

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 486 J.R.]

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

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENTS

AND

P. PLUNKETT LIMITED, WESTMEATH COUNTY COUNCIL, CAVAN PEAT LIMITED, HARTE PEAT LIMITED, NANCY HENNESSEY, EAMONN CREGGY, MICHAEL BRADY, JOHN PATRICK MURTHA, JOHN REILLY, PÁDRAIG HILL, CLOVER PEAT

NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 9th day of March, 2018.

Introduction:

1. The applicant is a limited company whose objectives include the protection of the Irish environment. In pursuance of these objectives, the applicant became concerned about peat extraction in Ireland. The applicant maintains that under both domestic and European Union legislation certain peat extraction works are not "exempted developments" and thus require planning permission. The applicant also maintains that certain peat extraction works require an Environmental Impact Assessment and an Appropriate Assessment, pursuant to the said legislation.
2. In pursuance of its objectives, the applicant by letter dated 21st August, 2010 referred certain peat extraction work in the townlands of Lickny/Newcastle, Doon, and Carlanstown, County Westmeath, under s. 5 of the Planning and Development Act 2000 ("the Act of 2000") to the appropriate planning authority. The purpose of the referral was to seek a determination as to whether such peat extraction activities were or were not exempted development.
3. Westmeath County Council, the planning authority concerned, considered the referral and referred the matter to the respondent on 24th November, 2010.
4. Following investigations and the preparation of an inspector's report, the respondent issued its decision on 3rd May, 2013. The respondent dismissed the referral under s. 138(1)(b)(i) of the Act of 2000 for reasons and considerations stated therein. These reasons and considerations are the subject matter of the application herein.
5. The applicant seeks an order of *certiorari* quashing the determination of the respondent made on 3rd May, 2013.

The Act of 2000

6. It is necessary to look at the relevant provisions of the Act of 2000 under which the applicant made its referral and the respondent its determination. The relevant statutory provisions are:-

Section 5:-

"(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

(2) (a) Subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

(b) ...

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3) ...

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, 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."

Section 6:-

"(6) A planning authority and the Board shall each have all such powers of examination, investigation and survey as may be necessary for the performance of their functions in relation to this Act or to any other Act."

Section 129(1):-

"(1) The Board shall, as soon as may be after receipt of an appeal or referral, give a copy thereof to each other party."

Section 131:-

"Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request—

(a) any party to the appeal or referral

(b) any person who has made submissions or observations to the Board in relation to the appeal or referral to make to make submissions or observations in relation to any matter which has arisen in relation to the referral."

Section 138(1):-

"(1) The Board shall have an absolute discretion to dismiss an appeal or referral

(a) ...

or

(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to -

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

(ii) any previous permission which in its opinion is relevant.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based."

Section 250:-

"(1) Where a notice or copy of an order is required or authorised by this Act or any order or regulation made thereunder to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways.

....

(d) where the address at which he or she ordinarily resides cannot be ascertained by reasonable inquiry and the notice or copy is so required or authorised to be given or served in respect of any land or premises, by delivering it to some person over the age of 16 years resident or employed on the land or premises or by affixing it in a conspicuous place on or near the land or premises;

(2) Where a notice or copy of an order is required by this Act or any order or regulation made under this Act to be served on or given to the owner or to the occupier of any land or premises and the name of the owner or of the occupier cannot be ascertained by reasonable inquiry, it may be addressed to "the owner" or "the occupier", as the case may require, without naming him or her.

...

(7) Where the Minister or the Board is satisfied that reasonable grounds exist for dispensing with the serving or giving under this Act or under any order or regulation made under this Act of a notice or copy of an order and that dispensing with the serving or giving of the notice or copy will not cause injury or wrong, the Minister or the Board may dispense with the serving or giving of the notice or copy and every such dispensation shall have effect according to the tenor thereof...."

