Neutral Citation [2012] IEHC 300

THE HIGH COURT JUDICIAL REVIEW

RECORD NO: 2011/359J.R

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2010 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000, (AS AMMENDED) AND IN THE MATTER OF AN APPLICATION

BETWEEN:-

ANGELA PEARCE

APPLICANT

v.

WESTMEATH COUNTY COUNCIL

RESPONDENT

&

ANGELA BOYHAN

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 24th day of July 2012

1. The applicant resides at Fearbranagh, Multifarnham, Co Westmeath. The respondent is the County Council with responsibility for the administrative area of Co. Westmeath. The notice party operates a quarry located at Killintown, Ballinriddera, Multyfarnham, Co. Westmeath.

Background Facts

2.1 This is a preliminary application brought by the respondent, Westmeath County Council for the trial of a point of law preliminary to the substantive hearing, to determine whether the within proceedings are within or outside the eight week time limit specified for bringing an application for judicial review under s. 50(6) of the Planning and Development Acts 2000-2010.

The respondent also seeks an order pursuant to the inherent jurisdiction of the Court setting aside the order granting the applicants leave to apply for judicial review.

2.2 In the substantive proceedings the applicant seeks to challenge by way of judicial review a purported decision of the respondent to agree the submission by the notice party of a haulage route survey and details regarding the provision of lay-bys, dated the 1st December 2010 and made pursuant to amended condition 16(1) of planning permission (An Bord Pleanála) Reference Number PL. 25.222171M.

2.3 The planning permission which is the subject matter of the substantive proceedings was granted by on Board Pleanála on the 15th July 2009. The planning permission was for the continuation of quarrying activity by the notice party at Multifarnham, County Westmeath. Condition 16 of the permission required the notice party to submit to the respondent for agreement a haulage route survey and details in respect of the provisions of lay-bys in the interests of traffic safety and development. Condition 16 was subsequently varied by An Board Pleanala on the 23rd July 2010. Condition 16 as varied provided as follows:-

> "16. (1) The developer shall submit to the planning authority for written agreement a detailed survey of the entire one-way, haul route showing width, levels, verges and all other relevant features and identifying the number and location of all lay-bys to be provided by the developer.
>
> (2) The developer shall provide and complete all lay-bys agreed under paragraph 1 above within six months from the date of this order and shall comply with the requirements of the planning authority for such works and services."

2.4 On the 1st December 2010, Sean Lucy and Associates Ltd, planning consultants, acting on behalf of the notice party lodged a submission with the respondent in respect of compliance with Condition 16 (as amended) of the planning permission. This submission was considered by Mr. Mkhululi Ndebele an executive engineer with the respondent on 3rd March 2011. On that date Mr. Ndebele determined that the submission was compliant with Condition 16 of the planning permission. A written record of this determination of compliance was made. The respondent wrote to Sean Lucy and Associates Ltd on the 11th March 2011 informing them of the decision.

2.5 On the 3rd May 2011 the applicant issued proceedings seeking leave to apply for judicial review of the impugned decision on a number of grounds including *inter alia* that it was made in breach of amended condition I 6 of the planning permission and/or the six month time limit imposed therein, was made in a manner which was in breach of natural and constitutional justice and/or that the respondent failed to give any reasons in respect of the impugned decision and it was *ultra vires*, invalid or of no legal effect.

2.6 The applicant maintains that the decision regarding compliance with condition 16 was made on the 11th March 2011, whereas the respondent maintains that this decision was made on the 3rd March 2011. This issue is of particular significance because the within proceedings issued on the 3rd May 2011. Consequently if it is determined that the decision was taken on the 3rd March 2011 the proceedings are outside the statutory eight week time limit prescribed by s.50 (6) of the Planning and Development Acts 2000-2011 ('the PDA') for challenging such decisions by way of judicial review.

