

THE HIGH COURT

IN THE MATTER OF ARTICLE 18 (8) OF THE

WASTE MANAGEMENT (FACILITY PERMIT AND REGISTRATION)

REGULATION 2007

AND

IN THE MATTER OF ORDER 84 OF THE RULES SUPERIOR COURTS

BETWEEN

DAVID BOYLAN LIMITED

APPLICANT

AND

KILDARE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Margaret Heneghan delivered on the 7th day of July, 2017.

1. This matter came before the court by way of originating notice of motion issued on the 8th December, 2014 seeking the following reliefs:-

1. An order pursuant to Article 18 (8) of the Waste Management (Facility Permit and Registration) Regulations 2007 and knowing or amending the decision of the respondent of the 17th November, 2014 where the respondent refused to grant to the applicant a waste facility permit in respects of lands at Kerdiffstown, Co. Kildare (WFP – KE – 14- 0071- 01).
2. For an order pursuant to Article 18 (8) of the Waste Management (Facility Permit and Registration) Regulations 2007 granting the said facility permit.
3. In the alternative an order directing the respondent, Kildare County Council, Derby Park, Naas, Co. Kildare to grant the said waste permit.
4. Such further other order as the Honourable Court deems appropriate.

2. The said notice of motion was grounded on the affidavit of Mr. David Boylan, a director of the applicant company, and was dated the 9th December, 2014. Mr. Boylan avers at para. 3 that he has a lease agreement in respect of lands located at Kerdiffstown, Co. Kildare, a disused quarry, which lands were owned by Roadwise Logistics Limited. He avers that the lands had the benefit of a planning permission for the restoration of a sand and gravel pit, through the recovery of earth soil and stones which was granted on 25th October, 2006, and extended for a period of five years on 10th January, 2013. At the date of swearing the affidavit, Mr. Boylan avers that the development on foot of the said permissions had not yet commenced, the applicant had engaged upon consultants for the purposes of lodging compliance submissions in respect of conditions attached to the permission and that the process was ongoing. Mr. Boylan avers that the respondent had sought further information in relation to the compliance documentation presented, and the applicant had applied for a waste permit to give effect to the proposed development. The respondent refused the application for a waste permit on 17th November, 2014. Mr. Boylan, at para. 8, avers that the said refusal is not valid, is premature, is contrary to law and makes no practical sense. He avers that the respondent cannot state, as it has in its refusal, that the development is not compliant, because the development does not exist. Further he avers that the lack of agreement, as yet, and matters of detail in the context of compliance cannot constitute grounds for a refusal of a permit and he prays for the relief as sought in the notice of motion.

3. Grounds of opposition were furnished dated 27th February, 2015 wherein it is denied that the applicant is entitled to reliefs claimed or to any relief. The respondent states that a decision to refuse the waste facility permit was made pursuant to Article 18 (4) (d) of the 2007 Regulations, as amended and that the same expressly provide that a local authority shall not grant a waste facility permit unless it is satisfied that the facility is compliant with planning or is exempt from planning permission. The respondent contends that it is entitled, and was obliged, to be satisfied, that the applicant had demonstrated its ability to comply with the conditions attached to the planning permission prior to the granting of a waste facility permit to the applicant and in circumstances where the development on the lands had yet to commence. Further the respondent contends that on the basis of the applicant's failure to demonstrate compliance with the specified conditions of planning permission, it would not have been possible for the respondent to make a determination in respect of the mandatory requirements of Article 19 (b)(ii) of the Waste Facility Regulations, which expressly obliges the respondent to attach conditions to a waste permit.

4. In an affidavit sworn by Mr. Liam Dunne, Senior Executive Officer and acting Director of Services of the Kildare County Council, on 27th February, 2015, he avers that planning permission was granted in respect of lands at Kerdiffstown, Naas, on or about the 25th October, 2006, and was subsequently extended on the 10th January, 2012 until the 26th November, 2017, and was subject to 36 conditions a number of which could be described as pre-commencement development conditions. These include the following:-

- I. prior to the commencement of the development the developer shall liaise with the National Roads Design Office (condition 2),
- II. prior to commencement, the developer shall submit a detailed scheme for landscaping the restored site to the planning authority for its written agreement (condition 14),
- III. car parking space shall be provided for on site for the duration of the works (condition 26),
- IV. a traffic management plan shall be submitted for the written approval of the planning authority (condition 29).