7. It is clear that the owners and/or occupiers of land the subject matter of a referral under s.5 of the Act of 2000 have a clear interest in the determination of the respondent. A determination by the respondent to the effect that what was once an exempted development is no longer exempt can have serious consequences for the owners and/or occupiers involved. Therefore, as one would expect, the statutory provisions set out above give legislative effect to basic fair procedures. That is, that those affected by a determination of the respondent have an opportunity to make observations or submissions as they may wish.

8. However, in order for the owners or occupiers to be afforded an opportunity to be heard, they must first be identified.

Identification of Owners/Occupiers

9. The applicant made its referral under s. 5 to Westmeath County Council by letter dated the 21st August, 2010 seeking a determination on peat extraction "in the townlands of:-

"1 Lickny (Newcastle) (see map 1);

Doon (see map 2);

Carlanstown (see map 3),

is or is not development or is exempted development"

10. The maps referred to simply delineate the three areas involved. There was no supplementary information as to who the owners and/or occupiers of these lands were.

11. The three sites in question are not adjoining, although the townlands in which they are located are. Each site is substantial, the Lickny/Newcastle site comprises approximately 100 hectares, the Doon site comprises approximately 60 hectares and the Carlanstown site comprises approximately 7 hectares.

12. By letter dated 24th November, 2010 Westmeath County Council, in accordance with s. 5(4), referred the matter to the respondent. The reasons for doing so were, *inter alia*:-

"1. Insufficient information submitted on foot of a request for FI, in relation to when peat extraction commenced on each of the individual sites and when drainage of the bog land commenced on each of the individual sites..."

13. Having received the referral, by letter dated 3rd December, 2010, the respondent sought relevant additional information from Westmeath County Council, including:-

"(i) the name and address of the owner of the land in question and the name and address of the occupier of the said land, if different..."

In response, Westmeath County Council submitted to the respondent some thirteen land registry folios which indicated some nine parties involved. There were a number of maps appended to the various folios ("folio maps").

14. A comparison of the maps submitted with the applicant's referral letter and the various maps attached to the Land Registry folios is instructive. For example, the applicant's map for the location of Carlanstown, County Westmeath (map 3) shows two well delineated parcels of land with a road (R394) running through. An examination of one of the folio maps (folio WH3788F) which is part of these lands shows the same area with numerous subdivisions. The same point can be made about the lands situated at Lickny/Newcastle (folio 1816) the folio map again shows numerous subdivisions. Each subdivision may have a different occupier engaged in the extraction of peat.

15. The respondent wrote to each of the nine persons referred to in the various Land Registry folios. The various responses did not advance to any extent the respondent's knowledge of the relevant owners/occupiers. In some cases there was no response. I will now refer to some of the responses received by the respondent.

16. Harte Peat Limited is referred to as being the "full owner" of folio 936F. The respondent wrote to Harte Peat Limited and received a response from its solicitors dated 3rd February, 2011. In the course of this response, the solicitor stated:-

"No land of Harte Peat Limited has been specifically identified insofar as can be ascertained, no reference is made to our client and insofar as can be ascertained no lands occupied by, or any activity of Harte Peat has been identified. There is no basis to ground any application for a s. 5 referral, no issue has been raised in respect of development and/or exempted development relevant to our client..."

17. Clover Peat Products Ltd was also written to. In a response dated 2nd February, 2011 solicitors for Clover Peat Products Ltd confirmed that their client did own certain lands but pointed out that the Land Registry records, which the respondent was relying on, failed to include all of the relevant property in the area and stated:-

"Aside from the danger of relying on incomplete ownership and occupancy details provided by the Council, the error in the planning authority analysis, which concerns a pivotal point, is likely to unduly influence the Board's decision, to the detriment of our client..."

Subsequently, Clover Peat Products Ltd submitted to the respondent a report from Vincent J.P. Ferry & Co Limited, planning and development consultants. This report included a submission of what it described as a "preliminary point of law". This concerned the wording of s. 5(4) of the Act of 2000, which referred to "any question as to what, in any particular case, is or is not development or is or is not exempted development..." It was submitted that what was intended were questions on whether a "particular case" comprises development or exempted development to be decided individually not, as in this case, where the request from the applicant referred to three individual sites which were "clearly disparate, physically distinct, exhibit a different history and are in separate ownership..."

