Neutral Citation Number: [2005] IEHC 156

THE HIGH COURT

[Record No. 2004 1154 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

MAARTEN OPENNEER

APPLICANT

AND

THE COUNTY COUNCIL OF THE COUNTY OF DONEGAL

RESPONDENT

AND

JOHN SWEENEY AND SIOBHAN SWEENEY

NOTICE PARTIES

Judgment delivered by Mrs. Justice Macken on the 13th day of April, 2005

1. This is an application for judicial review in a planning matter and so it falls to be considered predominantly pursuant to the provisions of s. 50 of the Planning and Development Act, 2000 (as amended).

2. The application concerns two separate developments, of two individual dwelling houses, in County Donegal, which were the subject of planning application reference numbers 04/2511 and 04/2512, in respect of which decisions to grant permissions were made on 7th May, 2004 and 11th May, 2004 respectively. From the material disclosed on affidavit, it seems clear that the notifications of the grant of planning permission were issued on 25th and 29th June, 2004 respectively.

3. The applicant seeks, in essence, leave to issue judicial review proceedings in respect of these two decisions, seeking (a) certiorari to quash them both, (b) declarations that the above numbered applications which led to the decisions were null and void, (c) an order extending the time within which the proceedings can be brought, (d) a stay on the implementation of the purported planning permission, or in the alternative, an injunction restraining the implementation of the permissions.

4. The grounds upon which the leave to issue the proceedings are firstly, the respondent failed to have regard to submissions lawfully made by the applicant within the statutory period for so doing, and thereby breached the rules of natural and constitutional justice and of the statutory requirements of the Planning and Development Regulations, 2001. Secondly, the respondent failed to accept the submissions of the applicant, with the same consequences in law. Thirdly, the respondent failed, in the circumstances of the case, to accept the submissions of the applicant for both or for one or other of the planning applications and failed to notify the applicant of that decision until after the period for the lodging of submissions had expired. Fourthly, the respondent failed to advise the applicant as to the fee applicable in relating to the lodging of the submissions, and accepted a lesser fee, without notification to him of the error in so doing. Finally, on this aspect of the claim, the applicant pleads that the respondent failed to notify the applicant of its decision to refuse to accept the applicant's submission as soon as may be and in any event not until after the date of the decision, and contrary to the provisions of Article 31 of the regulations of 2001, so that, in consequence, this frustrated the applicant's in exercising his statutory right of appeal.

5. In a second series of grounds, the applicant claims that the respondent accepted an application for planning permission which did not comply with the statutory or regulatory requirements in that it granted permission for rural housing to persons not indigenous to the rural community in question, and in breach of s. 25 and in material breach of the Donegal County Development Plan, 2000. Further, it failed to inspect the sites for the appropriate site notices within the required period from the date of the applications for planning permission. Further, the provisions of the Article 17 of the Regulations of 2001 were not complied with.

6. As I have mentioned, the applicant also sought an extension of time within which to commence the within proceedings on grounds which I will consider in greater detail, as the Respondent pleads that the applicant should not be permitted to bring these proceedings, in light of the delay which has occurred. The notice parties concur with the arguments of the respondent in that regard.

7. To understand the factual matrix in which the application for leave is sought, and also the issue of delay, I must set out in some detail the chronology of events in respect of the applications and the decisions made.

8. Applications were made by each of the first and second named notice parties for permission to construct two separate houses with appropriate ancillary works in County Donegal. The two applications bear the numbers already referred to. The applications were lodged on 18th March, 2004 and received the date of 19th March, 2004 for the purposes of time running under the statute. With the applications it would appear that there were furnished (a) the required newspaper notices, and (b) what purported to be the "site notices", both required to be provided pursuant to the statutory scheme on planning applications.

9. It appears to be the case, and this is not disputed, or at least not clearly disputed in the affidavit evidence filed, that neither of the site notices was in fact in place on the site of the proposed dwelling houses prior to or at the time when the applications were filed, although this is what is required. The applicant avers that the site notices were not affixed to the site until a date in the first week in April. The first named notice party swore an affidavit in which he denied that the notice parties had not complied with the statutory requirements. However, he did not say that the site notices were actually affixed to each of the sites, nor when they were so affixed nor by whom, either on his own behalf nor on behalf of his sister the second named notice party. I am prepared to deal with this case on the basis that the applicant's evidence should, at least at this point in time, stand as evidence that the site notices were not erected until sometime in or around the 4th April, and were not in place on the 18th or 19th March, 2004.

