[2015] IEHC 822

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 672 J.R.]

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

BETWEEN

BOBBY O'CONNELL & SONS LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CLARE COUNTY COUNCIL, JOHN MCNAMARA,

RUTH MCNAMARA AND CLAIRE MCNAMARA

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. The applicant is the operator of a quarry at Ballycar South, Kilmoculla, Ardnacrusha, Co. Clare. Having operated the quarry for some decades it was required under s. 261(7) of the Planning and Development Act 2000 to apply for permission from the planning authority, Clare County Council, in order to continue its activities. That application was made on 2nd April, 2007. Following an appeal, An Bord Pleanála granted a planning permission for the operation of the quarry on 21st April, 2009.

2. Permissions in any particular local authority area are potentially subject to development levies imposed pursuant to a development contribution scheme or a supplementary development contribution scheme in that behalf adopted by the elected members under ss. 48 and 49 of the Planning and Development Act 2000.

3. Under the scheme which was adopted by the council, developments were broken down into different classes. The operation of a quarry falls into "*class 3*". Under that classification, levies are calculated only by reference to what is referred to in the scheme as "*operational land"*.

4. The development contribution is subject to certain reductions, including in particular for waste water treatment by the developer. I will refer to this further below.

5. Conditions 21 and 22 of the permission in this case required the applicant to pay development levies. These were made up of two elements, firstly a general financial contribution under Condition 21 and secondly a special contribution in relation to specific road works under Condition 22. The amount of the development levies was to be agreed between the applicant and the council. In default of agreement, the conditions provided that "*the matter shall be referred to the board"*.

6. In the event, the levies were not, in fact, agreed and therefore the matter was referred to the board as required. The applicant complained in correspondence that the referral to the board took place over its head and without a fair opportunity to agree matters with the council but it would seem that the applicant's own stance in relation to agreeing these levies was somewhat passive over the years since the permission was granted and in those circumstances it cannot be heard to complain if the council forced the matter on by referring it for determination to the respondent. That is not to say that the applicant cannot pursue the argument that certain matters should have been allowed to be made the subject of further negotiation or discussion between the council and itself. A number of the applicant's complaints made in correspondence, such as that the levies could not be enforced due to laches, or because the applicant had a pending claim for compensation due to the sterilisation of a 20m buffer zone around the quarry, are not a basis for judicial review of the decision, and sensibly formed no part of the grounds argued as part of this application.

7. I note in passing that the conditions stated that the contribution should be paid prior to the commencement of development, although the development had, in fact, already commenced prior to the grant of permission. The fact that the applicant was allowed to pay levies after, rather than before, the development is, if anything, a concession in its favour and not something on which it can rely in the present judicial review.

8. The board made a determination regarding the appropriate amount of levies on 13th October, 2015.

9. The core of the decision was that while the total area of the quarry was 16.9 hectares, there was a requirement for a 20 metre buffer zone around the quarry boundary as required by a condition (no. 6) of the permission granted, and accordingly the area for the purposes of calculating the development levies should be reduced by 2.1 hectares. However that was the only reduction which the board was prepared to contemplate because it was intended "*to excavate almost the entirety of the quarry footprint"*, only a small area of the site close to the entrance will not be excavated and even that will remain in operational use (associated with entrance, parking, office, weighbridge and ancillary activities).

10. By contrast, the applicant's planning consultants were of the view that only 10.5 hectares were operational land (see report at

exhibit POD6 to the grounding affidavit).

11. The reason for the decision in relation to the special contribution was in essence that the contribution sought by the planning authority was clearly set out, properly aligned with the specific requirements of the condition, was justifiable and was reasonable.

12. The applicant now seeks leave *ex parte* to apply for judicial review to quash that determination. In accordance with s. 50A of the Planning and Development Act 2000, the *"substantial grounds"* test applies to this application. Mr. Eamon Galligan, S.C., who appeared (with Ms. Suzanne Murray B.L.) for the applicant, has grouped his challenge to the decision under five broad headings which I will deal with, as follows.

The failure to provide an exemption for waste water treatment on site

13. The role of the board in relation to the assessment of levies is essentially to give effect to the scheme for development levies adopted by the council. It is not the function of the board to depart from that scheme. Ultimately, the interpretation of the scheme is a matter for the court. This was the approach adopted by Kelly J. (as he then was) in *Cork County Council v. An Bord Pleanála* [2007] 1 I.R. 761. In that case, Kelly J. decided that the board had effectively rewritten the scheme to include provisions which were not there (see p. 777). I would propose to follow that approach as being the appropriate way to assess whether substantial grounds exist to challenge the decision of the board in determining the amount of the levies in this case.

14. As mentioned above, there are a number of exemptions in the development contributions scheme which would have the effect of mitigating what would otherwise be the full application of a development levy. Of relevance under this heading, is exception (ix), which provides for a reduction in levies where the developer provides waste water treatment. In the present case, the applicant says that it is providing waste water treatment on site.