18. Correspondence was also received from Cavan Peat Limited through its solicitor. The solicitor in question was identified from one of the Land Registry folios. The solicitor, John V. Kelly & Co, wrote as follows:-

"We note that in your correspondences you refer to Cavan Peat Limited. Cavan Peat is a legal entity, it is a company incorporated under the Companies Acts and has its own registered office. We are not instructed in respect of Cavan Peat nor have we furnished our name for the address for the service of any correspondences and it would be entirely inappropriate if we were to approach Cavan Peat in respect of the documentation served upon us. None of the documentation lodged refers to Cavan Peat and as it does not identify that company anywhere in the documentation, in effect, we would be asking a third party who has not instructed us to instruct us and clearly this would be an inappropriate procedure in view of the relationship between a solicitor and a third party..."

It subsequently transpired that the registered office for Cavan Peat Limited was at Merville Road, Stillorgan, County Dublin.

19. The applicant was kept informed by the respondent of its efforts to identify the relevant owners/occupiers. Although the applicant did provide further information, this information did not add to the respondent's knowledge of who were the relevant owners/occupiers. It should be noted that s. 5(1) of the Act of 2000, set out at para. 6 above, does require the applicant to provide "any information necessary to enable the authority to make its decision of the matter." No such information was forthcoming from the applicant.

20. By reason of the foregoing, it seems to me that in dealing with the referral under s. 5 of the Act of 2000, the respondent was faced with a number of difficulties:-

i. Those who may be affected by the determination of the respondent were entitled to be heard, i.e. owners/occupiers of the lands in question;

ii. The identities of the owners/occupiers were difficult to ascertain. The maps provided by the applicant were only a start point. There was more detailed information available in the various Land Registry folios and folio maps but this still did not

yield all the necessary information;

iii. There was a potential legal issue in that s. 5(4) refers to a "particular case" whereas what was before the respondent were three separate parcels of land.

Inspector's Report

21. Prior to reaching its determination, the respondent instructed an inspector to prepare a report. It is fair to say that the primary role of the inspector's report was to deal with the planning aspects of the referral rather than the identities of the owners and/or occupiers. However, the inspector did consider "whether a proper case for a declaration has been stated". Under this heading the inspector reported:-

"The sites to which the request refers are defined with reasonable clarity on the maps submitted by the requester. The location and boundaries of the sites shown on those maps is consistent with what was observed at the time of inspection. The type of operations and acts with which the request is concerned were described in the text of the request and the referral by the planning authority... though the description of land and of works is sufficiently precise to form a basis for a declaration. The objection has been raised, however, that the fact that the request cited three separate parcels of land which are not necessarily in the same ownership or occupation means that it does not state a case particular enough for a declaration. This objection is reasonable and should be considered by the board.

Nevertheless it would not justify the Board refusing to deal with the referred request. While the sites are not contiguous and no connection in their ownership or occupation has been demonstrated, the environmental impact of the works upon them is closely connected in a manner that has a direct bearing on whether the works on any individual site would be likely to have significant effects on the environment and thus, under the 2011 Act, whether those works amount to exempted development... if there are any grounds to distinguish between the status of the works on each of the sites, then the Board could make a declaration that reflected that fact. The Board may therefore proceed to consider the request as referred to it by the planning authority..."

22. It is reasonable to make the observation that the inspector referred to the maps submitted by the applicant rather than folio maps submitted to the Board. As stated above, the folio maps disclosed a considerably more complex situation concerning ownership and/or occupation than the maps submitted by the applicant.

Determination of the Respondent

23. In its determination dated 3rd May, 2013 the respondent stated:-

"Decision

Dismiss the said referral under subsection 1(b)(i) of s. 138 of the Planning and Development Act 2000, (as amended), based on the reasons and consideration set out below.

