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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE DECISION OF THE COUNTY COURT JUDGE FOR THE DIVISION OF CRAIGAVON

IN THE MATTER OF AN APPLICATION FOR THE PROVISIONAL GRANT OF AN INTOXICATING LIQUOR LICENCE PURSUANT TO ARTICLE 5 (1)(B) OF THE LICENSING (NORTHERN IRELAND) ORDER 1996

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BETWEEN

DENMIN LIMITED

Applicant/Respondent

AND

JOHN HUGHES AND SINEAD HUGHES

Objectors/Appellants

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McALINDEN J

Introduction

[1] By Notice of Appeal dated 20 July, 2018, the Objectors/Appellants appealed the decision of the His Honour Judge Lynch handed down on 3 July, 2018 whereby he ordered that a provisional grant of a section 5 (1) (b) intoxicating liquor licence be granted to the Applicant in respect of premises situated at Units 2, 3 and 4 of the Colin Centre, Pembroke Loop Road, Belfast.

[2] By agreement of the parties, the issue of locus standi or the statutory entitlement of the Appellants to object to the provisional grant of a section 5 (1)(b) intoxicating liquor licence, was tried as a preliminary issue and the preliminary hearing took place on 9 January, 2019, 11 January, 2019, 15 January, 2019, 17 January, 2019, 25 January, 2019, 28 January, 2019 and 29 January, 2019, with the Court hearing

evidence from Mr John Hughes and Mrs Sinead Hughes, Mr Frank Denny, a Director of the Applicant Company and Mr Maurice Maguire, a Planning Consultant, retained on behalf of the Applicant/Respondent. Mr Liam McCollum QC appeared with Mr Richard Shields instructed by Robert G Sinclair and Company on behalf of the Applicant/Respondent and Mr Keith Gibson instructed by RJW Law appeared on behalf of the Appellants.

[3] The hearing of evidence on this preliminary issue was necessarily prolonged and involved detailed and rigorous and vigorous cross-examination of the witnesses who gave evidence before me. The integrity and professionalism of Mr Maurice Maguire, the Planning Consultant, who gave evidence on behalf of the Applicant/Respondent was vigorously challenged by Mr Gibson in cross-examination. Mr Hughes' evidence was also subject to rigorous forensic scrutiny by Mr McCollum QC. As this judgment deals only with the preliminary issue of locus standi, the Court will, where possible, refrain from commenting on evidence which has a more direct bearing to the issues which have to be determined following the substantive hearing of appeal and the Court at this stage will only make findings on the issue of the locus standi of the Appellants in this case, bearing in mind that the hearing before the High Court is a complete and fresh re-hearing of the matter.

[4] The Appellants are husband and wife and they reside at 30 Hannahstown Hill, Belfast. Denmin Limited is a company that operates "Premier Store" a convenience store in Units 2, 3 and 4 of the Colin Centre, Pembrook Loop, Poleglass, Belfast. Prior to 2015, the entire Colin Centre was owned by Omara Limited, a company in which Mr John Hughes had a controlling interest. In 2007, Omara Limited let Units 4a and 5 of the Colin Centre to Mr John Hughes under a 20-year lease at an annual rent of £5,200, exclusive of rates, insurance and VAT, payable monthly in advance. Omara Limited and Mr Hughes also entered into an Agreement for Permission to Sublet the said premises in 2007. In 2010, Mr John Hughes assigned this lease to his wife Mrs Sinead Hughes. At some stage prior to 2015, Omara Limited went into liquidation. The Colin Centre was eventually sold to Fradine Limited in 2015 and this company is now the owner of Units 2, 3, 4, 4a and 5 of the Colin Centre and the successor in title to Omara Limited in respect of the lease in respect of 4a and 5. Mr Frank Denny has a controlling interest in both Denmin Limited and Fradine Limited.