5. Mr. Dunne avers that access to the lands, the subject matter of the planning permission, was to be via a private industrial estate road and a bridge over the N7 motorway (Monread Accommodation Bridge). He avers that with the onset of the development, there would be a significant increase in vehicular access to the Northern side of the motorway, and accordingly planning conditions were attached to ensure appropriate measures would be put in place and works would be carried out to the bridge by the developer to ensure its appropriate upgrade in the circumstances. Furthermore he averred that condition 2(b) expressly provided the applicant prior to the commencement of any development submit for the written agreement of the planning authority a start and finish date.

6. He avers, specifically in relation to the waste facility permit application, which was submitted by the respondent on 17th December, 2013, the respondent sought further information from the applicant, pursuant to Article 30 of the 2007 Regulations, and the applicant was advised that pursuant to Article 18 (4) (d) a waste facility permit cannot be granted unless the site is compliant with planning permission. Mr. Dunne avers at para. 13, that there is no dispute by the applicant, by reference to paras. 4 and 5 of the affidavit of Mr. Boylan, that compliance in respect of conditions attaching to the planning permission continued to remain outstanding and the applicant confirmed it had engaged planning consultants for the purposes of lodging compliance submissions in respect of the conditions as attached. Mr. Dunne avers despite having retained the services of planning consultants, compliance with the specified conditions remain outstanding. He further avers, the respondent's decision to refuse to grant to the applicant of the waste facility permit was made in circumstances where the applicant had been requested on numerous occasions to provide the relevant information to comply with the specified conditions attached to the planning permission. He avers again that according to Article 18 (4) of the Regulations, the respondent is not permitted to grant a waste facility permit unless it is satisfied that the said permit is compliant with planning permission, and as the applicant had failed to comply with the specified conditions of planning permission, the applicant's application was refused.

7. In an affidavit sworn on 23rd March, 2015 by Mr. Symons, a Senior Environmental Consultant, in response to the affidavit of Mr. Dunne, he avers that he has never witnessed an undeveloped site being scrutinised for pre-development planning conditions and that the position being taken by the respondent in this case is an exception to what one would expect, in his professional opinion.

8. Mr. Boylan in his second affidavit sworn on 7th April, 2015 avers that Article 18 of the Regulations requires a facility to be compliant with planning permission, and the article is designed to deal with facilities that are in existence. He avers that in the instant case, the site in question is a disused quarry for which an application was made for restoration of the lands. He avers the site is not unauthorised and has the benefit of planning permission for the purposes of its restoration. He avers that a waste permit was previously granted by the respondent for this restoration. He further stated that it is neither practical or economically viable to undertake a full planning process including complete planning compliance in advance of an application for a waste permit and that this is never done. He avers that start and finish dates are entirely dependent on when a waste permit will issue, and that all outstanding matters are in the course of agreement, are matters of detail not substance, and will be agreed shortly. He avers it is entirely unreasonable that the applicant would have to recommence a fresh application for a waste facility permit and any further delays will seriously jeopardise the execution of the development. He avers that development has not yet commenced and there is no non-compliance with conditions, rather agreement is being reached in respect of matters to be agreed. He avers it is simply not possible to furnish compliance with the conditions until the permit is granted. He avers that none of the matters that remain to be agreed with the respondent are of any consequence or relevance to the issuance of the waste permit. He avers it is "unheard of" in his experience for a waste permit application to be made not only after planning permission has been obtained, but after full compliance with conditions has been achieved and site infrastructure works have been commenced or completed.