Respondents Submissions
3.1 It is agreed between the parties that the impugned decision is a decision which may only be challenged in accordance with the provisions of s 50(6) of the Planning and Development Act 2006 which provides as follows:-

> "Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

Section 50(8) of the Planning and Development Act 2006 makes provision for the extension of the aforesaid eight week time-limit in certain limited circumstances. The respondent however submits that s.50 (8) is not relevant in the within proceedings as no application for an extension has been made by the applicant.

3.2 The courts have held that the eight week statutory time-limit imposed by s.50 (6) of the Planning and Development Act 2006 in respect of challenging planning decisions is a strict time-limit. In *Openneer v Donegal County Council* (Unreported, High Court, Macken J., 13th April 2005) the Court outlined the reasons behind the 8 week time limit that applies, at pages 12-13:-

> "It is a well established principle of law that any application for judicial review must be sought promptly. That has been interpreted in the jurisprudence as imposing a high obligation to move, not merely within the time scale provided for by Order 84 of the Rules of the Superior Courts, but to move at all events promptly, as is clear from the decision of Fennelly J. in the judgment of the Supreme Court in *Dekra Eireann Teo v. Minister for the Environment*, unreported, 4th April, 2004 and of the High Court in the judgment of Finlay Geoghegan, J. in *Connolly v. The Director of Public Prosecutions*, unreported, 15th May, 2003. The situation is even more certain and strict in the case of planning, which is the subject of a statutory scheme intended to impose and actually imposing strict time limits, including those more strict than in judicial review in general, and also more strict than previously existed under earlier versions of the Act of 2000. It is very understandable why such time limits are imposed by the legislation. Planning matters are of their very nature, when they include a right in third parties to make submissions, such as in the planning regime, such that those securing permission may wish to rely on the rights granted, as soon as possible after the expiry of a statutory period within which a challenge might have been made but was not, in the certain belief that the right is 'final'. It is one of the very reasons why the challenge must be made within the time limit provided for, as otherwise the party with the right vesting in him arising from the permission granted might be in limbo for an inordinate period of time, and the permission would lack legal certainty."

The notice party in these proceedings is entitled to legal certainty regarding her permission.

3.3 The respondent submits that it is clear from the evidence set out in the affidavit of Mr. Ndebele that the impugned decision was in fact taken on the 3rd March 2011 and not on the 11th March 2011 as the applicant erroneously asserts. It apparent that whether through error or otherwise the applicant mistakenly understood the letter 11th March 2011 from the respondent to the notice party as constituting the impugned decision. The respondent submits that on any analysis of the facts this is not the case. It is clear that the decision of the respondent on whether the notice party had complied with condition No. 16 of the planning permission was a technical matter which would have to be determined by an appropriately qualified member of the respondent's staff. It fell to Mr. Ndebele an executive engineer with the respondent to make this determination following a technical appraisal of the notice party's submission. Mr. Ndebele has given evidence on affidavit that he made his decision as to compliance with condition no. 16 of the planning permission on the 3rd of March 2011. A written record of his determination was made and has been exhibited at 'MN A' in the affidavit of Mr Ndebele. The respondent submits that this document entitled "record of compliance with conditions received', clearly illustrates that the decision as to whether the notice party's submissions were in compliance with Condition No. 16 of the planning permission was in fact taken on the 3rd March 2011. No further decision was made by the respondent in relation to the planning permission subsequent to that date. The letter of the 11th March 2011 from the respondent to the notice party was merely to inform the notice party of the earlier decision of the 3rd of March 2011. This is clear both from the text of the letter of the 11th March 2011 and by virtue of the fact that the letter was signed by a clerical officer who did not have the technical expertise to make a decision as to whether the notice party's submissions were in compliance with Condition No. 16 of the planning permission.