[5] It is common case that between 2007 and 2010, Mr John Hughes, and from 2010 up to May, 2018, Mrs Sinead Hughes sublet the premises to Chinese sub-tenants who operated the business of a Chinese Take Away. The last of a number of sub-tenants left the premises in May, 2018 and the premises have remained vacant since that time. The case made by Mr and Mrs Hughes is that the sub-tenants vacated the premises because of a major problem with a leaking roof and that it is the responsibility of Fradine Limited to repair the roof under the lease. The merits of this argument will no doubt be argued in another forum. This Court is

only concerned with the fact that since May, 2018, Units 4a and 5 of the Colin Centre have been vacant and no business is presently operating in or out of those units.

[6] The Court observes that on 21 February, 2018 Mr John Hughes and Mrs Sinead Hughes as Plaintiffs initiated proceedings by way of an Equity Civil Bill naming Denmin Limited and Fradine Limited as Defendants and claiming ownership and possession of lands situate at the Colin Centre and seeking an injunction to prevent the Defendants from trespassing on the Plaintiffs' lands and continuing a nuisance on the said lands. In addition, the Civil Bill claims £10,000 damages against the Defendants for trespass to land and nuisance. As yet the merits of this claim have not been adjudicated upon by a Court.

[7] A Notice of Forfeiture was subsequently served by Fradine Limited on Mr John Hughes dated 21 September, 2018 based on two grounds: (a) non-payment of rent and (b) allowing the premises to remain unoccupied for more than 21 days in breach of specific terms of the lease. These breaches were disputed by Mrs Hughes and on 27 September, 2018, by Notice of Motion for an Interim Injunction, Mrs Hughes sought an Order preventing Fradine Limited from: (a) re-entering Units 4a and 5 of the Colin Centre; (b) taking any steps to forfeit Mrs Hughes' lease of the premises; and (c) taking any steps to prevent or obstruct Mrs Hughes' occupation of the premises.

[8] During the course of the hearing before me, the Court was informed that the Equity Civil Bill and Notice of Motion presently stand adjourned on foot of an undertaking having been given by Fradine Limited not to take any further steps at this stage to obtain possession of the premises which are the subject of the lease. In addition, undisputed evidence was given that there is also an ongoing and active rent review process in respect of the said premises. For the purposes of the present proceedings and in light of the matters referred to above, the Court finds that there continues to exist a valid lease in respect of Units 4a and 5 of the Colin Centre, with Fradine Limited as the owner and lessor and Mrs Sinead Hughes as lessee. Whether, either lessor or lessee is in breach of specific provisions of that lease is not an issue which this Court has to determine. For present purposes, it is sufficient for the Court to determine that for the purposes of these proceedings a valid lease still exists.

[9] The right to object to an application before the County Court and on appeal to the High Court for the grant of an intoxicating liquor licence is prescribed by the provisions of the Licensing (Northern Ireland) Order 1996 ("the 1996 Order"). The relevant provisions are set out in paragraphs 4 and 5 of Part I of Schedule 1 to the 1996 Order.

> "4. A sub-divisional commander upon whom notice is required by paragraph 1 to be served, the district council mentioned in that paragraph or any person owning, or residing or carrying on business in, premises in the

> vicinity of the premises for which the licence is sought may appear at the hearing of the application and object to the grant of the licence on any ground mentioned in Article 7(4)(a) to (e)(i).
>
> 5. Any person having an estate in the premises specified in any subsisting licence which is proposed to be surrendered under Article 7(4)(e)(ii) may appear at the hearing of the application and object to the surrender of that licence."

[10] In respect of Units 4a and 5 of the Colin Centre, Mr Gibson, on behalf of Mrs Sinead Hughes, submitted that she came within the ambit of paragraph 4 because she both owned and carried on business in premises which were obviously in the vicinity of the premises for which the licence is sought.

[11] Mr McCollum QC on behalf of the Applicant/Respondent did not seek to argue that Units 4a and 5 were not in the "vicinity" as that word is interpreted and defined in the relevant case law. Instead, he argued that Mrs Sinead Hughes neither owned nor carried on business in Units 4a and 5 of the Colin Centre.

