THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 657 J.R.]

BETWEEN

DRUMQUIN CONSTRUCTION (BAREFIELD) LIMITED AND

PADRAIG HOWARD

APPLICANTS

AND

CLARE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Coffey delivered on the 19th day of December, 2017

1. This is an application for judicial review which arises from a dispute as to the expiry date of an order made by Ennis Town Council extending the life of a planning permission and the consequent validity of enforcement notices issued by the respondent against the applicants in reliance on the earlier of two possible dates.

2. The applicants seek the following reliefs:

> (1) a declaration that the order made by Ennis Town Council dated the 5th September, 2012, made pursuant to ss. 42 and 42 (a) of the Planning and Development Acts, 2000-2011 (hereafter "the Act") should be interpreted having regard to the provisions of s. 251 of the Act as extending the appropriate period of planning permission reference 06/46 by an additional period from the correct date of expiry of the said permission being the 29th August, 2012, until the 29th August, 2017;
>
> (2) a declaration that the enforcement notices issued by the respondent dated the 20th July, 2017, and addressed to each of the applicants pursuant to s. 154 of the Act in respect of the development are invalid, ultra vires and of no effect;
>
> (3) an order of *certiorari* quashing the said enforcement notices dated the 20th July, 2017.

Factual Background

3. On the 16th July, 2007, Ennis Town Council granted planning permission to the second named applicant (who was then the owner of the relevant land) to construct 29 houses and 18 apartments at Tulla Road, Roslevan, Ennis, County Clare ("the permission").

4. As the order granting the permission did not specify the appropriate period for which development was authorised, the permission was by virtue of s. 40(3)(v) of the Act for a period of five years beginning on the date of the grant of the permission.

5. Section 251 of the Act of 2000 provides that the period between the 24th December and the 1st January, both days inclusive, should be disregarded when calculating, *inter alia*, any "appropriate period" under the Act. Accordingly, nine days must be added to each year of the five years for which the permission was granted with the result that the permission expired on the 29th August, 2012.

6. On the 13th July, 2012, the second named applicant completed an application form to extend the appropriate period of the permission for an additional period of five years from the 15th July, 2012.

7. The said application form was enclosed in a covering letter dated the 12th July, 2012, from the applicants' planning advisors who sought an extension of five years from the 15th July, 2012, to "July, 2017".

8. On the 5th of September, 2012, the designated Senior Executive Officer of Ennis Town Council made an order pursuant to ss. 42 and 42(a) of the Act ("the extension order"), granting an extension to the permission for five years in the following terms:

> "I, hereby extend the appropriate period of Planning Permission Reference 06/46 for a period of five years from the date of expiry i.e. 15th July, 2012, to 15th July, 2017."

9. By letter dated the 5th September, 2012, Ennis Town Council wrote to the second named applicant to inform him that the permission had been extended "up to and including the 15th July, 2017". The letter enclosed a notification which stated that the permission "will now cease to have effect on the 15th July, 2017".

10. On the 1st June, 2014, Ennis Town Council was dissolved and ceased to exist, and the respondent became the successor to the Town Council on that date.

11. On a date unspecified in 2015, the second named applicant sold the relevant lands to a Pat Murphy, who in June 2016, sold the lands to the first named applicant, of which the second named applicant is a director.

14. On the 10th July, 2017, the applicants commenced works on the relevant site which continued up and until the 27th October, 2017.

15. There were two pre-commencement conditions attached to the permission, namely, conditions 16 and 41. Condition 16 required the applicants, prior to commencement of the development, to lodge with the planning authority an insurance bond in the sum of

€145,000 to secure the satisfactory completion of the proposed development. Condition 41 required the applicants, prior to the commencement of the development, to pay a contribution of €554,499.50 to the planning authority in respect of public infrastructure and facilities benefiting the development.

16. Although the applicants made endeavours to reach an accommodation with the respondent, the fact is that the works began and continued in circumstances in which there was *prima facie* non-compliance with the relevant conditions. Neither the existence of the said conditions, nor the fact of *prima facie* non-compliance were disclosed in the affidavits sworn by the second named applicant to ground the application for leave to this Court.

17. At all times prior to the 4th July, 2017, the parties had proceeded on the understanding that the extended permission would expire on the 15th of July, 2017. At a meeting with the respondent on the 4th July, 2017, the applicants' planning advisors, for the first time, made reference to s. 251 of the Act. By letter dated 19th July, 2017, the respondent wrote to the applicants' planning advisors to state that the extension order had specified the date of expiry to be the 15th July, 2017 and to assert that the permission had expired.