3.4 A written record of the respondent's decision of the 3rd March 2011 was placed on the public planning file relating to the planning permission. This decision was available to be viewed by members of the public including the applicant. The applicant averred that she inspected the planning file on the 25th March 2011. A written record of the decision would have been on the file at this time. The respondent submits that the application for leave to seek judicial review in the substantive proceedings was based on a fundamental error of fact, namely that the decision of the 3rd March 2011 was made on the 11th March 2011. At no stage in the *ex parte* hearing for leave to apply for judicial review was the court made aware of the fact that the decision had in fact been made on the 3rd March, 2011.

3.5 The eight week time limit runs from the "date of the decision" i.e. the 3rd March 2011 not the date of the notification of the decision to the notice party i.e. the 11th March 2011. Therefore in this case the eight week period for challenging the impugned decision by way of judicial review expired on the 27th April 2011. On the 13th May 2011 the respondents solicitors wrote to the solicitors for the applicant highlighting the fact that the impugned decision had in fact been taken on the 3rd of March 2011 and accordingly the eight week time limit prescribed by s.50 (6) of the Planning and Development Acts 2000-2010 for challenging the decision by way of judicial review had expired. In replying correspondence the applicant's solicitors suggest the decision of the 3rd of March 2011 is simply 'an internal administrative document'. The respondents submit that this is to ignore the fact that the written record of decision of the 3rd of March 2011 was put on the public file and thus cannot simply be dismissed as 'an internal document'. It also ignores the sworn evidence of Mr. Ndebele that he took the impugned decision on the 3rd of March 2011.

3.6 The applicant also takes issue with the fact that there is no record by way of an order of the County Manager of the decision of he respondent of the 3rd of March 2011. However, there was no requirement for an Order of the County Manager in respect of the said decision. A decision by a planning authority as to the compliance with a condition in a planning permission is not a function required to be done by way of a Manager's Order pursuant to Schedule 15 of the Local Government Act, 2001 (as amended). The respondent submits that the applicant is also not entitled to raise this ground because it was not raised in their statement of grounds.

The respondents accept that the Courts are slow to set aside an initial grant of leave however it is clear that the court has jurisdiction to set aside leave in appropriate circumstances. (*In this regard see Adam v Minister for Justice* [2001] 3 I.R. 53; [2001] 2 ILRM 452 and *Gordon v DPP* [2002] 2 I.R. 369). This is particularly so where the grant of leave was based on a fundamental error of fact as to the date of the impugned decision and the challenge to the impugned decision was taken outside the statutory time-limit imposed by s.50 (6) of the Planning and Development Act 2006.

Applicants Submissions

4.1 These judicial review proceedings challenging a purported decision of the respondent dated 11th March 2011 were issued on the 4th May 2011. The applicant seeks an order of *certiorari* quashing the said purported decision of the respondent to agree the submission of the notice party of a haulage route survey on the 1st December 2010 pursuant to condition 16(1) of planning permission, (Westmeath County, Planning Register) Reference Number 06/5362. In its statement of opposition the respondent claims that the decision challenged was made on 3rd March 2011 and that the letter of 11th March 2011 constitutes a communication of the decision and not the decision itself. The respondent therefore submits that the judicial review proceedings are out of time, being more than the statutory eight week time period prescribed by section 50(6) of the Planning and Development Act 2000 as amended ("the 2000 Act") for taking judicial review proceedings of a decision of a planning authority pursuant to its functions under the 2000 Act.

4.2 The applicant submits that what the respondent describes as a 'decision' is merely an internal form which is no more than a confirmation by a frontline officer of a planning authority, that all the information required by condition 16(1) had been submitted and in that sense the submission was compliant and ready to be passed upward for consideration by an authorised officer. Condition 16(1) as approved by An Bord Pleanála required -

> "the developer to submit to the planning authority for written agreement a detailed survey of the entire one-way haul route."