[12] For the purposes of determining the preliminary issue in relation to the premises at unit 4a and 5 of the Colin Centre, the Court is satisfied that the evidence establishes that Mr John Hughes has no proprietary interest in the premises nor does he presently carry on any business in the premises. The Court is satisfied as to the continued existence of a valid lease giving Mrs Hughes a leasehold interest in the premises. However, the premises, since May, 2018, have been vacant and unused and, in the circumstances, the Court does not accept that Mrs Hughes presently does or ever did carry on business in the said premises. For Mrs Sinead Hughes to come within the ambit of paragraph 4 of Part I of Schedule 1, she must establish that she is the owner of the premises.

[13] Mr Gibson, on behalf of Mrs Sinead Hughes, submits that her leasehold interest is clearly sufficient to enable her to fall within the definition of "owner" of premises as defined in the 1996 Order. However, the word "owner" in paragraph 4 has to be contrasted with the use of the phrase "any person having an estate in premises" in paragraph 5. "Owner" must mean something different from "any person having an estate in premises."

[14] Article 2 of the 1996 Order defines the "owner" of premises as follows:

> "means the person for the time being receiving the rack rent of the premises, whether on his own account or as personal representative, trustee, assignee, committee, liquidator, receiver or guardian, or who would so receive the same if the premises were let at a rack rent;"

[15] Mr Gibson argues that Mrs Sinead Hughes between 2010 and May, 2018 was receiving market value rent from her tenants in respect of Units 4a and 5 of the Colin Centre. He argues that but for the fact that the tenants vacated the premises in May, 2018 because of a leaking roof, she would still be receiving market rent and is entitled to such rent if she were successful in sub-letting the premises again.

[16] Mr McCollum QC, relying on a decision of His Honour Judge Pringle QC, as he then was, in the case of *Stewart's Supermarkets Limited Applicant, Cavan and Others Objectors*, Belfast Recorder's Court 14 May, 1984, argues that it is clear that Fradine Limited is receiving the rack rent of the premises and, therefore, is the only owner of the premises for the purposes of the 1996 Order.

[17] The limited report of the Learned Recorder's decision which has been made available to the Court indicates that the Learned Recorder considered the case of *Newman v Dorrington Developments Limited* [1975] 3 All ER (a case involving the interpretation of the phrase "rack rent" in the era of statutory rent control) and concluded that the Applicant paid rack rent to the Developer of the shopping centre and therefore the Statutory Notice of Ownership that named the Developer as the only owner was not defective. The Court has to consider whether this decision and the limited report available to the Court assists in determining the issue at large between the parties in this case.

[18] The definition of "owner" of premises contained in the 1996 Order is and has historically been used in other legislation in Northern Ireland and in England and Wales in the fields of betting and gaming, club licensing, housing and rating. As far back as 1955, the House of Lords in *London Corporation v Cusack Smith* [1955] AC 337 considered the statutory definition of the "owner" of premises (in the context of planning legislation) which was "a person ... who ... is entitled to receive the rack rent of the land or, where the land is not let at a rack rent would be so entitled if it were so let. ..."

[19] I have particular regard to the speech of Lord Reid at p 357 where he said:

> "A, the freeholder, may let to B for a rent of £100 which is a rack rent at the date of B's lease, and later B may sublet to C for a rent of £200 which is a rack rent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rack rent of the land. … I am therefore of opinion that there can be more than one owner under the first limb of the definition, and that if the freeholder lets at a rack rent he is and remains an "owner" no matter what his tenant may do."

[20] In light of this weighty judicial pronouncement, I conclude that in law more than one person can be entitled to receive the rack rent in respect of the same

premises in a case such as this where there is a lease and sublease. The lease in this case is a 20-year lease which means that barring its termination, the leasehold term will not expire until 2027. I, therefore, conclude that Mrs Sinead Hughes does come within the definition of "owner" within Article 2 of the 1996 Order and does have locus standi to object to the application in this case.

