Neutral Citation: [2015] IEHC 256

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 242 JR]

BETWEEN

NOEL ROSS AND GARY ROSS

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 23rd day of April, 2015.

Introduction

1. In the within proceedings, the applicants seek an order of *certiorari* quashing that part of the decision of the respondent granting planning permission, being retention of a replacement mobile home at Ballinoulart, Cahor, County Wexford, dated the 27th of February, 2014 that requires compliance with Condition 2. The applicants further seek a declaration that the respondent acted *ultra vires* the provisions of the Planning Acts 2000-2013 in granting the permission or alternatively, a declaration that insofar as the powers of the respondent purporting to permit the limitations on the use of private property as set out in the decision, the same are in breach of Articles 40.1, 40.3.2 and 43 of the Constitution. With regard to the latter relief, the applicants accept that the court cannot adjudicate on that claim in the absence of the Attorney General being joined as a notice party.

Background Facts

2. The first named applicant owns a small plot of land comprising 0.1010 hectares (approximately a quarter of an acre) situated at Ballinoulart, Kilmuckridge, County Wexford. The site is situate in a coastal location south of Courtown. The first applicant purchased the site in 1973 together with a mobile home which had been located thereon since in or about 1959. On acquiring the property, he placed a new mobile home on the site. It is accessed by an unpaved track. There are no services. Since that time, the first applicant together with his family, including the second applicant, his son, have used the property as a holiday home enjoying many vacations there.

3. In the summer of 2010, the mobile home was irreparably damaged by fire and was replaced by a new mobile home of the same dimensions and in the same location as the original.

4. On the 20th of January, 2011, the planning authority, Wexford County Council ("the Council"), served a notice on the first applicant warning him that an enforcement notice under s. 154 of the Planning and Development Act 2000 (as amended) ("the PDA") may be issued against him. Arising from this warning letter, the second applicant, on behalf of his father, made a number of submissions and observations in a letter of the 8th of February, 2011. In this letter, the second applicant pointed to the fact that many family holidays had been spent in the mobile home since 1973 and he enclosed photographic evidence. The first applicant had become aware in June, 2010 that a fire had severely damaged the mobile home leading to the necessity for its replacement. He submitted that this did not involve a breach of any planning regulation given that there had been a mobile home on the site since 1973 and probably 1959. He further submitted that the structure had been on the land in excess of five years and in the event of proceedings being taken by the local authority, they would be vigorously defended.

5. In a letter of the 10th of August, 2011, the local authority accepted that the original mobile was in situ for many years and was destroyed by fire damage. It was suggested that the replacement mobile home however was larger and in a new location on the site and it remained the Council's view that planning permission was required. Notwithstanding that view, the Council indicated that it intended referring the case under s. 5(4) of the PDA to the respondent for a determination as to whether the development in issue was exempted development. The applicants were further informed that no enforcement action would be taken until a decision was issued by the respondent.

6. Arising from the s. 5 referral, the second applicant made further written observations to the respondent. He clarified some factual matters and made legal submissions as to why planning permission was not required.

7. The respondent made its decision on the s. 5 referral on the 25th of January, 2012 and determined that the replacement of the mobile home was development and was not exempted development. The respondent's decision was accompanied by a notice advising that its decision may be challenged by way of judicial review only. No application in that regard was made by the applicants.

8. Instead, the second applicant lodged an application for retention planning permission for the mobile home on the 23rd of September, 2013. This was grounded on a planning application form dated the 15th of September, 2013. This is a pro forma document where information was furnished under various headings including the following:

> "9. Description of proposed development:
>
> (Brief description of nature and extent of development)
>
> *Retention of replacement of mobile home…*
>
> 15. Where the application refers to a material change of use of any land or structure or the retention of such a material change of use:
>
> Existing use (or previous use where retention permission is sought)
>
> *Mobile home*
>
> Proposed use (or use it is proposed to retain)

Replacement mobile home

Nature and extent of any such proposed use (or use it is proposed to retain)

The retention for replacement of mobile home proposal is for the same use it has been used since 1973 and that is for use for holidays during summer."

9. The first applicant completed a further document furnishing supplementary information required in the case of single rural housing applications. In this, he indicated a willingness to accept an occupancy condition for a period of five years and further referred to the fact that his wife was a member of the local community going on holidays in the area her whole life.

10. In its decision of the 15th of November, 2013, Wexford County Council refused the application for the following reasons:

"1. The development is considered contrary to Objective CZM09 in the Wexford County Development Plan 2013 – 2019, which states that it is an objective of the Council to restrict development outside the boundaries of existing coastal settlements to that which is required to be located in that particular location. A mobile home does not have this particular locational requirement and, therefore, would be contrary to this policy and therefore, contrary to the proper planning and sustainable development of the area.