Reasons and considerations

Having regard to the different parcels of land identified in this referral, which appear to be in multiple ownership, in varying size of individual holdings with numerous parties involved and in the absence of certainty in regard to ownership of the land or the individual circumstances of the plots (not necessary adjoining), it is considered that the question is (sic) referred is not sufficiently particular or detailed enough to enable the Board to carry out its obligations under s. 129 of the Planning and Development Act, 2000, (as amended). Furthermore, the diversity of circumstances involved militated against a thorough evaluation of the referral question as posed. In light of the forgoing, the Board decided to dismiss this appeal..."

Application of Legal Principles to the Determination of 3rd May, 2013

24. At para. 6 above, I set out the relevant provisions of s. 138(1) of the Act of 2000. Section 138(1) provides that the respondent "shall have an absolute discretion" to dismiss a referral. The term "absolute discretion" has been considered in a number of authorities. Firstly, in *Mallak v. Minister for Justice* [2012] 3 IR 297 Fennelly J. stated:-

"[45] It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons. As Henchy J. put it, in a celebrated passage in his judgment in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, at p. 658, 'the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'."

and

"[47] The fact that a power is to be exercised in the 'absolute discretion' of the decision-maker may well be relevant to the extent of the power of the court to review it. In that sense, it would appear potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration. It does not follow from the fact that a decision is made at the absolute discretion of the decision-maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously...."

25. In *Cleary Composition and Shredding Limited v. An Bord Pleanála* [2017] IEHC 458, Baker J. stated:-

"62. The principle is that, even when a person or body is entitled as a matter of statute to make a decision in its absolute discretion, the exercise of the statutory power must comply with certain basic requirements of fairness, and "accord with the statutory parameters within which the underlying power is conferred". Mc Kechnie J. identified this as a fourth

requirement viz. "that the decision does not breach the legislative framework within which the power is given". (para. 71)"

and

"65. I accept as a matter of general principle that the exercise of the power to dismiss an appeal is one that should be carefully exercised and the discretion of the Board is neither unfettered nor immune from review. This arises also from the fact that the dismissal of an appeal must be for stated reasons and considerations: s. 138(2): the decision should state "the main reasons and considerations" on which the decision is based.

66. Further, because a decision to invoke the power undoubtedly will impact on the rights and obligations of the respective parties, the general principles that govern the review of administrative decision making are applicable.

67. No authority has been identified regarding the operation of s. 138, but I consider that as a matter of first principle, arising from the nature of the power, the statutory power is one that must be engaged only when the matter is clear, and for good reason, and only if the decision maker has correctly formulated the question before it."

26. Arising from these authorities, it does not appear to me that the use of the term "absolute discretion" as opposed to "discretion" limits the extent of the power of the court to review the decision. The decision must be rational, reasonable, and within the legislative framework that enables the decision to be made.

27. The applicant contends that the respondent had sufficient information, or that it had the statutory power to obtain the necessary information (a submission I will consider later), for the purposes of making its determination.

28. What is in issue in these proceedings is the determination made by the respondent based on the information it had. The respondent submitted that it was best placed to assess whether it had the information necessary to make a determination and also to comply with its legal obligation to follow fair procedures, in particular, to hear from those who may be affected by the determination. The court was referred to *Kinsella v. Dundalk Town Council* [2004] IEHC 373, where Kelly J. (as he then was) stated:-

"The decision as to whether the information obtained on foot of an article 33 request contains significant additional data is one for the planning authority... This Court, in exercising its judicial review jurisdiction, is not a court of appeal on the merits from the exercise by a planning authority of its statutory function. I decline the invitation extended to me by counsel for the applicant to sit in the chair of Mr. Ewbanks and decide for myself whether or not the information supplied by Coverfield on foot of the article 33 request contained significant additional data. He contends that I would be in just as good a position as Mr. Ewbanks to make such a decision..."