[21] Mr and Mrs Hughes also assert their entitlement to object to the grant of a provisional licence in this case by reason of their ownership of two premises which they allege are in the "vicinity" of the premises for which the licence is sought as that word is interpreted in the relevant caselaw.

[22] The premises, ownership of which they rely upon, are situate at Townhouse 4, 150-152 Upper Dunmurry Lane, Belfast and Apartment 9, 16 Old Suffolk Road, Belfast. Both sets of premises are owned jointly by Mr and Mrs Hughes. Mr Hughes gave evidence that the apartment in Old Suffolk Road is let out to an elderly gentleman who has been a tenant for some time. In relation to the townhouse located in a new development at 150-152 Upper Dunmurry Lane, these premises are also subject to some form of lease. Mr and Mrs Hughes' daughter is the tenant but she is presently not residing there. Evidence was given that she intends to take up residence of these premises again when she returns from Finland. In the meanwhile, the evidence of Mr Hughes is that he sometimes uses the premises for his own purposes at the weekends.

[23] The question of "ownership" is clearly resolved in Mr and Mrs Hughes' favour in this case. The bulk of the hotly contested evidence which occupied the greater or lesser parts of seven days of Court time concerned the issue of "vicinity" and, in particular, whether the "vicinity" which was proposed by Mr Maurice Maguire, and was accepted by HH Judge Lynch, should be accepted or rejected by this Court.

[24] I do not propose, at this stage of the proceedings, to exhaustively rehearse all the evidence adduced in relation to vicinity, the arguments made for and against the proposed "vicinity" or to make any determination at this stage as to the area to be definitively included within the "vicinity" in this case. This can only be done when all the evidence has been heard and full submissions made and carefully considered.

[25] In respect of the test to be applied and the approach to be adopted at this stage, Counsel for the Respondent and Counsel for the Appellants both referred me to the decision of Gillen J, as he then was, in the case of *Sainsbury's v Winemark and Others* [2012] NIQB 45. Building on the earlier caselaw, Gillen J gave very helpful guidance in relation to the test to be applied and the approach to be adopted at paragraphs [28] to [38] of his judgment.

[26] He stated that the concept of vicinity is a chimera. Its definition may evolve under the impact of changing social and demographic conditions thus progressing the purpose and theme of the many authorities that deal with it. However, the

definition of vicinity must be viewed within the context of the purpose and theme of those earlier authorities. If there is a lack of structure in the approach to the definition of vicinity, it can result in an absence of clear channels within which fairness can be seen to operate and those seeking or opposing the grant of licences will be overwhelmed rather than enabled by the process.

[27] Gillen J then referred to the relevant caselaw and went on to distil some of the principles that have emerged in these cases in order to provide a convenient synthesis of the principles which should govern the Court's approach to this issue. He firstly noted that vicinity is not limited to premises immediately surrounding the proposed premises. Whilst it is impossible to lay down any general rule as to the extent of the area indicated by the word vicinity, it is limited to the premises in the neighbourhood in the sense in which one speaks of being a neighbour of another. This is not to be confused with locality. It means a physical proximity best indicated by a sense of neighbourhood. People are within a neighbourhood if they or the neighbourhood are near enough to be affected in some way if the application is granted.

[28] In arriving at a fact sensitive conclusion in any particular case, it is necessary for the Court to consider the following matters:-

- The physical features of an area e.g. a river, railway, range of hills, and layout of the streets, nature, character and use of buildings.
- Any natural boundaries.
- The size and distribution of the population.
- Established dwelling patterns.
- Geographical allegiances of those who live work or shop there.
- The habits and movements of people in the area.
- The direction in which these habits take them in the course of their daily lives.
- One test is to stand at the applicant's premises and look out to determine the neighbourhood.
- The functional relationship and mixes of uses and whether these are consistent across the vicinity.

