Neutral Citation: [2013] IEHC 261

THE HIGH COURT

[2012 No. 563 J.R.]

BETWEEN

HEATONS LIMITED

APPLICANT

AND

OFFALY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 4th June, 2013

1. May a planning authority make a reference to An Bord Pleanála pursuant to s. 5(4) of the Planning and Development Act 2000 ("the 2000 Act"), without notice to the relevant landowner in question and, if so, is a reference which asks whether the occupier of the premises is operating in compliance with relevant planning conditions a valid reference for this purpose? These are among the essential issues which arise in the present judicial review proceedings.

2. The applicants operate a department store at Unit H, Tullamore Retail Park, Cloncollog, Tullamore, County Offaly for which they have planning permission, albeit a permission which is subject to certain conditions. It is the nature of these conditions which assumes a particular importance so far as the present case is concerned.

3. Conditions No.2 and No. 16 of the relevant planning permission (PL2-01-651) provide as follows:-

> "6. The range of goods permitted to be sold in the approved units shall comprise only bulky household goods such as carpets, furniture and white electrical goods, DIY items and auto motor products...
>
> 16. Details of occupancy of each unit hereby approved and any subsequent change in occupancy shall be agreed with the planning authority..."

4. These conditions were further augmented by supplementary planning permission (PL2-04-254) which amends the earlier planning permission, Condition No.2 of which provides:-

> "2. Permission is granted for the removal of Condition 6 of PL2-01-651 to allow use as a catalogue retail store in relation to Unit D only. Units A, B, C, E, F, G and H shall remain as retail warehouse uniting and the range of goods permitted to be sold shall comprise only bulky households goods such as carpets, furniture and white electrical goods, DIY and auto motive products. No change of use shall take place without a prior grant or planning permission (notwithstanding the exempting development provisions of the Planning and Development Regulations 2001)."

5. On 11th September, 2007, Messrs Simon Clear & Associates, wrote to Offaly County Council indicating that it was now proposed that Unit H would be used by Heatons for the following purposes:-

> "The proposed store will encompass total gross floor space of approximately 2592m^2 (the figure includes 1296m^2 of mezzanine floor space). The main retail and display floor area will provide for the primary display and sales area for household goods, soft furnishings, bed linen and accessories, sport equipment apparel, homewares and ancillary apparel. The mezzanine floor may facilitate storage of bulky goods, staff areas and some sport equipment display areas.
>
> A prerequisite for all modern Heatons stores is the style of a floor plan which will accommodate an extensive modern showroom type layout. The Tullamore Retail Park Unit H affords the required showroom and space for the proposed Heatons Department Store and thus, it is submitted that Heatons will be an appropriate and exceptionally viable tenant in the retail park."

Mr. Clear then went on to request that the planning authority:-

> "Permit the proposed store to occupy Unit H of the Tullamore Retail Park and deem this proposal to comply with Conditions Nos. 6 and 16 of planning permission PL2-01-651 and Condition No.2 of PL2-07-684."

6. The Council responded to this letter on 13th March, 2008. The director of services noted that Heatons would sell among other things "bulky household goods, soft furnishing and homewares". He went on to say that this was considered acceptable to the planning authority and this would be in accordance with the conditions specified in the planning permission.

7. In the wake of that correspondence Heatons duly went into occupation of Unit H. Subsequently, however, a number of inspections carried out by planning officials revealed (apparently) that a substantial number of non-bulky household goods were on sale in a manner which the Council considered to be a contravention of the terms of the conditions contained in the planning permission.

8. On 3rd September 2009 the Council issued an enforcement notice requiring Heatons to comply with condition no. 6 of planning permission PL2/01/651. Specifically, the Council required Heatons to cease the sale of all non-bulky household items by 16th February 2009. The Council then commenced an enforcement prosecution against the company under s. 154 of the 2000 Act, but this prosecution was dismissed by the District Court on 11th March 2011. It would appear that the prosecution foundered principally by reason of an ambiguity contained in the original enforcement notice. The District Court did not, however, address the individual merits of the planning issue.

9. An inspection was subsequently carried out by an official from the planning department on 17th October, 2001. In the course of her very comprehensive inspection, the planning inspector surveyed both floors of the retail unit and concluded that the vast bulk of the items sold were non-bulky, including clothes, footwear, toys, sports items, and items for the home and kitchen. Within these categories there were, admittedly, some items which were bulky. Thus, for example, the sports section sold golf clubs and bicycles.

