the court exercise its discretion in their favour, by reference to their alleged *bona fides*, it is essential that they make full and frank disclosure to the court of all relevant facts. For the reasons outlined in the principal judgment, I concluded that this had not been done in the present case.

25. The relevant findings are set out as follows (at paragraphs 48 to 51 of the principal judgment).

> "*(iii) Bona fides of respondents*
>
> The respondents have sought, in their written legal submissions, to attribute their conduct in carrying out unauthorised development to 'naivety' on their part. It is also suggested that it was reasonable for the respondents to consider that retail development would be appropriate having regard to the established use of the two sites.
>
> These arguments are not, however, borne out or supported by the affidavit evidence. Regrettably, the affidavits sworn by the general director of the respondent companies, Mr Naeem Maniar, can only be described as evasive and self-serving. Despite having sworn no less than seven affidavits, no explanation has ever been provided of the steps taken to investigate the planning status of the lands *prior to* the entry into of three leases (each of which is said to be for a term of twenty years). The leases have not been exhibited, and the court does not, therefore, know whether the obligation to comply with planning was attributed to the lessor or the lessee. It strains credulity that a well-resourced company, which on its own admission operates in excess of 30 retail stores, would not have taken legal and planning advice prior to executing such lengthy leases.
>
> If a respondent to proceedings under section 160 of the PDA 2000 wishes to resist an immediate order on the basis of their *bona fides*, it is essential that they make full and frank disclosure to the court of all relevant facts. This was not done in this case.

> The alleged *bona fides* of the respondents is further undermined by the fact that in the case of each of Dungarvan and Tramore, a statutory warning letter had been received from the planning authority in advance of the first opening of the stores. Notwithstanding this, the respondents proceeded to commence the unauthorised retail activity regardless. It also seems that no urgent effort was made to take up the relevant planning files."

26. Mr. Maniar objects to the characterisation of his evidence as "evasive". Significantly, however, Mr. Maniar has made no meaningful attempt to challenge the correctness of this finding. It remains the fact that, despite the respondents having asserted their *bona fides*, no proper explanation has ever been provided to the court as to how Mr. Maniar could reasonably have thought it lawful to carry out retail development at two of the three sites *in the absence of* planning permission authorising retail use. (The position in respect of the Waterford city centre site is different).

27. It is not said, for example, that legal and planning advice had been obtained, prior to the commencement of the unauthorised development, which mistakenly indicated that no planning permission was required. Nor has Mr. Maniar sought to put any additional documentation before the court which might support the allegation that the respondents had acted reasonably. It remains the position that the only planning advices put before the court consist of reports which *post-date* the commencement of the unauthorised development, and which had been prepared for the purposes of defending the proceedings. Much of the content of Mr. Maniar's affidavits is directed to criticising the planning authority's conduct, rather than addressing his own conduct and that of the companies that he manages. The selective and self-serving basis on which Mr. Maniar presented his evidence is properly characterised as "evasive".

28. At the hearing on 15 February 2021, Mr. Maniar submitted that he had been giving evidence on behalf of the respondent companies rather than on his own behalf. Mr. Maniar further submitted that the principal judgment should be revised so as to state

that the findings were made against him in a "work" capacity, rather than a "personal" capacity.

29. If and insofar as this submission is intended to imply that a *lesser* standard of candour applies to a deponent who is giving evidence on behalf of his employer, it is to be deprecated. The swearing of an affidavit in legal proceedings is a solemn process irrespective of the context in which it arises. It is also to be recalled that Mr. Maniar occupied a very senior position in the respondent companies and had been the person instructing the legal team on his own behalf and on behalf of the corporate respondents.

30. Mr. Maniar had been represented at the hearing on 14 December 2020 by very experienced counsel (senior and junior). This court specifically raised its concerns as to the quality of Mr. Maniar's evidence with leading counsel for the respondents, thus affording an opportunity to Mr. Maniar's legal representatives to address those concerns and to draw the court's attention to all relevant aspects of that evidence. Counsel did so ably, within the confines of the selective evidence which Mr. Maniar had put before the court. The findings set out in the principal judgment were only reached after careful consideration of those submissions, and following a thorough consideration of all of the affidavit evidence.