[29] Gillen J was at pains to point out that whilst usually the concept of neighbourhood embraces residential estates, there is no reason why it inevitably must do so. He stated that there is no logical reason why a shopping centre cannot constitute a neighbourhood in the same way that that concept is recognised in pharmaceutical decisions such as R v. FHSSA ex parte E Moss Limited (Boots the chemist interested party) Court of Appeal 48 BMLR 204.

[30] He also stated that he saw no reason why in appropriate circumstances vicinity cannot be defined by virtue of a road system network taking into account ease of movement and travel patterns. Crucially, at paragraph [38] of the judgment he stated:

> "[38] In short the first step is logically to determine what licensed premises are in the vicinity of the proposed premises. One might approach that in either of two ways, by defining with more or less precision the area which one determines to be the vicinity or by looking at each of the other licensed premises near to the proposed premises and deciding if each counts as being in the vicinity of the proposed premises. I agree with the approach of Carswell J in Donnelly's case where he was inclined to the latter approach as containing the necessary flexibility and elasticity of the concept of vicinity."

[31] The case which Gillen J was referring to in that paragraph of his judgment was the case of *Donnelly v Regency Hotels*, [1985] NI 144, a decision of Carswell J as he then was.

[32] In the determination of this preliminary issue, I consider it appropriate to adopt a similar approach and look at each of the sets of premises in turn and decide if each counts as being in the vicinity of the proposed premises. In doing so, I make no final decision on whether the "vicinity" which is proposed by the Applicant/Respondent in this case, which was accepted by the Court below should be accepted or rejected by this Court. On the basis that the issue of "vicinity" may well be the subject of further evidence when considering the issue of "adequacy" at the substantive hearing, I have already indicated that I do not intend to exhaustively rehearse all the evidence adduced in relation to vicinity, the arguments made for and against the proposed "vicinity" or to make any determination at this stage as to the area to be definitively included within the "vicinity".

[33] Having carefully listened to the evidence of Mr and Mrs Hughes, Mr Denny and Mr Maguire and having analysed the evidence given and having considered the various maps, plans, aerial and ground-based photographs which have been submitted in evidence, cross-examined on and referred to, I conclude that the premises on the Old Suffolk Road are not within the "vicinity" of the premises for which the licence is sought. I take account of various matters referred to by Gillen J in paragraphs [34] to [37] of *Sainsbury's v Winemark* case and I conclude on the basis of all the available evidence that there is not a shred of evidence to indicate that anyone residing in the Old Suffolk Road would be affected in any way if the application was granted. The two areas are separated by the Colin Forest Park and the two areas are quite patently different neighbourhoods with only a circuitous road connection. Therefore, Mr and Mrs Hughes' ownership of premises on the Old Suffolk Road does not give Mr John Hughes or Mrs Sinead Hughes locus standi to object to the application in this case.

[34] In respect of the premises situate at Townhouse 4, Dunmurry Close, 150-152 Upper Dunmurry Lane, Belfast, I have carefully listened to the evidence of Mr and

Mrs Hughes, Mr Denny and Mr Maguire and have analysed the evidence given and considered the various maps, plans, aerial and ground-based photographs which have been submitted in evidence, cross-examined on and referred to. Having regard to the fact that these premises are separated from the Poleglass estate by the very busy main arterial route of the Stewartstown Road; are located outside the present and proposed ward boundaries of the Poleglass electoral ward; are located outside the boundaries of the Nativity Parish in Poleglass; and having regard to the fact that there was no evidence given to even suggest that anyone residing in Dunmurry Close would regard that development as being in the neighbourhood of Poleglass or that anyone residing in this development would be in any way affected by the granting of the application made by the Applicant in this case, I am satisfied to the requisite standard of proof that the premises situate at Townhouse 4, Dunmurry Close, 150-152 Upper Dunmurry Lane, Belfast are not within the "vicinity" of the premises for which the licence is sought. Mr and Mrs Hughes' ownership of premises situate at Townhouse 4, Dunmurry Close, 150-152 Upper Dunmurry Lane, Belfast, does not give Mr John Hughes or Mrs Sinead Hughes locus standi to object to the application in this case.