10. There were two previous applications lodged in respect of two houses at the same location, also in what might be called duplicate applications, but these had been withdrawn. The applicant, together with several other named persons, wished to oppose the two applications the subject matter of this application. The applicant and those others therefore decided to oppose them, and on 20th April, 2004 lodged an objection in writing, which according to the affidavit evidence was delivered by hand at the respondent's office in Letterkenny. The subject matter of the objection was described in the title to the objection as: "planning applications no. 04/0511 and 04/0512 as lodged on 19th March, 2004 by John and Siobhan Sweeney respectively to erect dwellings in the National Heritage Area Aghalattive-Ards". This heading appeared in the covering letter to the objection and in the objection itself.

11. According to the affidavit of the applicant, and this is not disputed, the applicant tendered the sum of €20.00 which was requested of him by the respondent's administrative officer in its offices in Letterkenny, Co. Donegal in respect of which a receipt was issued. The receipt, which was in court, does not refer to any particular planning application number.

12. Also, according to the affidavit evidence filed, this objection was transmitted forthwith to the Dungloe offices of the respondent, which is where the applications were being dealt with. On that occasion it became immediately clear that the appropriate statutory or regulatory fee in respect of submissions to planning applications had not been paid, in that only €20.00 had been paid. There were however two distinct applications although the submissions to both were joined in one written submission. The affidavit evidence of Mr. Eunan Quinn on behalf of the respondent is that, on receipt of this material and on his discovering that the payment made was not in accordance with the regulatory fee, he endeavoured to contact the applicant at the telephone number indicated in the papers filed by him, but was unsuccessful in so doing.

13. The fee was not thereafter applied by the respondent either to one or other application, but shortly thereafter was returned together with the submissions filed, to the applicant, the respondent indicating that the submissions could not be considered as they did not comply with the requirements of the statutory scheme, not being accompanied by the appropriate fee.

14. The correspondence between the applicant and the respondent commenced in or around 20th April, 2004 and continued back and forth until late November, 2004. The proceedings were then commenced on 13th December and were served on 20th December, 2004.

15. I have set out in some detail the foregoing chronology of events, because the first argument of the respondent is that the proceedings were not commenced promptly as is required by law, nor within the time limits imposed by the statutory scheme which the respondent submitted is to be very strictly complied with, that being the intention of the Oireachtas as found in the Local Government (Planning and Development) Act, 2000. This ground was raised, in effect, as a preliminary ground, and before considering the merits of the applicant's case, which the respondent also contests. The notice parties supported the respondent's claim that the proceedings were not commenced promptly and therefore on the grounds of delay and failure to comply with the statutory time limits, should not be entertained. As against that, the applicant seeks an extension of time within which to bring these proceedings, and pleads that in the particular and peculiar circumstances of this case, especially having regard to the manner in which the respondent dealt with the issues, such an extension of time ought to be granted, because there are good and sufficient grounds for doing so.

16. It seems to me that it is essential to deal with this aspect of the matter first. The case made on behalf of the applicant is that he lawfully filed submissions to the applications for planning permission, and that he paid the amount of the fee which was sought by the respondent's administrative officer, who is well aware of such matters and received the appropriate receipt in respect of the same. It was argued by Mr. Kilty, S.C. on his behalf that, having made submissions, the failure to accept them was due to the respondent's failure to state the correct fee, the respondent's failure to apply the fee actually paid at least in respect of one of the planning applications, and to its failure to notify the applicant when it was discovered by the respondent that it had made an error in charging only €20.00 instead of double that figure, when time still existed for the error to be rectified. In support of this last aspect of the matter, the applicant claimed that the submissions were delivered on 20th April, 2004 and since the closing date for receipt of those would have been 23rd April, 2004 there were three days in which to notify him of the incorrect fee charged, and for him to remedy the matter.