10. On the 17th April, 2012, the Council sent a letter to An Bord Pleanála requesting it to accept the enclosed reference pursuant to s. 5(4) of the 2000 Act. The letter was, in material part, in the following terms:

> "Whether Heatons are operating in compliance with planning condition no. 6 of Ref PL/2/01/651 and condition no. 2 Ref PI/2/04/254 at Unit H Tullamore Retail Park?"

11. The Council enclosed the appropriate cheque, site map and a copy of the relevant permissions. The Council also drew attention to a number of other decisions of the Board in some similar cases (including permissions granted to Heatons in respect of their stores in other locations), but it did not otherwise elaborate or comment. It is common case that no notice was given to Heatons of such reference and, indeed, it appears that the company learnt of the making of the reference from reports in local media outlets. At that juncture the Heatons' solicitors wrote to the Board on 25th May 2012 enclosing a submission.

12. On 28th May 2012 Heatons' solicitors received a letter from the Board enclosing a copy of the reference which was stated to have been "provisionally validated pending review". Heatons were requested to make submissions in accordance with s. 129 of the 2000 Act. The Board's letter enclosed a copy of the earlier submissions of 25th May which had been received before the referral was issued to the parties. The Board indicated that the submission might be resubmitted as part of Heatons' response to the reference.

13. Heatons applied for leave to apply for judicial review in June 2012 and was granted leave to apply on several grounds. Although not formally a party to the proceedings, An Bord Pleanála agreed to abide by the outcome of the proceedings. It further indicated that it would take no steps to determine the reference pending the delivery of this judgment.

Whether Heatons should be allowed to make arguments based on compliance with s. 127 of the 2000 Act

14. At the outset of the hearing, counsel for the applicant, Mr. Ralston S.C., sought to rely on a new argument to the effect that the reference did not comply with the requirements of s. 127(1)(d) of the 2000 Act. No leave had been granted by this Court to enable this argument to be advanced - although this point had been raised with the Board in a letter from the applicant's solicitors dated 18th June 2012 - and counsel for the Council, Mr. Keane S.C., objected strongly to such permission being granted.

15. Not without hesitation I have come to the conclusion that such leave to amend should be granted. In this respect, I am influenced by two primary considerations. First, it is now plain in view of the decision of the Supreme Court in *Keegan v. Garda Siochána Complaints Board* [2012] IESC 29 that a more accommodating approach to the issue of the amendment of pleadings in judicial review is now mandated. In effect, the test enunciated by Fennelly J. requires the court to balance a number of sometimes competing considerations in order to weigh the balance of justice. These include factors such as whether the amendment will significantly enlarge the scope of the existing case, the strength of the argument, the reasons for the amendment, whether the amendment will be prejudicial or would affect third parties or otherwise compromise legal certainty.

16. Applying these principles, therefore, it may be observed that the proposed amendment will not greatly expand the scope of the existing case. The proposed amendment furthermore involves a pure point of law and nor will it involve a challenge to a different decision. The applicant had already maintained that the reference was invalid as a matter of law, albeit that it had not quite put its finger on this point. As Fennelly J. noted in *Keegan* these are factors pointing to the exercise of judicial discretion in favour of permitting the amendment.

17. Second, the proposed amendment not only raises a matter which is of importance, but is one which, for reasons I will set out presently, is fundamental to the fair and proper operation of the reference procedure itself. Put another way, if Heatons were not permitted to argue this issue, there is a serious risk that the fairness of the procedure operated by the Board pursuant to statute would be jeopardised.

18. The applicant also sought leave to argue that the reference was invalid because the Manager had not made the appropriate order pursuant to s. 155 of the Local Government Act 2001. I would decline to permit this amendment for three basic reasons. First, this point is a technical one which does not directly bear on the fairness of the planning process. Second, this amendment would, if permitted, significantly expand the scope of the case and would involve a new argument that a particular decision had not been taken. Third, the argument is not as strong as the argument based on non-compliance with s. 127(1)(d).

19. We may now proceed to consider the merits of the several grounds now advanced to challenge the reference itself.

Whether the reference was a valid reference by reason of non-compliance with s. 127(1)(d)

20. Section 127(1)(d) of the 2000 Act provides that such a reference:

> "shall ....state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based."