15. It was not altogether clear in the papers as originally presented whether the part of the lands owned by the applicant on which the waste water treatment facility is provided is correctly part of the lands that are subject to the development levy. Following the adjournment of the application, a further affidavit was sworn by Patrick O'Donnell on 4th December, 2015 exhibiting a map of the site in question which shows the waste water treatment facility located within those lands.

16. I do not take the applicant as arguing (and in any event consider that substantial grounds have not been shown to argue) that the special levy should be mitigated by reference to waste water treatment. The special contribution relates to road works and not to the general matters covered by the general contribution, to which the treatment of waste water is of significance.

17. Having regard to the foregoing, given the absence of a clearly specified basis in the decision for failing to mitigate the levy by reference to on-site waste water treatment, I consider that substantial grounds have been made out in relation to this aspect of the challenge, which covers grounds 26 – 28 inclusive of the statement.

Alleged double charging

18. The applicant complains that it has put in place a concrete batching plant on the site, and a development levy was previously required in relation to that matter. The development contribution guidelines for planning authorities issued by the Department of the Environment, Heritage and Local Government in 2013 indicate that the practice of double charging should not occur and local authorities should deduct any payments already made from a subsequent charge.

19. However, Mr. Galligan concedes that this principle is not reflected in the development levy scheme itself. The decision of Kelly J. in *Cork County Council v. An Bord Pleanála* would indicate that it is not a matter for the board to add into a scheme a provision which is not there. It may be that the scheme itself is, in this respect, open to debate, but that would not appear to give rise to substantial grounds to challenge the board's interpretation of it.

20. On the foregoing approach, substantial grounds have not been demonstrated to challenge the decision under this heading, as set out in grounds 30 – 32 of the statement.

Failure to have regard to concession by the council

21. Mr. Galligan criticises the board's decision for failing to have regard to what he sees as a concession by the council that a significant reduction in the potential amount of the special financial contribution could be considered. This arises from a report prepared on behalf of the council which is at exhibit POD5 to the grounding affidavit. The discussion in relation to this matter is at page 11 of that document. Taking that document as a whole, it is clear that a total sum in the amount of €900,000 is specifically being sought by the council. The reference to a potentially reduced figure of €602,100 only arises in the context where the council considers that what appears to be a possible phasing or scaling back of road works "*allows for the possibility of accepting a reduced contribution*".

22. This is a reference to a possibility, and is not a concession, let alone a clear concession. In the context of the document as a whole, the council is maintaining its request for the higher figure. The applicant had a period of six years to agree the amount of the levies with the council and such agreement was not reached.

23. However, given the stated willingness of the council to at least consider a reduction under this heading, it seems to me that for present purposes there are substantial grounds for contending that the board should at least have addressed this possibility in more detail in its decision. Much would depend on how the board viewed this statement. If it was merely a statement that the council would have considered a reduction in the context of overall agreement, but in the absence of such agreement it is insisting on the full payment of the development levy, or if it is viewed as an assessment of a mere possibility that the full works might not be required, or might be required but should not be attributed to the developer, which possibility the council considered and then rejected, little may turn on it. If it is viewed as an on-going and current indication by the council that the full road works as envisaged either will not be necessary at all due to the reduced activity at the quarry and corresponding reduced loading on the road network, or that such works are required but should not be attributable to the developer in full due to alternative routes, and therefore a reduction in the levy could still now be contemplated, then there are substantial grounds for contending that that would require consideration and express determination. The statement is too ambiguous on its face to allow me to ascertain exactly what it means without that having been expressly considered by the board in its determination. The matter may well be capable of full clarification in the course of the judicial review proceedings, but for the purposes of a leave application I am of the view that there are substantial grounds for contending that the decision ought to have addressed the suggested reduction in more detail.

24. I therefore consider that this matter, at ground 36 of the statement, has been shown to be supported by substantial grounds.

Breach of fair procedures

25. In this case, there were two reports of inspectors for the board. The first, I am told, was abandoned as it was adopted on the wrong basis. In the second report, the inspector indicated that there was some dispute as to what was "*operational land*". It was recommended that an opportunity be given to allow the applicant and the council to resolve this matter.

26. The board, however, in its decision did not decide to accept this recommendation and simply determined the level of the contribution itself on the basis that virtually the whole quarry footprint was to be excavated and was therefore operational. Mr. Galligan submits that the board should have allowed the applicant and the council to agree this matter.

27. While it is perfectly legitimate to argue that in general it might have been preferable to allow the applicant and the council to agree on this issue, they had six years to do so and the fact that they did not would normally be, in itself, sufficient to require the matter to be referred to the board and therefore to enable the board to make its determination.