2. The development is considered contrary to Objective TM 34 in the Wexford County Development Plan 2013 – 2019, which states that it is an objective of the Council to prohibit the replacement of individual mobile homes and caravans in rural or urban areas except in extenuating circumstances. It is considered that the applicant has not demonstrated sufficient extenuating circumstances in this instance. Therefore, the development would be contrary to the proper planning and sustainable development of the area."

11. The decision referred to two objectives of the Wexford County Development Plan 2013 – 2019 which are as follows:

"It is an objective of the Council:

Objective CZM09

To restrict development outside the boundaries of existing coastal settlements to that which is required to be located in that particular location such as:

- Development to support the operation of existing ports, harbours and marinas;
- Agricultural development;
- Tourism related facilities appropriate to the particular coastal location (other than new build holiday home accommodation) where there is a demonstration of a location or resource based need;
- Other developments where an overriding need is demonstrated.

New development shall be prohibited where it poses a significant or potential threat to coastal habitats or features, and/or where the development is likely to result in adverse patterns of erosion or deposition elsewhere along the coast and where it is likely to affect the integrity of Natura 2000 sites…

Objective TM34

To prohibit the replacement of individual mobile homes and caravans in rural or urban areas except in extenuating circumstances and where permitted the planning permission will only be for a limited period."

The Appeal to the Respondent

12. In an undated document, the first applicant submitted an appeal from the decision of the local authority and set out four grounds. The first was that it was unfair to deprive the applicant of his long established entitlement solely because of the damage occasioned by the fire. Secondly, he submitted that the development was not in fact contrary to Objective CZM09. Thirdly, he disputed that the damage by fire did not amount to an extenuating circumstance within the meaning of Objective TM34. Fourthly, the applicant accepted that while he did not judicially review the decision of the respondent in the s. 5 referral, he disputed that the mobile home was not in fact exempted development.

13. The respondent's inspector attended at the site on the 4th of February, 2014 for the purposes of an inspection. In her report to the respondent, the inspector identified the development as:

"Retention of a replacement mobile home proposed for the same summer holiday use as former mobile home use since 1973."

14. She described the planning application in the following terms:

"According to the application, the proposed use of the mobile home as a holiday home during summer months is a use that commenced in 1973."

15. The inspector, in her assessment of the application, noted a number of points including that a strong case had been made in the appeal to the effect that the replacement of the mobile home was *de minimis* although the decision on the s. 5 referral was not consistent with that argument. She did however consider that the applicant had made a strong case to support the claim that the replacement was justified on the basis of extenuating circumstances as provided in Objective TM34. She also concluded that the development had minimal visual impact on the local environment. Whilst the development plan reasonably discouraged mobile home development in sensitive landscapes, the inspector felt that given the strong case made regarding replacement of the original

structure, the lack of significant visual or other impact on the landscape, a grant of permission would be reasonable, not in material conflict with the development plan objectives and not seriously injurious to the visual and recreational amenities or landscape characteristics of the location. She believed that the subject proposal was atypical of mobile home development in terms of limited adverse impact, the established use, the limitation of use to holiday home use in summer months for holiday purposes, and limited relevance of the rural settlement policy objectives.

16. In the light of the foregoing, the inspector arrived at the conclusion that a grant of permission for retention was recommended. She further recommended a condition confining the use of the holiday home to the applicant with an exclusion of subletting or sale. She made other recommendations not material to the issues herein.

17. On the 26th of February, 2014, the respondent issued its decision to grant permission for the development in accordance with the plans and particulars based on the reasons and considerations and conditions set out therein. Under the heading "Reasons and Considerations" the respondent said:

> "Having regard to the similar nature and scale of the replacement mobile home the retention of which is proposed relative to the former mobile home that was located on the site since 1973, the circumstances leading to the replacement of the former home, the characteristics of the site location towards which there are no public views of the proposed development and, the limited summer holiday use of the mobile home by the owner, it is considered that, subject to compliance with conditions set out below, the proposed development would not seriously injure the visual and recreational amenities and character of the area, would be in accordance with the settlement policies and objectives along with the policies relating to extenuating circumstances set out under TM34 and CZM09 of the Wexford County Development Plan 2013 – 2019 and would, therefore, be in accordance with the proper planning and sustainable development of the area."

