Neutral Citation: [2016] IEHC 394

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 363 JR]

BETWEEN

MARTIN MCCREESH

APPLICANT

AND

AN BORD PLENÁLA

RESPONDENT

AND

LOUTH COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of July, 2016

1. The applicant in this case seeks leave subject to s. 50 of the Planning and Development Act 2000 to apply for judicial review of a decision of the board dated 30th March 2016 confirming a compulsory purchase order made by Louth County Council. The application raises an issue of general application, namely the date on which the clock stops for the purposes of the judicial review limitation period.

2. Notice of the making of the board's decision was published by Louth County Council on 6th April, 2016. The application was filed on 27th May, 2016 and was moved in court on 30th May, 2016. The application was not served on the board until 10th June, 2016, pursuant to a direction in that regard which I gave on the 30th May, 2016.

3. The application is subject to s. 50 of the 2000 Act because it relates to a challenge to a consent given by the board pursuant to a function transferred by Part XIV of the Act (see s. 50(2)(b)).

4. I have heard from the applicant in person and from Mr. Alan Doyle solicitor, of Barry Doyle & Co. solicitors for the board, who makes two submissions: firstly that the application out of time and secondly that there are no substantial grounds.

Is the application out of time?
5. Pursuant to s. 50(7), time in this case runs from the publication of the decision rather than its making. Time therefore ran from 6th April, 2016.

6. In support of the submission of the time should stop running when the application is served or moved, rather than filed, the board relies on an obiter comment of Finlay C.J. in *K.S.K Enterprises Ltd. v An Bord Pleanála* [1994] 2 I.R. 128 at 136 that *"an application to the court made by motion ex parte cannot be said to be made until it is actually moved in court".*

7. As noted, it is clear that, and indeed it is accepted by the board that, this comment was obiter on the facts of K.S.K. More fundamentally, the Chief Justice in that case was referring to an ex parte judicial review application in the context of the procedure which applied at that time, which did not involve a requirement for the filing of papers before the ex parte application was moved.

8. The judgment in *K.S.K.* was delivered on 24th March, 1994. The following day, however, 25th March, 1994, a new High Court practice direction HC02, entitled "*Ex parte* applications for judicial review" was issued (see Benedict Ó Floinn B.L., *Practice and Procedure in the Superior Courts,* 2nd ed., p. 977 as to the date of this instrument, which is undated in the version currently published on courts.ie). It expressly states that *"the original statement and grounding affidavit should be filed in the Central Office beforehand and a certified copy bearing the record number issued by the Central Office, provided to the court on moving the application".* The introduction of this approach brought about a significant change in the way such ex parte applications were brought and introduced considerably greater formality in that regard and in my view fundamentally changed the context in which the obiter statement in *K.S.K.* should be viewed.

9. The Central Office of the High Court is an arm or instrument of the High Court and not some sort of entirely separate or independent agency. An application which is made by being filed in the Central Office is therefore an application that is made *to the court.* Depending on the rules of court, formal practice direction, or administrative decisions that may be made from time to time for particular lists, a hearing date for a matter filed in the Central Office may be assigned at that time of filing (as applies to a special summons, notice of motion, or case stated). Alternatively it maybe left to the individual applicant to move the application at a convenient date. These matters are capable of being subject to change in procedure from time to time, and there would nothing to prevent the adoption of a practice that, for example, upon the filing of statement of grounds by way of application for leave for judicial review, a date for the hearing of the leave application would be administratively assigned by the Central Office. The possibility of such a hypothetical but perfectly permissible practice would somewhat militate against the postulate that the *ex parte* application, under the system which currently obtains, is only made when it is moved, as opposed to when it is filed.

10. Whatever might have been the view to be taken of the *obiter* statement in *K.S.K.,* the matter was subsequently and definitively addressed by Geoghegan J. in *Mc.K. v. A.*F. [2005] 2 I.R. 163 at 172, where he said that "[*g]iven the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any such cognate words should be interpreted as meaning the date of issuing if the proceedings require a summons or filing or possibly in some cases filing and serving if what is involved is a motion, but unless there are express words in*

the statute that require it, it should not be interpreted as meaning the actual moving of the application in open court". I previously applied this decision in *Burke v. Minister for Justice and Equality* [2015] IEHC 614 (Unreported, High Court, 12th October, 2015) at para. 2.

11. It is notable, and perhaps reflective of an understandably cautious approach taken by legal practitioners, that the *obiter* statement in *K.S.K.* as to the necessity of mentioning an ex parte application in court to stop the clock has passed into general consciousness despite the considerable practical inconvenience such a position occasions to all concerned, including the court, to say nothing of the needless anxiety such a view generates for practitioners and parties; whereas the later and more definitive position in *A.F.*, which is supported by a considerable rationale both as spelled out in that case and elaborated on above, which is considerably more convenient for the court, practitioners and parties, which is supported by the context of the subsequent practice direction and which makes coherent sense in that context, has eluded popular awareness. In my view the date of the making of an *ex parte* application is the earlier of the dates on which papers are filed or the matter is moved in court. Normally it is the date of filing in the Central Office because the practice direction requires that to be done first. In essence the date on which the application is made is the date on which the applicant first engaged with the court (or the Central Office on behalf of the court) in a suitably formal manner. Filing the statement of grounds therefore stops the clock. The present application is not out of time, and did not become out of time simply because of the nearly 2-week delay in serving the board following my direction in that regard. The initiation of a judicial review is a one-off step and this application was initiated within time.

Are there substantial grounds for the application?
12. The applicant challenges the confirmation by the board of a compulsory purchase order under the Housing Act 1966. The function of confirming such an order was transferred to the board pursuant to s. 214 of the Planning and Development Act 2000.

13. The essential grounds of challenge as set out in the statement of grounds are firstly that the order was obtained as a result of a conspiracy, and secondly that the site in question is not a derelict site. Issue is also taken with the valuation of the site but that appears to be a matter of merits and not legality, even if it arises at this stage, which does not appear to be the case from the board's decision.

14. The astronomer Carl Sagan is associated with the aphorism that extraordinary claims require extraordinary evidence. *A fortiori*, such claims requires *some* evidence, but in this case the claim of conspiracy is supported only by the applicant's assertions in that regard. I do not consider that substantial grounds have been made out under this heading.

15. As regards the claim that the site in question is not a derelict site, the board, as appears from their decision made no finding that it was a derelict site. Indeed the decision of the board dated 23rd March, 2016 specifically acknowledges that the schedule of the compulsory purchase order should be modified to provide for a revised description confirming that the house is fit for human habitation. This appears to be inconsistent with the alleged finding that the site was derelict.

16. Insofar as the grounding affidavit could be construed as advancing further grounds, a claim of absence of due process is made in para. 9 of the affidavit, but this is insufficiently particularised to enable me to find that substantial grounds exist for it.

17. Paragraph 8 of the affidavit amounts to a general allegation of illegality in the appointment of auctioneers and again is insufficiently particularised to permit a finding of substantial grounds.

Order
18. For the foregoing reasons, substantial grounds for advancing the applicant's claim are not discernible and follows that the application for leave will be refused. Pursuant to s. 50A(7) of the 2000 Act, this order is not appealable to the Court of Appeal without leave of this court.