The applicant submits that the argument that a submission of a survey of approximately a quarter of the entire haul route (7km out of 28km) was purportedly approved by the respondent by the vague recommendation on the form entitled - "Record of Compliance with conditions Received", constitutes an extraordinary attack on third parties rights in the planning process in that it places an intolerable burden on any interested party to scan the planning file forensically in an attempt to spot any document that might be construed as a decision which could start time running for an appeal or judicial review, irrespective of how incomplete or vague such a document might be. There is no record by way of County Manager's Order of the respondent's decision to give written agreement to the submission made on the 1st December 2010 by or on behalf of the notice party. The applicant submits that in the normal course an agreement reached by a planning authority on foot of "a points of detail condition" is dealt with by a Manager's Order sanctioning the issue of a letter of compliance with the condition or conditions which is based on a written report by the planner for the area and a recommendation by an administrative officer and signed by an official to whom the appropriate powers had been delegated by order of the Manager or indeed signed by the Manager in accordance with the relevant provisions of Chapter 3 of the Local Government Act 2001 in particular section 151 therein. In the instant case there is no record by way of a County Manager's Order of the respondent's decision to give written agreement to the notice party's submission of the 1st December 2010 seeking the respondent's agreement in compliance with condition 16(1). The requirement that a local authority or planning authority act by way of Manager's Order or by way of a formal letter of compliance arises out of the duty in law to exercise its discretionary powers in good faith and in a reasonable manner.

4.3 An examination of this form which is entitled- "Record of Compliance with conditions received" reveals that it is an internal Westmeath County Council administrative document which records that a compliance submission has been received on a specified date in respect of a particular condition of a planning permission; to whom it is to be referred and provides that the compliance is checked and in order and is signed by Olivia O'Grady, Clerical Officer. It also provides for it to be signed by the Area Planner and dated which was not done. The document also has at the bottom thereof the handwritten word "compliant", a signature "M. Ndebele" and a date "3/3/2011". The relevant section of this document to note the referral of the submission onward for a substantive decision headed "Refer:" is left blank and the boxes "yes" and "no" to record whether the "compliance report" has been "checked" and whether "it is in order" are also left blank. This document does not record that the planning authority has decided to agree in writing and/or to give its written agreement to the submission made on 1st December 2010 by the notice party's agent, Sean Lucy & Associates Limited, as required by the amended condition no. 16(1).

4.4 The applicant submits that the word "compliant" should be construed as a recommendation that the submission meets the standard required in order for it to be accepted as a submission and that it complies with the information requirements in order to be accepted. The word "compliant" should be construed as an agreement by the planning authority to the details of the haul route contained in the submission about widths, levels, verges, all other relevant features and number and location of lay-bys. It is submitted that given the weight and amount of detail to be considered, one scrawled word cannot amount to a reasoned decision of a public statutory body discharging its functions under the Planning Acts and reaching a decision on the use of 27km of public roads as a haul route from a stone quarry and affecting the villages of Multyfarnham and Crookedwood together with various other members of the public with differing interests in the decision.

4.5 The form entitled "Record of Compliance with conditions Received" is signed by a Mr. Ndebele who identifies himself in his grounding affidavit as an executive engineer employed by the respondent planning authority. As averred to in the supplemental affidavit of Ms. Pearce, the respondent to this motion, sworn on the 21st December 2011 there is no record of a delegation of planning powers, duties or functions by the County Manager to an executive engineer or to Mr. Ndebele in particular. The letter of the 11th March 2011 is described by the respondent as a communication of a decision of the 3rd March 2011. The applicant however points out that the letter makes no reference to an earlier decision of the 3rd March 2011 which the respondent claims it was communicating. Binding decisions of a planning authority such as a decision to grant or refuse planning permission are headed with a bold heading indicating what they constitute and as such are clearly identifiable to any person receiving them or searching the planning file. Notifications of such decisions must refer back to the decision itself and give the date thereof so as to leave the recipient thereof in no doubt as to the date from which the statutory time period ran. The compliance noted on the form dated 3rd March 2011 remained open to revision by the respondent planning authority and therefore cannot be held to constitute a decision binding on the public at large. The form as filled out does not use the word decision or any correlate word to indicate to the world that a decision has been taken. The form taken as a whole lacks any quality of finality as ought to be found in such a decision or determination. The applicant submits that the informality and vagueness of the form highlights the provisional nature of the compliance recorded. The fundamental argument against construing the form entitled - "Record of Compliance with conditions Received" as a decision on a very important condition, is the unfair and unjust burden it places on any party searching the planning

file that might have reason to rely on such documents.