31. It should be emphasised that the finding as to the quality of Mr. Maniar's evidence is not a peripheral or incidental finding; rather, it formed an essential part of the rationale for the decision not to exercise the court's discretion in favour of the respondents by reference to their alleged *bona fides*. Put otherwise, the finding as to the quality of Mr. Maniar's evidence could not be excised from the judgment other than by this court embarking upon a wholesale reconsideration of this aspect of the principal judgment. It is not possible to unpick this finding without unravelling the entire thread of the decision.

32. If and insofar as Mr. Maniar is aggrieved by this finding or, indeed, any other finding in the principal judgment, he has a full right of appeal against that judgment to the Court of Appeal. The Court of Appeal has jurisdiction to draw its own inferences from affidavit evidence.

33. It is reiterated that, as discussed under the previous heading, the threshold which has to be met on an application to have the High Court revisit its own judgment is higher than that in respect of an appeal. For the purposes of his present application, it is necessary for Mr. Maniar to identify "exceptional circumstances" or "strong reasons" for setting aside the findings in the principal judgment. None have been put forward. In his written submission of 19 February 2021, Mr. Maniar records that he fully accepts the court's findings and the orders made in respect of the (retail) premises in question and the findings in favour of the planning authority. His objection is confined to the characterisation of his affidavit evidence. Mr. Maniar submits that his reputation and personal rights have been infringed. No attempt has been made, however, to explain in what way it is alleged that his rights have been infringed.

34. The threshold for reopening a written judgment has not been met. There is no basis for alleging that fair procedures were not applied in this case. Mr. Maniar had the benefit of legal representation by experienced counsel at all material times. As appears from the history of the proceedings, orders and directions were put in place to ensure that, notwithstanding the urgency of the proceedings from the planning authority's perspective, the respondents' right to defend the proceedings was fully respected. Thus, for example, an interim order made against the respondents had been set aside precisely because it had been made without their having an opportunity to be heard (*Waterford City and County Council v. Centz Retail Stores* [2020] IEHC 540). The initial date for

the hearing of the full section 160 application had been adjourned to allow further time to the respondents to prepare.

(2). JOINDER AS RESPONDENT

35. Mr. Maniar also objects that he should not have been named personally as a respondent to the proceedings. Mr. Maniar invites the court to remove him as a respondent post-judgment.

36. The issue of Mr. Maniar's status in the proceedings is one which was expressly canvassed at the hearing on 14 December 2020. Counsel on behalf of Mr. Maniar and the other respondents expressly indicated that his clients were not seeking to have Mr. Maniar removed from the proceedings. This formed part of a submission to the effect that the respondents were adopting a responsible attitude to the proceedings and not seeking to rely on technical points. Put otherwise, the respondents chose to make a virtue of their not having raised technical points, in support of a broader argument that the court should exercise its discretion in their favour. Mr. Maniar confirmed at the hearing before me on 15 February 2021 that this had been done on his instructions.

37. Having chosen to adopt this approach to the defence of the proceedings, it is not now open to Mr. Maniar to attempt a *volte face* and to argue that he should be released from the proceedings post-judgment.

CONCLUSION

38. Mr. Maniar has a full right of appeal against the principal judgment to the Court of Appeal. He has chosen, instead, to pursue an application to have the High Court revisit its own judgment. The finding which it is sought to revisit is not a peripheral or incidental finding; rather, it formed an essential part of the rationale for the decision. The threshold

which has to be met on this application is higher than that in respect of an appeal: it is necessary to identify "strong reasons" for setting aside an operative finding in the principal judgment. (*Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63 applied).

39. Mr. Maniar has not demonstrated any "strong reasons" for revisiting the principal judgment. The principal judgment therefore stands. The final orders in the proceedings can now be drawn up in accordance with the agreed draft.

40. The proceedings will be listed before me on 12 April 2021 at 10.30 am to address any outstanding issues and any application in respect of additional costs incurred.

Approved