17. The respondent raises several legal issues in respect of questions of delay and on the claim by the applicant to be entitled to an extension of time. Firstly, Mr. Flanagan, S.C., submitted that it is necessary to distinguish between what is being sought in these proceedings and what might have been sought by the applicant on discovering that an incorrect fee had been paid.

18. First he submitted that the applicant in fact paid the incorrect fee. He submitted that it is not for the respondent to suggest or to indicate the correct fee, as this is clearly established as part of the statutory scheme in question, and this is made especially clear in the site notices which the applicant accepts were erected, even if he alleges they were not erected in good time. Each of the notices, he submitted, stated specifically the precise charge which must be made in respect of each of the applications for planning permission in the event of a person wishing to file submissions, namely €20 in respect of each such application.

19. Moreover, on the facts of the case, Mr. Eunan Quinn Area Manager in the Planning and Economic Development department of the respondent, averred, in his affidavit sworn on 9th February, 2005, to having sought to contact the applicant when the error came to his attention, but was unable to do so when he tried by the telephone number given. This attempt by the respondent's Mr. Quinn was not obligatory, but was a genuine attempt to notify the applicant that he had failed to comply with the appropriate regulations. Moreover, counsel argued that the respondent could not and had no power to allocate the fee actually paid to one planning application or another.

20. But further, if the applicant had considered that the respondent was not entitled to reject the submissions filed, because of the alleged underpayment of the appropriate fee, he was notified of this step by letter dated 30th April, 2004, less than ten days after the date of lodgement and well prior to any decision being taken by the respondent on the applications for planning permission, and therefore would have been entitled to seek leave to issue judicial review proceedings in respect of that complaint in good time to resolve the matter. Not having done so, he cannot now base his judicial review proceedings, in which he seeks relief against the decisions actually made, on those planning application matters, in view of the inordinate delay.

21. Secondly, counsel argued, the applicant averred in his affidavit that he understood at all time from the correspondence exchanged between him and the respondent, that the planning applications remained open and under active consideration and that it was not until late in November, 2004 when a lengthy letter was written to him by the respondent replying to a range of queries raised by him that it became clear final decisions had actually been made on the two applications.

22. The Respondent counters these averments by pointing to exchanges in the correspondence between the parties from which the respondent says it is clear that the applicant well knew, even at an early stage in the process, that decisions had been made and that the decision had become final, but that notwithstanding this, no steps were taken by the applicant to bring these proceedings until the month of December 2004. In particular counsel for the respondent relied on a letter to it from the applicant dated 31 May, 2004 in which the applicant stated: "According to information from the Service Centre in Dungloe planning permissions on the mentioned applications were granted on 7th May, we even feel more embarrassed by the fact that the area manager, while interpreting the law to the point of injustice on our submission, had no problems to grant planning permission." The respondent also submitted that the applicant well knew that permissions had been granted when he wrote on 5th July, 2004 in a letter from him to the respondent in which he stated, *inter alia*, "… the misleading information and lies … should be enough reason to reject the applications … and to retract the granted permissions on the applications 04/2511 and 04/2512. The reference to the "applications" was to two other number applications not the subject of these proceedings.

23. Finally, on this aspect of the matter, the respondent submitted it was clear from the correspondence and/or from the submissions filed that the applicant had access to legal advice throughout the process, and had on several occasions threatened to bring legal proceedings or to invoke legal measures to compel the respondent to comply with its alleged obligations.

24. In the foregoing circumstances, the respondent has argued that the applicant had no good grounds for delaying in bringing proceedings until the month of December, 2004. Since the decisions granting planning permission pursuant to the applications were made on 7th May and on 11th May respectively, the statutory time limit for challenging these expired eight weeks later on 1st and 5th July, 2004. The respondent further argued that the eight week time limit imposed is to be strictly construed, in particular since a late challenge may have significant adverse effects on third parties. Quite apart from the statutory time limit, the respondent also argued that the applicant has presented no material facts upon which the court ought to permit an extension of time pursuant to s. 50(4)(a)(iii) of the Act of 2000. Finally, on the general obligation imposed on an applicant in judicial review proceedings, Mr. Flanagan invoked the decisions of the Supreme Court in *State (Cussen) v. Brennan* [1981] I.R. 181 and *De Roiste v. Minister for Defence & Others* [2001] 1 I.R. 190, as well *Slatterys Ltd v. Commissioner of Valuation and Others* [2001] 4 I.R. 91, in support of his contention that an applicant must, in any event, move promptly for the type of relief sought here.