18. Four conditions are attached to the permission. The first is a fairly standard condition requiring the development to be retained and completed in accordance with the plans and particulars lodged with the application. Conditions 3 and 4 are not material and Condition 2, which gives rise to the within proceedings, provides as follows:

> "2. The use of the replacement mobile home shall be confined to use as a holiday home during summer months. It shall not be let or sold for use at the site location as a holiday home or for any other purpose.
>
> **Reason:**
> To ensure that the development for retention is confined to that which is in accordance with the settlement policies within the current development plan and the interest of the proper planning sustainable development of the area."

The Pleadings

19. In their statement of grounds, the applicants rely on six grounds:

> 1. The reference to "summer months" in the condition is vague and uncertain and an unlawful and arbitrary restriction of the applicant's use and enjoyment of the property and an impermissible interference with their right to private property.
>
> 2. Whilst it is disputed that planning permission was required to replace the mobile home, its retention was in fact permitted by the existence of "extenuating circumstances" as per TM34.
>
> 3. The restriction on alienation is a disproportionate interference with the applicant's right to own property and is an unequal treatment of the applicants vis-à-vis the owners of nearby property. Thus, it discriminates against the applicants and is unlawful.
>
> 4. The applicants were given no opportunity to address the respondent on the two aspects of Condition 2 prior to their imposition in breach of the requirements of natural justice. *This ground has been abandoned*.
>
> 5. Insofar as the PDA permits such a condition, it is contrary to Articles 40.1, 40.3.2 and 43 of the Constitution. *This ground underpins the claim for a declaration that the powers conferred on the respondent permitting such a condition are unconstitutional and thus cannot be proceeded with in the absence of notice to the Attorney General*.
>
> 6. The grant of permission was *ultra vires* the respondent because it was not an unlawful structure requiring retention and did not contravene Objective TM34.

20. The respondent in its statement of opposition joins issue with the applicant's statement of grounds. In relation to grounds 2 and 5, it pleads that the applicants are bound by the unchallenged decision of the respondent in the s. 5 referral. In relation to Condition 2, the respondent pleads that insofar as it restricts the applicants' use to the summer months, this is what they applied for and this is what they got. Alternatively, if they were in doubt as to what this meant, they could have sought clarification from the respondent under s. 146A of the PDA but failed to do so.

21. The respondent further pleads that Condition 2 is not severable from the planning permission as a whole insofar as it would leave in situ a permission never intended by the respondent.

Submissions

22. Mr. Finlay SC on behalf of the applicants submitted that Condition 2 is unlawful because the development objective sought to be achieved cannot in fact be achieved by the condition. In that regard, he relied on *Killiney and Ballybrack Development Association Ltd v. Minister for Local Government* [1978] I.L.R.M. 78 and also *Ashbourne Holdings Ltd v. An Bord Pleanala* [2003] 2 I.R. 114. Accordingly, it was argued that the condition was not "expedient" to the development within the meaning of s. 34(4) of the PDA and was thus *ultra vires*.

23. It was further submitted that the decision under challenge contravened s. 34(10) of the PDA in failing to comply with the requirement to state the main reasons for the imposition of the condition, where the reason actually stated was irrelevant to the decision. The applicants further contended that insofar as the condition is personal to the first applicant, it is invalid. Reference was made to authorities which showed that planning conditions enure for the benefit of the lands and are not properly regarded as personal to the applicant for such permission. Reliance was placed on *Mason v. KTK Sand and Gravel Ltd* (Unreported, High Court, Smyth J., 7th May, 2004). The applicants also referred to *Flanagan v. Galway City and County Manager* [1990] 2 I.R. 66, where the

members of Galway County Council passed a resolution directing the county manager to grant a planning permission in circumstances where the councillors took into account the personal circumstances of the applicant and his employees and thus did not restrict themselves to considering the proper planning and development of their area.

24. Finally, the applicants argued that if the condition in question is ultra vires, it ought to be regarded as severable from the rest of the planning permission and in that respect relied on *Bord na Mona v. An Bord Pleanala* [1985] I.R. 205.

25. Mr. Foley BL on behalf of the respondent made objection to a number of the applicant's submissions, in particular those relating to the failure to give adequate reasons pursuant to s. 34, on the basis that these were not grounds upon which leave to seek judicial review had been granted. In a ruling I delivered during the course of the trial, I accepted that submission and ruled that the applicants were precluded from making submissions based on either a failure to give any, or any adequate, reasons for the imposition of Condition 2 or from arguing that the condition is either irrational or unreasonable.

26. The respondent further argued that the applicants could not complain about the condition on the basis that a permission had been granted which was precisely what the applicants applied for. The suggestion that the condition regarding what was meant by "summer months" was vague and uncertain could, if the applicants really wanted clarification, have been the subject matter of such clarification pursuant to s. 146A of the PDA but the reality was that the applicants did not want clarification but simply no restriction of any kind. In that regard, the applicants had failed to exhaust their remedies and the court ought to exercise its discretion against granting relief.