9. In a further replying affidavit dated 14th July, 2015, Mr. Dunne avers he disagrees with the interpretation by Mr. Boylan of the word "facility", pursuant to Article 18 of the Regulations. He avers that Mr. Boylan's assertion that it is never done that complete planning compliance is carried out in advance of a waste permit application is incorrect, and the suggestion that an applicant for a waste facility permit would make the application without the benefit of either a prior grant of permission, or exemption, or the submission of a planning application is incorrect. Mr. Dunne avers he can confirm that the respondent is unaware of any waste facility permit applications, which it has been in receipt of since the introduction of the 2007 Regulations, where planning permission had either not previously been obtained or where there was no application in the process of being applied for. Furthermore, in respect of all waste facility permit applications received by the respondent where the lands consisted of a quarry, each applicant had first obtained a grant of planning permission. He avers the respondent has a statutory responsibility to be satisfied that the facility is compliant with its planning. He avers that at no stage has the respondent requested or suggested that the applicant was required to commence or complete the works required pursuant to its planning permission, rather the outstanding compliance issues related to the so called pre-commencement conditions.

Submissions

10. It was submitted by counsel for the applicant that the court has power to annul, confirm or amend the decision of the respondent, however that the application is somewhat novel, and this procedure has never been used previously. It was submitted that in this particular situation there is no facility in being, there is no development at all on the site, and if the attitude taken by the respondent, in these proceedings, was applied universally, no developer would ever be able to start a development. It was submitted that a developer would have to expend vast monies complying with planning permission, that a bank or an investor would not release funds where such uncertainty existed, and that indeed the industry would collapse. It was further submitted that if the court determines that the respondent was entitled to refuse the waste facility permit, that would have significant ramifications across the country, and that planning permission would have to cease across the country. It was submitted that the reasons, as furnished by the respondent, for a refusal of the waste facility permit were peculiar, impractical, and not a correct interpretation of the Regulation in question.

11. The court was advised that the applicant had made a subsequent application for a waste facility permit to the respondent, and that having complied with conditions, a waste facility permit was in fact granted to the applicant by the respondent in August 2016. It was submitted while the case itself is moot, and whilst the applicant had not taken issue with the planning permission itself or the reasonable conditions attached thereto, that his only objection was that he has to comply with certain of those conditions before he can be granted a waste facility permit. It was submitted that either the applicant's interpretation of s. 18 is correct or otherwise and that the case stands or falls on that issue. It was submitted that the proceedings have been twice listed for hearing previously, where they did not get on for hearing, and in the intervening period, that the applicant having applied for a further waste facility permit and having complied with the conditions attaching thereto, was granted a waste facility permit by the respondent.

12. In reply, counsel on behalf of the respondent agreed that the issue is one of statutory interpretation, and that it was very apt and correct of counsel for the respondent in his opening of the case to refer to it as an unusual application. It was submitted that the respondent's case is that these proceedings were being pursued for tactical reasons in relation to costs, given that the applicant has now in fact obtained a waste facility permit in relation to the lands in question. It was submitted that what in fact happened was that having failed to comply with the conditions, as required by the respondent in relation to the first application for a waste facility permit, the applicant reapplied, and having complied with all of the conditions, as required by the respondent, the waste facility

permit in respect of the lands in question was in fact granted in August 2016 by the respondent. It was submitted that the second application by the applicant for a waste facility permit and his actions in complying with the conditions, as specified by the respondent in relation to that application, is the antithesis of what the applicant actually did in relation to the first application. It was submitted that since the institution of these proceedings, the applicant in his second application has participated in the very process that he seeks to query, impugn and question, that he has engaged in doing what he said he could not do, and that he has complied with all conditions, and having done so, that he was granted a waste facility permit by the respondent in August 2016. It was submitted despite the applicant's protest, that the proof of the pudding is in the eating, and that the applicant has not, in fact, built out the development, and that he was never required to do so.

13. It was submitted in 1998, one could apply for a waste facility permit without any planning compliance requirements, which resulted in enforcement matters having to be dealt with separately. It was submitted that that lacuna was amended in the 2007 Regulations, and in particular Article 18(4) where the language is mandatory. Article 18(4) confers a mandatory mandate on the local authority, whereby the local authority are statutorily prohibited from granting a waste facility permit unless certain conditions have been complied. It was submitted that in relation to the interpretation of the word facility, that one has to look at the literal meaning of the word, either a facility is compliant with planning conditions, or the facility has an exemption in relation to the same.