25. The notice party joined with the respondent in its argument on the question of delay, both as to the absence of any proceedings by the applicant for the alleged failure of the respondent to accept the submissions filed or to apply the fee paid to one or other application and also as to the alleged lengthy delay in bringing the within proceedings and the lack of entitlement to any extension of time. Miss Collard, B.L., on behalf of the Notice Parties argued further that in the present case there was good reason for not permitting any extension, because she submitted, the notice parties had entered into contracts for the purchase of the lands the subject matter of the planning applications on condition that such planning permission would be forthcoming, and had closed the contracts for the sale of the lands in question on that basis. In the circumstances the notice parties would suffer substantial losses if, at this remove, an extension of time were granted to the applicant to commence judicial review proceedings.

26. In response the applicant submitted that there was nothing in any of the special conditions attaching to the contracts for sale invoked by the notice parties, concerning planning permission in their favour. Further, he argued that in the present case the applicant was entitled to have the benefit of the statutory entitlement to make submissions and that it was incumbent on the respondent, where an error had been caused by their administrative officer, to ensure that that statutory right was protected.

Conclusions

27. It is clear that when the above referred to submissions filed by the applicant objecting to the planning applications the subject of the motion, were not accepted but rather were returned by the respondent, the applicant was entitled to seek to issue judicial review proceedings in respect of the same, and might have been in a position to do so possibly even prior to the dates in May, 2004 when the decisions were made. So also would the applicant have been in a position to challenge the decisions themselves prior to the statutory expiry date in July, but did not do so. The question which now arises therefore is whether, in light of the events occurring in the present case, the applicant should have an order extending the time for bringing these proceedings which commenced by notice of motion filed on the 10th December, 2004, some five months after the expiry of the statutory eight week period.

28. The applicant can undoubtedly seek and secure an extension of time if he can persuade the Court that there are "good and sufficient reasons for doing so". This will always depend on the particular circumstances of each case. In the present case, it is understandable that the applicant was very concerned that his submissions, as filed, and in respect of which he paid a fee, were not accepted. As I have mentioned, when these were returned, the applicant was entitled to seek leave to issue judicial review proceedings challenging this, as well as the failure of the respondent to allocate the fee actually paid to one or other planning application, although I refer to the merits of such a claim, in so far as they may be relevant to my decision in this particular case, below.

29. And, as I have indicated, even if he did not actually commence such proceedings for relief in respect of that discrete issue of the fee payment, he could have sought leave to issue judicial review proceedings within the statutory eight week period provided for under the Planning and Development Act, 2000, and included in such application a ground based on the payment of the fee and the alleged failure of the respondent to allocate the fee to one or other application.

30. To the extent therefore that the respondent argued that the applicant if he had a complaint about the fee, should have commenced legal proceedings in respect of that issue, the fact that he did not do so would not preclude him, for that reason alone, from seeking leave to issue such proceedings in which that too was a ground within the statutory period provided for under the Act of 2000, so long as he could be considered, in respect of that issue, to have moved promptly in any event.

31. However, in so far as the present application is concerned the applicant did not in fact, file his application for leave within the statutory period. Mr. Flanagan argued that this is a very strict time limit, which, save for exceptional circumstances, operates as a type of guillotine. While I accept that it does so operate, the wording of s. 50 requires only that there be "good and sufficient" reasons, not necessarily exceptional circumstances, to permit an extension of time.

32. As to the reasons put forward by the applicant in this application, I do not find that any good or sufficient reasons have been adduced. 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 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 "final". It is one of the very reason 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.

33. On the facts in the present case, I find that the applicant knew at a very early stage in the planning process that his submissions had been treated as invalid, due to the fee issue, and could have moved promptly to challenge the same but did not do so. Further, I am satisfied from the applicant's own correspondence that he also knew at a very early stage in the same process that a decision had been made on 7th May, 2004 even though he may not have known at that time that a decision on the second of the planning applications had been made on 11th May. It would seem clear from the availability of information, as evidenced in the exchanges between the parties, however, that that too could have been ascertained without any great difficulty.