21. Section 127(2)(a) provides that "an appeal or referral which does not comply with the requirements of subsection (1) shall be invalid". Pursuant to the amendment which I have just permitted, the applicant maintains that the reference was invalid because neither the letter of reference nor any of the accompanying documentation stated the grounds for the reference nor "the reasons, considerations and arguments" upon which the reference was based.

22. The present case may usefully be contrasted with the decision of Quirke J. in *O'Reilly Brothers (Wicklow) Ltd. v. An Bord Pleanála* [2006] IEHC 363, [2008] 1 I.R. 187 where these issues were also explored. This was a case where Wicklow County Council had made a reference to the Board arising from the applicant's quarrying activities.

23. A large number of documents were submitted to the Board by the Council and these were accompanied by a letter from a senior planning official which expressly sought:

> "...a declaration and referral on development and exempted development under s. 127 of the Planning and Development Act 2000. This is with a view to determining whether ... [the applicant]... [has]... intensified the use of this quarry to the extent that planning permission is required. This quarry is pre-1963 and would appear to have increased in scale".

While Quirke J. accepted that the quality of the documentation which accompanied the letter was "deplorable", he nonetheless held that ([2008] 1 I.R. 187, 196-197):

> "....the ground of the referral is contained within that letter. The subsequent exchange of documentation between all of the parties, (which was comprehensive in nature and detailed in evidential content), confirmed that the Council required the Board to determine whether the apparent intensification in the scale of quarrying operations at the relevant site was sufficiently large in scale that it comprised a "development" which was not an "exempted development".

Although Quirke J. also found that the "reasons, considerations and arguments" upon which the ground was based are not to be found within the letter, he nonetheless added that ([2008] 1 I.R. 191, 197):

> "the referral need not be contained within one document. It may be contained within one document or within a series of documents and it may be submitted in a relatively informal manner by a member of the public. What is mandatory is that the grounds of the referral and the "reasons, considerations and arguments" upon which they are based must be submitted in writing."

24. It is, I think, clear from the judgment of Quirke J. that he regarded this case as borderline. In truth, as Quirke J. found, the reasons, considerations and arguments were in fact contained in the reference in *O'Reilly Brothers*, albeit heavily camouflaged in a jumble of other documentation. Moreover, the letter from the planning authority did, in any event, identify the issue on which the Council sought a reference. Critically, however, even that cannot be said in the present case, since the letter of reference was framed at the highest level of generality and was entirely silent on the issues of the reasons, considerations and arguments. One could perhaps infer from both the terms of the letter and the accompanying documentation what issues actually subtended the reference, but even this would require some degree of supposition on the part of the Board. Just as importantly, potentially important documentation- such as the Simon Clear correspondence -was not included in the reference.

25. Quite apart from the fact that the Oireachtas has expressly stated in s. 127(2)(a) that such omissions are fatal to the validity of the reference, all of this was potentially prejudicial to the applicant. While the Board would naturally have been obliged by virtue of s. 129(1) to communicate the reference to the applicant (as, indeed, it did by letter of 28th May 2012), the latter would perforce have been place at a disadvantage in being obliged to respond in circumstances where the true basis of the reference was not explicitly stated. This prejudice might be especially marked given that s. 129(4) provides that, subject to the Board's right to hold an oral hearing under s. 134:-

> "... a person who makes submissions or observations to the Board in accordance with this section shall not be entitled to elaborate in writing upon the submissions or observations or make further submissions or observations in writing in relation to the appeal or other matter and any such elaboration, submissions or observations that is or are received by the Board shall not be considered by it."

26. Accordingly Heatons might well have been placed at a disadvantage in dealing with such a laconic and uninformative reference which also failed to enclose key documentation. Not only is a person called upon to respond in such circumstances always at a disadvantage where the precise nature of the point is requested to meet has not been expressly stated, but in the event that Heatons sought to rely on important documentation -such as the Simon Clear correspondence and the Council's response to it- it would now be doing so for the first time and in circumstances where it would not, by virtue of s. 128(4), enjoy any entitlement to respond in turn.

27. All of this underscores the importance of compliance with s. 127(1)(d). As this it is part of a complex set of interlocking statutory provisions, failure to comply with the requirements of this sub-section has in itself consequences which frustrate the proper operation of the other provisions. The "no further comment" rule ins. 129(4) is thus accordingly predicated on the assumption that s. 127(1)(d) will have been complied with in the first instance and that the other party to the reference is simply responding to a reference which itself contains the "reasons, considerations and arguments" in sufficient detail to enable the other party fairly to respond.