27. The respondent contended that the applicants are precluded from now seeking to claim that the development did not in fact require planning permission and is exempted on the basis that this was already the subject matter of the s. 5 referral which was not challenged by the applicants. It was further said that the applicants could not be heard to complain about the first named applicant's personal circumstances being taken into account because in making the application, these had been expressly relied upon as constituting "extenuating circumstances". It was submitted that in any event, the condition could not be viewed as being severable from the permission as a whole. If the applicants had sought year round use in the first instance, the application might well have been refused and thus what would remain would be a permission never contemplated by the respondent. Therefore, if the condition is invalid, the entire permission must be quashed, a relief which is not sought by the applicants and confers no benefit on them.

28. The respondent relied on the recent judgment of this court in *Ratheniska v. An Bord Pleanala* [2015] IEHC 18, in which Haughton J. reviewed many of the relevant applicable legal principles to applications for judicial review against bodies such as the respondent. The authorities established that the respondent's decisions enjoy a presumption of validity until the contrary is shown and as an expert body, a significant degree of deference should be shown by the court to decisions made within its own area of particular expertise.

Discussion

29. It is immediately apparent that when one has regard to the submissions made by the applicants in this case, they appear to bear little relation to the grounds upon which leave was granted herein. I have already adverted to this issue in the ruling above referred to.

30. Turning to the specific grounds upon which leave was granted, as already indicated, Ground 4 has been abandoned and Ground 5 cannot be proceeded with in the absence of notice to the Attorney General. Grounds 2 and 6 can be conveniently grouped together because both in effect make the same point, i.e. that the applicant's mobile home did not require retention permission because its use was permitted by "extenuating circumstances". This proposition is in my view unstatable. This issue was already canvassed in detail by the applicants with the planning authority, who referred it to the respondent under s. 5 of the PDA for determination. That determination was made by the respondent and could not be clearer. The development requires planning permission. The applicants were advised of their right to seek judicial review of this determination and they declined to do so. They cannot in my view now be heard to say that the development never required planning permission in the first place. The applicants are clearly estopped and precluded from attempting to re-agitate an issue that has already been conclusively and validly determined against them.

31. What remains therefore are Grounds 1 and 3. Ground 1 complains that Condition 2 is invalid in relation to the "summer months" restriction because it is vague and uncertain. There are a number of points to be made about this. If there is any vagueness and uncertainty about this condition, it was introduced by the applicants. As alluded to above, in their application form for planning permission the applicants expressly stated that the nature and extent of the use of the development that they proposed to retain was:

> *"The retention for replacement of mobile home proposal is for the same use it has been used since 1973 and that is for use for holidays during summer."*

32. There is no doubt that the relevant county development plan, whilst not absolutely prohibiting a retention of user of the kind proposed by the applicants, strongly discourages it. Thus, Objective TM34 makes clear that a development of the kind proposed by the applicants, namely the replacement of a mobile home, is prohibited except in extenuating circumstances and even then, permission would only be granted for a limited period. Clearly therefore, in order to have any prospect of obtaining a retention permission, the applicants had to make a strong case based on their personal circumstances that same were extenuating. Indeed, it is difficult to conceive how the concept of extenuation could ever be other than referable to the personal circumstances of the individual applicant. Thus, the applicants sought to persuade the planning authority and subsequently the respondent that the impact of the development on the local environment was significantly ameliorated by the limited use historically made by the first applicant and his family of the mobile home.

33. If the applicant's real complaint is that the meaning of "summer months" is vague and uncertain, it is surprising to say the least that they made no enquiry to establish what this actually meant. Indeed, it appears from submissions made by counsel for the respondent that the respondent has already come to a view on this and if certainty was required, all the applicants had to do was ask. They refrained from doing so either informally or by way of referral under s. 146A. In my view, there was an onus on the applicants to make some attempt to seek clarification of this condition if they required it before moving the court in judicial review proceedings. See in that regard *Donegal County Council v. O'Donnell* (Unreported, High Court, 25th July, 1982).

34. Quite apart from that, it seems to me that the applicants have significantly shifted their position from complaining about vagueness and uncertainty to a complaint that the restriction of use to the summer months does not advance any legitimate planning purpose and is therefore not a condition which is "expedient for the purposes of or in connection with the development authorised by the permission." – See s. 34(4) of the PDA.