Decision of the Court
5.1 The role of the court in Judicial Review was outlined in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 3, where Finlay C.J cited the following passage from the judgment of Lord Brightman in *R v. The Chief Constable of North Wales XP Evans* [1982] 1 WLR 1155:-

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court would in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power ... judicial review as the words imply is not an appeal from a decision, but a review of the manner in which the decision was made."

In order to challenge a decision made with special competence in an area of special knowledge an applicant must satisfy the court that the decision was irrational. The test for irrationality is set out in O'Keeffe *where Finlay C.J relied on the decision in* The State (Keegan) v. The Stardust Victims Compensation Tribunal [1986] I.R. 642 as follows:-

> "In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in that judgment set out a number of such circumstances in different terms. They are: - '1. It is fundamentally at variance with reason and common sense. 2. It is indefensible for being in the teeth of plain reason and common sense. 3. Because the Court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'...1 am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent with one another, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

Finlay C.J. went on to observe:-

> "It is clear from these quotations that the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare...The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."

5.2 The relevant time within which proceedings such as herein is not in issue. It is 8 weeks to be calculated from the date the decision was made. On the best evidence before the Court which is that of the decision maker, Mr Ndebele, the decision was made on the 3rd March 2011. At paragraph 11 he avers as follows:-

> " I say it is clear that the decision which the applicant seeks to impugn in the within proceedings, namely the decision of the Respondent to deem the submissions made by the Notice Party in compliance with condition 16 of the Planning Permission, was taken by me on behalf of the Respondent on the 3rd of March 2011."

I have no reason to believe from anything I have heard in the case that this is not so. I note also that no further decision was made by the respondent. This being so, it seems clear that the letter of the 11th March 201 I was, as it appears to be, a notification of a decision made. The time limit on this basis for bringing Judicial Review was the 27th April 2011. These proceedings were not issued until the 3rd May 2011.They would appear on this basis to be out of time.

5.3 It seems to me however that this matter cannot be allowed to rest there. The applicant states that she inspected the file on the 25th March 2011. In her affidavit she avers as follows at paragraph 19:-

> "In relation to the availability of the file to me this deponent, I this deponent say that on the 25th March 2011, I first received this file and purchased photocopies of the letter of 11th March 2011 and the developers submission of 1st December 2010..."

She has maintained throughout, even at this hearing, that she believed the letter of the 11th March 2011 was in fact the decision and the document on file was merely an internal memo. The applicant is clearly an informed and interested party. I accept that this belief was *bona fide* because examining the document dated the 3rd March 2011, it leaves much to be desired in terms of clarity.

5.4 It was argued in oral submissions to the court by the applicant that only the County Manager can make such a decision. No authority was cited for this proposition and in any event this claim was not made in the application for leave and thus does not constitute one of the grounds upon which leave was granted. This court therefore does not have jurisdiction to deal with that point. For the same reason it is not possible to deal with any argument that Mr Ndebele was not a designated officer.

5.5 What is the significance of this form which is entitled- "Record of Compliance with conditions Received"? In the first place it must be noted that it is intended to be an official record of a decision made by a local authority that the beneficiary of a Planning Permission has complied with a condition or conditions of a Planning Permission. Conditions of a Planning Permission are very significant. They are imposed to ensure that something is done or not done by the developer in order to make a particular development acceptable. Conditions may therefore reflect the end product of a long series of objections and the outcome thereof. Conditions may be of paramount importance to persons who were objectors and to the public at large.