Is the reference capable of being regarded as a valid one for the purposes of s. 5(4) of the 2000 Act?

28. Section 5(4) of the 2000 Act provides that:

> "...a planning authority may.... refer any question as to what in any particular case is or is not development or is or is not exempted development to be decided by the Board."

29. It is accordingly plain that the Board's single function under s. 5(4) is to determine whether in any given case there has or has not been development or, as the case may be, exempted development. Questions as to whether a particular use is unauthorised is not a function of the Board under s. 5(4) and, indeed, it may be observed that the Board has no enforcement role at all. This was the very point made by Finlay Geoghegan J. in her very careful and comprehensive judgment in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210 when she said:

> "The respondent has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not "unauthorised development". It may only determine what is or is not "development". Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not "unauthorised development" will most likely be determined by the courts where a dispute arises on an application under s.160 of the Act."

30. While as we have already seen the reference did not set forth the grounds on which such reference was made by the Council in the manner expressly required by s. 127(1)(d), it may be inferred from the surrounding circumstances that the Council considered that Heatons were using the premises in the manner which contravened the conditions specified in the planning permission. If this were correct, it would amount to an unauthorised use which might well amount to "development" in the special sense of that phrase as employed by the 2000 Act.

31. Section 3(1) of the 2000 Act defines "development" as meaning:

> "...the carrying out of any works, on, in, over or under land or the making of any material change in the use of any structures or other land."

32. There are no questions of any works at issue in the present. The real question is whether a breach of a planning condition would (or, at least, could) amount to a material change of use. It is clear that "material" in the sense contemplated by s. 3 of the 2000 Act

means "material for planning purposes": see, *e.g.*, *Monaghan County Council v. Brogan* [1987] I.R. 333, 358,*per* Keane J. and *Roadstone Provinces*, *per* Finlay Geoghegan J.

33. In the present case, therefore, the question of "development" amounts to this: could the use of retail premises for a purpose other than that (apparently) required by the terms of a planning permission amount to a material change in use and, hence, "development" in this sense? I have to say that I think that it can.

34. The classic test with regard to whether there has been a material change of use remains that posited by Barron J. in *Galway County Council v. Lackagh Rock* [1985] I.R. 120. One of the indicia of material change of use mentioned by him was whether the proposed development would be likely to require different conditions to those contained in the original planning permission. Judged by this standard, it is entirely possible that different conditions would have been attached had the retail unit been free to sell non bulky goods.

35. It is, moreover, clear from the authorities that a change of use can amount to a development. In *McMahon v. Dublin Corporation* [1997] 1 I.L.R.M. 227 the issue was whether the use of recently constructed houses in a housing development as holiday homes amounted to a change of use. Barron J. clearly thought that it could do so ([1997] 1 I.L.R.M. 227, 232):

> "If the houses....were not used as authorised by the planning permission but used in a different manner then there must have been a change of use. Such a change of use was a material change and, as such, was unauthorised development."

36. This was also the view of McGuinness J. in *Palmerlane Ltd. v. An Bord Pleanála* [1999] 2 I.L.R.M. 214. Here the applicant had been granted planning permission for a retail convenience store, but upon the opening of the store, it also commenced selling some hot food. When the planning authority threatened enforcement action on the ground that the sale of the hot food was unauthorised, the company which owned the store referred this question to the Board under the precursor provisions to s. 5(4) of the 2000 Act.

37. The Board, however, declined to accept the reference on the ground that the company had commenced selling the food on the same day as the store opened, so that there had been no change of use in the non-planning sense of this term and, hence, no "development" for the purposes. McGuinness J. quashed this refusal to accept the reference as erroneous in law. It is implicit in this judgment that a change of use in breach of a planning condition could amount to "development" for the purposes of s. 5(4). For good measure the decisions in both *McMahon* and *Palmerlane* were approved by the Supreme Court in *Grianán an Aileach Interpretative Centre Co. Ltd. v. Donegal County Council* [2004] IESC 41, [2004] 2 I.R. 625. As Keane C.J. observed ([2004] 2 I.R. 625, 636-637) in that case:

> "...a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the Act of2000 either by the planning authority or An Bord Pleanála."

38. It is for these reasons that I consider that the use of premises in a manner which breaches the term of a planning permission could amount to "development" for the purposes of s. 3 of the 2000 Act. To that extent the reference was not invalid on that account. Yet this merely serves to highlight once again the importance of compliance with the requirements of s. 127(1)(d), since in cases of this kind, presenting as they do rather subtle questions of mixed law and fact, the factual sub-stratum and the relevant issues must be highlighted in the original document submitted by the party making the reference.