18. On the 20th July, 2017, the respondent issued enforcement notices pursuant to s. 154 of the Act against both applicants, on the basis that the extended permission had expired and that the ongoing works constituted an unauthorised development.

Relevant legislation

19. The permission authorising development of the site was granted under s. 34 of the Act, but was unspecified as to the period of its duration and was, therefore, by virtue of s. 40(3)(b) of the Act for a period of five years.

20. Section 40(3) of the Act states that the "appropriate period is:-

> (a) in case in relation to the permission a period is specified pursuant to
>
> section 41, that period, and
>
> (b) in any other case, the period of five years beginning on the date of the grant of permission".

21. The calculation of the "appropriate period" and other time limits over holidays is provided for by s. 251 of the Act which states:-

> "Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded."

22. The meaning and effect of s. 251 of the Act was considered by Hedigan J. in *Browne v Kerry County Council and Others* [2011] 3 IR 514, who held that although "curious", the provisions of the section were nonetheless "plain and unambiguous" and, therefore, had to be given their literal meaning pursuant to s. 5(1) of the Interpretation Act, 2005.

23. The power to extend the appropriate period of a permission is given by s. 42(1) of the Act which provides:-

> "On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates…"

24. Article 42(1) of the Planning and Development Regulations 2001-2015 ("the Regulations") provides that an application to extend the "appropriate period" of a planning permission must be in writing and requires that it shall, *inter alia*, contain the following information:-

> "(h) the date on which the permission will cease to have effect…
>
> (l) the additional period by which the permission is sought to be extended."

25. A challenge to the validity of a decision on an application for planning permission is expressly confined to an application for judicial review which must generally be made within eight weeks of the date of the decision.

26. Section 50(2) of the Act provides:-

> "A person shall not question the validity of-
>
> (a) a decision of a planning authority or local authority, as appropriate-
> (i) on an application for a permission under this Part, or
>
> (ii) under section 179,
>
> (iii) in accordance with section 216
>
> (b) a decision of the Board—
> (i) on any appeal or referral,
>
> (ii) under section 175 , or
>
> (iii) in the performance by it of a function transferred under Part XIV,
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) ("the Order")."

27. Section 50(7) provides:-

> "an application for leave to apply for judicial review under the Order… shall be made with in the period of 8 weeks

beginning on the date on which notice of the decision (is first sent)…"

28. Section 50(8) of the Act gives to the High Court a power to enlarge time for the bringing of an application for judicial review in the following terms:-

> "The High Court may extend the period provided for in section (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that-
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave with the period so provided were outside of the control of the applicant for the extension".

Discussion

29. Perusal of the application for the extension order discloses that in accordance with Article 42(l) of the Regulations, the second named applicant specified:-

> (1) the 15th July, 2012, as the date on which the permission ceased to have effect;
>
> (2) five years as the additional period for which the extension was sought.

30. Perusal of the extension order discloses that it specified:-

> (1) the 15th July, 2012, as the date on which the permission ceased to have effect;
>
> (2) the 15th July, 2017, as the date of expiry of the extension order;
>
> (3) (by logical implication) five calendar years as the additional period for which the permission was extended.

31. The extension order cannot be considered in isolation but must be construed objectively by reference to the meaning and effect of the permission which it extends.

32. An extension order made pursuant to s. 42(1) of the Act merely extends by a specified additional period the appropriate period of a permission that has already been granted under s. 34 of the Act. The additional period, so specified, can only run from the date on which the permission expires and not from any other date. The expiry date of the permission is ascertainable only from a calculation of the appropriate period of the permission in accordance with s. 251 of the Act and cannot be retrospectively altered by the purported provision of a different expiry date in an extension order made under s. 42 of the Act.

33. The extension order in controversy specified the 15th July, 2012, as the date on which the permission expired. The expiry date so stated is not calculated in accordance with s. 251 of the Act and is, therefore, an error of law on the face of the record of the extension order. It is, moreover, an error of law that goes to the validity of the order insofar as it purports to retrospectively alter the date on which the permission ceased to have effect. It is common case that the validity of the order can only be questioned by way of judicial review and that the applicants are out of time to bring such a challenge having regard to the eight-week time limit prescribed by s. 50(7) of the Act.

34. Although it is accepted that the order is impervious to challenge, the applicants nonetheless contend that the extension order enjoys a presumption of regularity which requires the Court to construe it in accordance with the provisions of s. 251 of the Act with the result that the extension of five calendar years can only run from the 29th August, 2012, and not from 15th July, 2012, as specified in the order.

Relevant rules of construction

35. The rebuttable presumption that a planning permission is valid requires the Court to apply a double construction rule, whereunder, where the choice is open to it, a Court should prefer the interpretation which means that the planning permission would be valid (see Planning and Development Law, second edition, Garrett Simons at p. 218, para. 5-11).