5.6 As noted above an examination of this uncompleted form leaves much to be desired in terms of clarity. It does not have anything printed upon it to indicate that it is a formal record of a decision made. It refers to a report and ultimately states in longhand at the bottom "compliant". It has a number of uncompleted parts. It has a box entitled "refer", but both this box and the box opposite are blank. It has a section to record checking for compliance and neither the yes or no parts are ticked. It is signed by a clerical officer but the date is left blank. The two lines for the area planner's signature and date are also blank. It is signed and marked "compliant" all in longhand by Mr Ndebele. It is not clear from the form that he is an area planner. In fact he describes himself in his affidavit as "an Executive Engineer in Westmeath County Council." He is not the area planner although the form indicates it should be signed by such an official. This document does not record that the planning authority has decided to agree in writing and/or to give its written

agreement to the submission made on 1st December 2010 by the notice party's agent, Sean Lucy & Associates Limited, as required by the amended condition no. 16(1). Condition 16(1) requires the developer to submit for the written agreement of the respondent planning authority a detailed survey of the entire one way haul route showing widths, levels, verges, all other relevant features and the number and location of laybys. I note the applicants submission that given the weight and amount of detail to be considered, one scrawled word cannot amount to a reasoned decision of a public statutory body discharging its functions under the Planning Acts. However a signature written on a properly drafted and properly completed form could sufficiently record such a decision. However, the form herein as drafted and as completed could not in my view be considered a proper record of a decision of such importance. But all the evidence is that this was the decision. This being so however, that decision is recorded in a manner so vague and slipshod that it invites mistaken apprehension as to its real purpose and effect, as has quite predictably occurred here.

5.7 How should such a decision be recorded - a local authority has a very broad discretion but such a decision should at the very least be recorded in a document that:

> (a) Clearly identifies itself as a formal record of a decision on compliance with a specific condition or conditions of a planning permission granted.
>
> (b) Unambiguously and precisely states that in the view of the local authority a specified condition has been complied with.
>
> (c) Is signed and dated by an officer indicating that he/she is authorized to make such a decision.

Such a document should be properly completed so as to leave no blanks or unfilled boxes. These inevitably lead to confusion in the mind of even the best informed observer, and represent an unacceptably low level of administrative efficiency. The decision that a condition upon which a Planning Permission was granted, has been complied with is a decision of equivalent importance to that of the Planning Permission itself. It should be recorded in a manner that reflects this significance.

5.8 What are the consequences of this? Applying the above to this application I am satisfied that the decision on compliance was made on the 3rd March 2011, but was not properly recorded. The result of this was that members of the public examining the planning file on the public register could be and in the case of the applicant, were misled as to when the decision was made. Section 50(8) of the Act provides for extension of the time limited for Judicial Review where the Court is satisfied that there is good and sufficient reason and the circumstances that resulted in the failure to make the application within the period limited were outside the control of the applicant. It seems to me that both these criteria were met in this case and the Court may extend the time limit to seek Judicial Review sufficiently to allow in the challenge of the applicant herein. However for their own reasons, although invited by the Court to do so, the applicant has declined to seek an extension of time to bring these proceedings. The wording of the section seems however broad enough to allow the court act *proprio motu* to extend the time. But when should a Court act *proprio motu*? I think it should do so where there is a clear and pressing public interest. The public interest in the proper administration of the planning process and the proper recording of vital decisions made therein clearly constitutes such an interest. Thus I consider that the court should of its own motion extend the time for the bringing of judicial review herein. The result of this is that the court refuses the application to set aside the leave granted and finds that although the application was made outside the 8 week time limit provided by s. 50 (6) of the Planning and Development Act 2000-2010, that time limit should be extended so as to permit the applicant challenge the decision made by the respondent that the condition of the planning permission has been complied with.