34. Moreover, on the correspondence from the applicant himself, and as correctly contended for by the respondent, the applicant also knew in the month of July, 2004 that the planning permissions decisions had become final, and had requested that they be

retracted by the respondent.

35. It is therefore clear, on the facts, that the applicant was well aware, and for many months, that decisions had been made and that permissions had been granted, yet did not commence proceedings until December, 2004. Even taking the month of July as the cut off point in terms of knowledge of the decision, the applicant did not move for another five months.

36. The applicant argues however that this failure to move sooner should not be held against him, because although he had some knowledge about the events, he did not know definitively until the receipt by him of a letter from the respondent in late November, 2004 that the position on the permissions was final.

37. I am not satisfied that this is a correct reflection of the true position, and I find as a matter of fact that the applicant was sufficiently aware both of the true facts and also of the legal consequences arising from those facts at a date well in advance of the date upon which he commenced the proceedings. It is true that there was a significant volume of correspondence exchanged between the applicant and the respondent, but much of this was directed towards the applicant's view of the manner in which the respondent was dealing with or had dealt with his complaints, including of course the complaints the subject of these proceedings.

38. Although I find that the applicant did not, in the above circumstances, move promptly as required, I must also consider whether, despite this, there are good and sufficient grounds so as to permit the application to proceed. I am satisfied that there are not. It is true that on the applicant's case, if I take it at its highest, a statutory site notice was not in place from the date on which it should have been. That statutory notice is intended to permit members of the public to exercise their rights within the permitted time limits to make submissions in respect of a planning application. In the present case, while not in any way condoning the fact, on the assumption it could have been established, that the site notice was not in place as required, nevertheless on the applicant's own evidence it was in place from in or round the 4th April, 2004, he knew this, and it was erected well within the time during which he would be entitled to and had ample time to lodge submissions. To that extent therefore the applicant was not deprived, by the absence of a notice, of his right to make submissions.

39. Further, the applicant argued that because the €20 fee was not allocated to one or other application, but rather was returned, he was wrongly deprived of his right to make submissions. Leaving aside altogether the fact that he would have been entitled to seek leave to issue judicial review proceedings in respect of this complaint, and assuming this could still form part of the within judicial review proceedings, if commenced within the appropriate statutory period and promptly, nevertheless on the merits of such a claim, the applicant is not entitled to lay the blame on the respondent for the error made. The regulatory scheme in relation to planning provides for the payment of a fee in respect of any submissions to a planning application. It is perfectly obvious, even from the applicant's own submissions and from his affidavits, that two such applications were involved. The site notices, both of them, gave a clear indication of the charge to be paid in respect of any objection being lodged to either of them. The distinguishing feature of this case is that the applicant himself chose to combine the submissions in respect of both planning applications in one document. But that was his choice and it does not take from the fact that there were two submissions to two different applications. In the circumstances, it was for the applicant to ensure that the statutory or regulatory requirements, duly notified to him by means of the site notices, were complied with. While the respondent made an attempt to bring the deficiency in fees to the attention of the applicant, this did not exonerate the applicant from the obligation to ensure that the appropriate fee was made.

40. Nor do I accept that it would have been possible for the respondent, even if it attempted to bring the matter to the applicant's notice, could have done so within a period of time which would have permitted the applicant to remedy matters, since in the absence of successful telephone contact, as here, the only other appropriate means would have been by post, and that might not have led, on any reasonable assessment of the time scale involved, to the applicant being in a position to pay the appropriate sums in respect of two applications in time. In acknowledging that the respondent did attempt to contact the applicant by telephone, I am not to be taken to accept the applicant's contention that there was any legal obligation on it to do so.

41. It is not necessary for me to deal with the merits of the other elements of the applicant's claim. The application for leave to challenge the decisions of the respondent was not made within the statutory period provided for. Nor was it made promptly. And there are no factors which fall within the ambit of "good and sufficient" reasons upon which the court should exercise its entitlement to extend the time for the making of the application. In the circumstances, I refuse the leave sought.