14. It was submitted that counsel for the applicant had now advised the court the applicant was not seeking reliefs under paras. 2 and 3 of the originating notice of motion. It was submitted that it was simply asking the court to either annul the decision of the respondent, or amend the decision and remit it back to the respondent for further consideration. Counsel for the respondent pointed out, however, that in the grounding affidavit, the applicant contended that the refusal of a permit, at that time, was premature and contrary to law, because the facility could not be commenced by the applicant and therefore he could not comply with the conditions as imposed. However, the court was reminded that the applicant now has a grant of planning permission for the development of these lands, and as of August 2016 he is in possession of a letter from the local authority saying that he has complied with the conditions as required on the second application, and that it had taken the applicant over two years to get that compliance in order to be granted the waste facility permit. It was submitted that the applicant has now addressed the deficiency, all the outstanding conditions have now been complied with, which resulted in the grant of a waste facility permit in August 2016.

The Law

15. Article 18 of the Waste Management (Facility Permit And Registration) Regulations 2007 provides as follows:

"18.(1) A local authority may, on application being made to it, grant a waste facility permit in accordance with these Regulations, or refuse to grant such a permit, in relation to the carrying on by the applicant of an activity specified in Part 1 of the third schedule at a facility located in the functional area of the said local authority.

(2) Where considered necessary a local authority shall physically inspect a facility or, as the case may be, a proposed facility, before deciding whether to grant or refuse an application for a waste facility permit....

(4) A local authority shall not grant a waste facility permit unless it is satisfied that—

(a) the activity concerned, carried on in accordance with such conditions as are attached to the waste facility permit, will not cause environmental pollution,

(b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment,

(c) best available techniques will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity concerned,

(d) the facility is compliant with planning or is exempt from planning permission under Section 5 of the Planning and Development Act 2000, and

(e) the applicant is a fit and proper person....

(8) A notification under sub-article (5), of a decision of a refusal to grant a waste facility permit, to an applicant or waste facility permit holder shall include a reference to the right of appeal to a court of competent jurisdiction against such a decision and, on hearing the appeal, the court may confirm, annul or amend the decision."

16. Section 19 provides as follows:-

"Conditions which shall be attached to a waste facility permit.

19.(1) A local authority shall attach to each waste facility permit granted by the authority—

(a) such conditions as are, in the reasonable opinion of that authority, necessary to give effect to the provisions of the Community Acts specified in the second schedule, insofar as such provisions are relevant to the waste related activity concerned.

(b) such conditions as are necessary, in the reasonable opinion of the authority—

(i) to give effect to the objectives of the relevant Waste Management Plan or the National Hazardous Waste Management Plan, as the case may be, or

(ii) for the purposes of article 18(4), or

(iii) to prevent the disposal of waste which has previously been collected in source-segregated form in order to facilitate recycling or to prevent the collection, transport, handling or mixing of waste in a manner so as to make it unsuitable for recycling or recovery."

17. Section 5 of the Regulations, provides general interpretations as follows:

"Activity" means in relation to the disposal and recovery of waste any of the activities specified in the third schedule of the Act or, as the case maybe, the fourth schedule of the Act and "disposal activities" are "waste recovery activities" shall be construed accordingly;

"authorised facility" means a facility which has been granted a waste authorisation in the form of a waste licence, a waste facility permit or a certificate of registration;

Interpretation Act, 2005

18. Section 5(2) of said Act provides as follows:-

"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument—

i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made, the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

Comment

19. Having considered all matters in this case, including the affidavit evidence, the written submissions and the oral submissions of counsel for the applicant and the respondent, it seems to me that the submission by counsel for the applicant, as to the interpretation of the word "facility" as provided for in Article 18 of the 2007 Waste Regulations, is purely theoretical and does not reflect the facts of this particular case. In *E.P.A. v. Harte Peat Limited and Lismore Limited* [2014] IEHC 308, Barrett J. opined that s.5(2) of the Interpretation Act, 2005, allows the court to depart from the literal meaning of the Act or statutory instrument in circumstances where, amongst other things the result would be absurd. In the instant case, there is no suggestion that the literal interpretation of the word "facility" is absurd or fails to reflect the plain intention of the instrument as a whole in the context of the enactment under which it was made. In the circumstances, the complaints made by the applicant in the view of the court are theoretical. Had events transpired in a particular fashion, the applicant's arguments might carry some weight, however, in the circumstances of this particular case, this court is of the view that the applicant's arguments in that regard carry no such weight.