28. However in the present case there is an additional factor, namely that the decision of the board is premised upon the assertion that based on the information on file in connection with the 2009 appeal decision, which would have included the original 2007 planning file, it was intended to excavate virtually the entirety of the site. I have now, in the supplemental affidavit, had the benefit of the original maps in connection with the 2007 planning application and an updated map showing all major features on site including the area for excavation. From those maps it is clear that the area for excavation is not the entire site due to a number of reasons but mainly the presence of ESB pylons across the north-eastern section of the site. Given that the board's perspective is arguably based on a misunderstanding of the extent of the site to be used for extraction, and given the limited definition of operational land in the council's scheme (that definition encompasses land for extraction, roadways, buildings etc. rather than land generally), there are sufficiently special factors to create substantial grounds for arguing that the board should not have proceeded without seeking clarification of the extent of operational land, ideally by agreement between the parties.

29. The other element of the case that engages the right to fair procedures in this context is that the board's inspector did not herself resolve the issue of what constituted operational land (para. 34 of affidavit of Patrick O'Donnell). To do so fully would have required an examination of the site in the absence of agreement. This the board proper was not in a position to do and would have had to rely either on its inspector or on such agreement. To proceed to determine the extent of operational land in the absence of either would create substantial grounds for contending that the decision was taken contrary to the principle of fair procedures.

30. I would, therefore, give leave on grounds 33 – 35 which relate to this issue.

The board's decision to allow three months for payment of the contributions

31. Ground 29 of the statement of grounds complained that the board erred in requiring that the contribution be paid within three months of the date of the order or in such phased payments as the planning authority may facilitate. It is said that Condition 21 required the contribution to be paid prior to the commencement of the development, and that therefore the board had no jurisdiction to impose a requirement that payment may be made within a three month period.

32. This argument is completely devoid of merit. The applicant has had the benefit of being able to operate the development without payment of the development levies for some six years since the board's original decision. The strict interpretation the permission which it is now urging on the court would have meant that it should have been prohibited from operating the development until such time as the levies had been agreed or determined and paid. If there was any concession, or even error, in giving latitude to the applicant, it was a concession or error in its favour and could not conceivably constitute arguable, let alone substantial, grounds for challenging the decision of the board.

Stay

33. The applicant has sought a stay on the enforcement of the board's decision. However, as clearly appears from the above, the principle of the development levies is not in issue. The only issue is the extent of the levies and, even on the applicant's version, it is liable to pay significant development contributions. In those circumstances it would not be appropriate to stay the entire determination but merely the portion of it that is being questioned on the applicant's version, and the stay set out at the end of this judgment is fashioned on that basis. That stay will also expressly allow the council greater leeway to phase the payments than the board apparently contemplated, as such phasing would be possible in any event administratively even without being provided for in the board's determination. A party is not obliged to insist on their strict rights. The fact that the board, and therefore this court, imposed a three month period for payment of most of the levies does not prevent the council from adopting a more flexible approach it if is minded to do so. That is a matter for it.

34. The applicant contends that the appropriate deduction for waste water treatment should be 50% (see paras. 40-41 of affidavit of Patrick O'Donnell). I do not need to decide this issue at this point and in terms of any stay to be granted arising from this issue I would not be prepared at this stage to proceed on the basis that the sum of 50% is correct, because that figure is derived from a reasoning by analogy with the apportionment of development levies in terms of council spending rather than as a direct commitment to reduce the levies by half if waste water is treated. Indeed the lack of a quantification of the deduction could be something of a possible shortcoming in the council's scheme. The court ultimately hearing this matter may find that a 50% reduction is justified, or it may not (indeed if it upholds the board's decision it would be finding in effect that no reduction is justified). But I consider it appropriate to proceed at this stage on the basis that it is a matter for the council, at least in the first instance, to decide what deduction should be allowed for on-site waste water treatment in calculating the amount of money that should be paid despite a stay on the elements of the levies that are affected by the grant of leave. If the applicant is unhappy with that determination, it can apply by motion on notice to extend the stay if there are appropriate grounds for doing so.

Order

35. Having regard to the foregoing considerations I will order as follows:

> (i) The applicant will have leave to seek the reliefs at para. D1 to D7 on the grounds set out at E26 to E28 and E33 to E40;
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> (ii) Grounds E1 to E25 are factual matters which do not require a grant of leave but which may be used in support of the legal grounds. Leave to apply on grounds E29 to E32 is refused.
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> (iii) The board's determination regarding payment of development contributions will be stayed save as follows:
>
> > (a) In relation to the general financial contribution, the council may enforce a contribution, to be calculated by it, based on an area of operational land of 10.5 hectares, subject to applying a deduction to that sum, in an amount

that the council considers appropriate, having regard to the on-site treatment of waste water, such payment to be made within 3 months of the board's determination or in such phased manner as the council determines.

(b) In relation to the special financial contribution, the council may enforce a contribution of €602,100, such payment to be made on the basis that half of that sum be paid within 3 months of the board's determination or on such phased basis as the council determines, and the remaining half be paid at the rate of €30,105 per year until the final determination of the proceedings or the making of the 10th such annual payment, whichever first occurs, or on such alternative phased basis as may be agreed between the council and the applicant.

(iv) I will hear the applicant further on the timescale for service of an amended statement of grounds and any consequential matters.