Breach of fair procedures

39. The applicant also maintains that the Council breached fair procedures by involving the statutory reference procedure without prior reference to it. While I am sure that no discourtesy was intended and that the matter came about through simple oversight, it was nonetheless unsatisfactory that Heatons should learn of this development from the local media. Irrespective of any strict legal obligations, a courtesy letter from the Council to Heatons informing them of this fact would not have gone astray.

40. If, however, the matter is approached from the perspective of legal rights, it cannot be said that the Council were obliged to give advance notice of the reference. Cases where advance notice of an application to an administrative body is required are rare and are generally confined to cases where the very fact of such an application is either potentially prejudicial from a reputational perspective or where the triggering of the administrative process would otherwise be potentially burdensome. Applications for an inquiry into the professional conduct of an individual represent a classic category of such cases, since the very fact that such an inquiry is being conducted, coupled with the stress, strain and burden involved in such inquiries all clearly indicate that fairness requires that the professional person be given an opportunity of responding to the potential complaint before an application is made to the professional body for an inquiry: see *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 42.

41. While it is true that the decision of the Board will form an integral part of the planning history of the site (sees. 5(5) of the 2000 Act and *West Wood Club Ltd. v. An Bord Pleanála* [2010] IESC 16), it cannot be said that the making of the reference will have immediate reputational implications for Heatons. In that respect, the case is entirely distinguishable from *Dellway Ltd. v. National Asset Management Agency* [2011] IESC 11 where the very act of transferring significant bank loans to NAMA carried with it the implication to outsiders (including other financial institutions) that the company could not service those loans, even if that implication was not necessarily warranted by a consideration of the objective facts.

42. The fundamental reason, however, why no such advance notice is required is because the merits of the application will adjudicated fairly by the Board in the careful manner specified by ss. 129 *et seq*. of the 2000 Act. Heatons would therefore get that opportunity to be heard before any decision adverse to its interests might possibly be taken. All of this re-inforces yet again the obligation on the part of the referring party to comply fully with the requirements of s. 127(1)(d), since absent such proper compliance the careful manner in which the procedural rights of all parties are preserved by the operation of these inter-locking statutory provisions might otherwise be compromised.

Conclusions

43. It remains only for me to summarise my principal conclusions.

44. First, not without hesitation, I will grant the applicant leave to extend time to raise the s. 127(1)(d) argument in the light of the more accommodating attitude taken to questions of extensions of time taken by the Supreme Court in *Keegan v. Garda Siochána Complaints Board* [2012] IESC 29. I will not grant leave to raise the argument based on s. 155 of the Local Government Act 2001.

45. I am arriving at this conclusion principally because I think that the form of the reference plainly did not comply with the requirements of s. 127(1)(d) of the 2000 Act in that the letter of reference did not "state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based." Unlike *O'Reilly Bros*. - itself a marginal case - the reasons for

the reference are left entirely to inference and potentially important material such as the Simon Clear correspondence have been omitted.

46. Nor is the precise ground of reference clear. One assumes this because this relates to Heatons' (alleged) occupation of the premises in breach of its planning conditions amounts to "development". But this is an objection which must be clearly stated, not least that the change of use here could only be material by reason of the specific condition which confined the retail premises principally to the sale of bulky goods. Were it not for such a condition, it is unlikely that any change of use of the store from bulky goods to non-bulky goods would amount to a change of use.

47. The issue raised is capable of amounting to a valid reference for all the reasons set out by Barron J. in *McMahon* and by McGuinness J. in *Palmerlane* and as approved by Keane C.J. in *Grianán an Aileach*.

48. There was no need to consult in advance prior to the making of the reference because Heatons' procedural rights would be fully protected by the Board in line with s. 129 of the 2000 Act. While it is true that the decision of the Board would affect the planning history of the site in the manner specified by s. 5(5) and had implications for the exercise by Heatons of the exercise of their property rights, it was largely an administrative step with no systemic reputational implications, unlike cases such as *O'Ceallaigh* and *Dellway*. But since, nevertheless, the exercise of these rights of these rights is premised on the existence of a reference which does in fact fully set out the grounds of reference, this makes compliance with s. 127(1)(d) all the more important and it is for this single reason that I will quash that reference.