Consideration as to whether the proceedings are now moot

20. In *Thomas Deegan v. The Minister for the Environment, Heritage & Local Government, Ireland and the Attorney General*, [2016] IEHC 216, Gilligan J. at para. 27 stated as follows:-

*"Clearly the first issue for the Court to determine is whether the cause of action in these proceedings has become moot. The law in this jurisdiction is clear that, in general, a Court will not proceed to determine a matter where there is no real dispute between the parties and will not, as a matter of course, issue advisory opinions. Hardiman J. explained the doctrine of mootness eloquently in *Gould v Collins* [2004] IESC 38, wherein he stated:*

'A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of locus standi but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties.'"

21. In the instant case, proceedings were commenced by way of originating notice of motion dated 8th December, 2014, and first listed before the court on 19th January, 2015. In August 2016, the applicant having made a second application for the grant of a waste facility permit, was granted the same by the respondent in August 2016, and prior to the hearing of the within proceedings, which commenced in October 2016. The respondent has argued from the outset that the proceedings were moot, but the same were being pursued for tactical reasons, namely in relation to costs, by the applicant. Counsel for the applicant informed the court that prior to the matter coming on for hearing in October 2016, the matter had twice previously been listed for hearing but had not been reached in the list. Subsequently, on the second application of the applicant, the applicant having complied with conditions as required by the respondent, the applicant was granted the waste facility permit in respect of the lands in question. The applicant has however submitted in these proceedings, that the court must interpret the wording of s. 18, of the 2007 Regulations, and in particular interpret the meaning of the word "facility".

22. This court is of the view that at the time the proceedings commenced, there was in fact a real dispute between the parties, however, once the applicant was granted the waste facility permit in August 2016, the real dispute which had previously existed between the parties ceased to exist. This court is of the view that as of August 2016, the proceedings had become moot as between the parties. In particular, taking into account the words of Hardiman J., the eventual decision of this court if it so determined in relation to the interpretation of the word "facility" in s. 18 of the 2007 Regulations, would be of no tactical significance to the parties.

23. The proceedings having been rendered moot on the grant of the waste facility permit to the applicant in August 2016, the question this Court must determine is why the proceedings became moot. It is clear from the letter from the respondent to the applicant's representative dated 17th November, 2014, the respondent sets out therein the reasons for its refusal of the waste facility permit, as the respondent was not satisfied that the facility, the subject matter of the waste facility permit application was in compliance with the grant of planning permission, as extended, and the particular conditions which the applicant had failed to comply with were set out in detail. In December of the same year, the applicant commenced these proceedings by way of originating notice of motion. The applicant subsequently applied again for a waste facility permit, and the respondent, ultimately being satisfied that all conditions had been complied with, by the applicant, granted the waste facility permit. As previously stated, by virtue of the grant of the subsequent waste facility permit, these proceedings were rendered moot as between the parties. It appears to this Court, that the proceedings were rendered moot as a result of the grant of the waste facility permit to the applicant, consequent upon the applicant having complied with all conditions as required by the respondent.

Conclusion

24. This court having determined that these proceedings are indeed moot between the parties, consequent upon the applicant's compliance with conditions as required by the respondent on foot of which the waste facility permit was granted, is of the view the applicant was directly responsible for the "event" which has rendered these proceedings moot. In view of the foregoing, I will refuse the applicant's application further to the relief as sought at para. 1 of the notice of motion, and in view of the court's finding in relation to the reasons as to why the proceedings were rendered moot, the court will award the costs of the proceedings to the respondent as against the applicant.