36. When interpreting the meaning and effect of a planning permission, the Court must construe the relevant document and documents objectively being mindful of that fact that the permission is a public document which enures to the benefit not alone of the person to whom it issues but also for the benefit of anyone who acquires an interest in the property. As stated by Henchy J. in *Readymix (Eire) Ltd. v. Dublin County Council* (unreported Supreme Court 30th July, 1974):-

> "Since the permission notified to an applicant and entered in the register is a public document, it must be construed objectively as such, and not in the light of considerations special to the applicant or those responsible for the grant of the permission."

37. The principles to be applied to the construction of planning documents were set out by McCarthy J. in the case of *In re X.J.S. Investments Ltd* [1986] IR 750 at p. 756 as follows:-

> "(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.
>
> (b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

38. This passage was referred to with approval by Clarke J. (as he then was) in *Lanigan v. Barry* [2016] IR 656, at p 665 who went on to observe that:-

> "(the passage) was, perhaps, an early example of the move towards what has been described as the "text and context" method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. This approach has now become well established. The "text and context" approach requires the Court to consider the text used in the context of the circumstances for which the document concerned is produced including the

nature of the document itself."

39. The context and background in which the text and syntax of any particular planning permission must be considered will vary from case to case. Where the planning permission incorporates any other documents, it is the combined effect of such documents which must be looked at in determining the proper scope of the permission (see *Readymix (Eire) Ltd. v. Dublin County Council*, supra).

Decision

40. In July, 2012 the second named applicant and his planning advisers applied for and obtained from Ennis Town Council an extension order, which on its face extended the permission to the 15th July, 2017. This continued to be the understanding of the parties until in or about the 4th July, 2017, when the applicants' planning advisers for the first time sought to invoke the provisions of s. 251 of the Act in order to contend for a later expiry date.

41. Section 50(2) of the Act provides that a challenge to the validity of a decision on an application for planning permission must be by way of judicial review which s. 50(7) provides must be brought within eight weeks from the date on which notice of the decision is first sent. The manifest purpose of s. 50(7) of the Act is to give certainty to those who are affected or who rely upon decisions of planning authorities. The section thus provides that such decisions must be challenged within a very limited period of time with the obvious corollary that if not challenged, persons affected by such decisions ought to be entitled to rely upon them, certain in the knowledge that they are beyond challenge (see *Harrington v. Environmental Protection Agency* [2014] 2 I.R. 277 at p. 294).

42. It is common case that Ennis Town Council failed to apply the provisions of s. 251 to the calculation of the expiry date of the permission which gave rise to an error of law on the face of the record of the extension order which the second named applicant could have challenged but failed to do within the time limited by s. 50(7) of the Act. The applicants now contend that the Court should apply the presumption of regularity and the double construction rule thereunder in order to read back the provisions of s. 251 of the Act into the order so that both specified dates in the order including the expiry date of 15th July, 2017, can be disregarded. This requires the Court to do something that it cannot do, namely, to apply the presumption of regularity so as to in effect permit a collateral challenge to the very error of law that the applicants are out of time to question by way of judicial review by virtue of s. 50(7) of the Act.

43. The granular detail of the extension order is expressed in the specification of the relevant expiry dates. So expressed, a member of the public would naturally understand that the order expired on the 15th of July, 2017, because that is the date specified for its expiry. Indeed, that was the understanding of the second named applicant and his planning advisers throughout the period of extension until a different interpretation was put forward by the applicants' planning advisers at the meeting of 4th July, 2017.

44. The extension order provides for an expiry date that is specified as the 15th July, 2017. The expiry date so specified is clear and unambiguous, thereby leaving no room for the Court to construe it otherwise.

45. I accept the respondent's submission that a member of the public reading the wording of the order of 5th September, 2012, would read it in the ordinary way and interpret it as meaning that it intended only to extend the life of the applicants' permission to the date specified, namely, the 15th July, 2017, and not to apply the special meaning under s. 251 of the Act contended for by the applicants. I also agree with the respondent's submission that the order of the 5th September, 2012, is a planning document intended to be read and understood by members of the public, and the applicants' interpretation of it as extending the life of the relevant planning permission to the 29th August, 2017, is a strained and legalistic interpretation of the decision, which is an inappropriate and an unsound interpretation of the document on the basis of the XJS case. To use the words of Barrett J. in *Dunnes Stores v. Dublin City Council* [2017] IEHC 148, what the applicants contend for is "a forced reading" of the order rather than the unforced reading contended for by the respondent.

46. For the foregoing reasons, I refuse the reliefs sought.