35. In that regard, the applicants relied on the judgment of the Supreme Court delivered by Hardiman J. in *Ashbourne Holdings* following the earlier *Killiney* case. There is to my mind considerable doubt as to whether the applicants are entitled to advance this argument at all in circumstances where their grounds appear to make no reference to it. Leaving that consideration to one side for a moment, it is evident that an attempt has been made in this case to expand the grounds upon which leave was granted on the 10th of April, 2014 by the introduction of subsequent affidavits. The plaintiff's solicitor, Mr. John Brannigan, swore an affidavit on the 4th of November, 2014 in which he said (at para. 3):

> "It is not claimed that the restriction of the use to summer months is merely vague and uncertain (which it is), but more fundamentally, it is unequivocally claimed, either expressly or by implication, that the restriction of the use of the applicant's mobile home to use as a holiday home for the summer months, or indeed to restrict its lawful use to any time is an oppressive, unlawful and repressive restriction on the applicant's enjoyment of the land and the mobile home amenity." (Emphasis supplied)

36. Thus, the applicants have gone from a position of obtaining leave from this court on the grounds that the user restriction to summer months is vague and uncertain to a position where they now allege that any restriction on use is unlawful. Whilst I do not think that the applicants ought to be permitted to even advance that argument in the circumstances, the proposition that no restriction on user can be imposed is devoid of any merit. Section 39(2) of the PDA provides:

> "Where permission is granted under this Part for a structure, the grant of permission may specify the purposes for which the structure may or may not be used, and in case the grant specifies use as a dwelling as a purpose for which the structure may be used, the permission may also be granted subject to a condition specifying that the use as a dwelling shall be restricted to use by persons of a particular class or description and that provision to that effect shall be embodied in an agreement under *section 47*."

37. Indeed, in Mr. Brannigan's affidavit and a subsequent affidavit of the second applicant, it is sought to suggest that in fact the applicants use the mobile home year round and not just in the summer. This is an *ex post facto* attempt to introduce evidence that was never put before the respondent and ought not be permitted.

38. With regard to Ground 3, the applicants complain that the prohibition on alienation is a disproportionate interference with the applicant's right to own property. They contend that it is discriminatory in that it does not treat in equal manner the applicants with owners of nearby property in the same county. However, that latter argument was not pursued in the applicant's submissions. Rather, it was again argued that a restriction on alienation is not expedient to the development and the respondent was not entitled to personalise the condition to the applicants. I do not consider that the judgment of Blayney J. in *Flanagan* is authority for the proposition that a planning authority, or on appeal, the respondent, cannot have regard to the personal circumstances of an applicant. Rather, what the court was concerned with there was an attempt by councillors to overrule a decision of the county manager by reference to criteria which were entirely irrelevant to planning considerations.

39. The situation here is quite different. The applicant's entire application was predicated upon their personal circumstances. Indeed, it was essential for them to make the application on that basis if they were to have any hope of convincing the planning authority or the respondent of the existence of extenuating circumstances. Yet, the applicants now appear to suggest that those very circumstances may not be taken into account in imposing appropriate conditions. Here again it seems to me that the applicants are simply being confined to using the property for the purpose for which they have always used it. That was what they told the planning authority that they wished to retain.

40. There is of course no restriction on the applicant's right to sell the land comprising the site. If a new purchaser were to seek to use the mobile home on the site, he or she would have to make an appropriate planning application. Whether extenuating circumstances could then be said to exist would of course be a matter for the planning authority.

41. It seems to me that the applicants herein made a very specific case that they should be treated as an exception to the rule for particular reasons personal to them. The respondent was ultimately convinced that an exception should be made because of those particular circumstances. There is no substance in my view in the contention that Condition 2 is not expedient to the development. The reason given for Condition 2 seems to me to be perfectly rational and understandable:

> "To ensure that the development for retention is confined to that which is in accordance with the settlement policies within the current development plan and the interest of the proper planning and sustainable development of the area."

42. Even if I were wrong in my view of the validity of Condition 2, I am satisfied that it cannot be severed from the permission as a whole. The respondent was confronted with a very particular set of personal circumstances in concluding that the grant of permission was appropriate in this case. Those included the facts that historically over the previous forty years, the property had only ever been used by the first applicant and his family and then only during the summer months. In the absence of one or both of those factors, it seems to me that the application would have been of a radically different nature and the respondent may well have taken a different view of it. If Condition 2 were to be severed from the permission, it would leave in place a permission that was never contemplated by the respondent. Therefore, even if Condition 2 were invalid, it seems to me that the entire permission would have to be quashed. Clearly this is not a result which can have any benefit for the applicants nor is it one sought by them.

43. For these reasons therefore, I will dismiss this application.