29. The problem facing the respondent in reaching its determination was that, regardless of the fact that the lands could be identified, the relevant owners/occupiers could not to the extent that it would have been unsafe for the respondent to make a determination concerning the property rights of those involved. In previous paragraphs, I have set out the steps taken by the respondent to identify such persons.

30. In applying the principles set out in the authorities referred to, it is clear to me that I cannot conclude that the decision of the respondent to dismiss the referral was either irrational or unreasonable. Given the absence of information as to who owned and/or occupied the lands in question and the basic legal requirement that such persons be on notice of the referral, I cannot reach any other conclusion.

31. Mr. James Devlin S.C., counsel on behalf of the applicant, submitted that the problem concerning the identities of the owners and/or occupiers could have been overcome had the respondent utilised the provisions of s. 250(1)(d) of the Act of 2000, whereby notice could be given to the relevant person(s) "by affixing it in a conspicuous place on or near the land or the premises".

32. Further, counsel for the applicant submitted that under s. 250(7) the Board may dispense with the need to give notice where there are reasonable grounds for doing so and where such "will not cause injury or wrong". In light of the property rights involved, I do not think that it would have been reasonable for the Board to have dispensed with the necessity to give notice as it could well be anticipated that doing so would cause "injury or wrong" to those involved.

33. Ms. Nuala Butler, S.C., on behalf of the respondent, submitted that affixing a notice was not a solution to the problem. Counsel for the respondent brought to the attention of the Court the various folio maps which clearly showed various parcels of land subdivided into numerous lots, each with a potentially different occupier. This would suggest that a separate notice would have to be affixed for each lot.

34. The affixing of a notice "on or near the land" involved may be suitable where the respondent is dealing with a particular portion of land or structure but not in the situation that presents from the folio maps in question. Therefore, I do not think it unreasonable that a course of action, such as that submitted by the applicant, was not followed by the respondent.

35. More generally, the applicant submits that it was given no opportunity to make submissions to the respondent prior to the exercise of its power under s. 138 of the Act of 2000. An examination of the documentation exhibited makes it evident that the respondent involved the applicant in its consideration of the referral. I refer, in particular, to a letter dated 17th February, 2011 from the respondent to the applicant seeking documentation concerning the referral and a letter dated 11th March, 2011 from the respondent to the applicant in which it enclosed the submissions made on behalf of Clover Peat Products Ltd. In response to this, there was a detailed legal submission to the respondent from the applicant's solicitor, dated 31st March, 2011.

36. Insofar as it was suggested by the respondent that it was entitled to be circulated with the "proposed determination" prior to its issue on 3rd May, 2013 no such legal requirement has been established. A similar argument was made in the *Cleary Compost* case referred to above. In her judgment, Baker J. stated:

"101. As a matter of fact the Board did have before it submissions from the applicant regarding the planning question before it. There were no new factual matters before the Board. Therefore, I consider that the Board could, as a matter of law, have dealt with the matter in the way it did without affording a fresh opportunity to the applicant to address it on its approach. The matter was an appeal by the applicant from a refusal by the local authority, so one must assume that the applicant had furnished to the Board all material it considered necessary and relevant to its consideration. The applicant had also made submissions on the s. 5 applications."

37. The applicant submits that the respondent failed in its statutory duty under s. 138(2) which requires the respondent to "state the main reasons and considerations on which the decision is based". It is well established that a body, such as the respondent, in giving reasons is not "bound to provide a discursive judgment as a result of its deliberations". (see the decision of Murphy J. in *O'Donoghue v An Bord Pleanála* [1991] ILRM 750).

38. The basis on which the respondent reached its determination is clear to me. I have set out at para. 23 above the "reasons and considerations" for the determination. This refers to, succinctly, problems in identification of the individuals who owned and/or occupied the lands involved. Furthermore, as stated above, the applicant was fully aware of the problems which the respondent encountered in seeking to identify the persons whom it was obliged to put on notice of the referral. Therefore, I cannot conclude that there was any failure on the part of the respondent, in the words of the s. 138(2) of the Act of 2000, to state "the main reasons and considerations on which the decision is based".

39. By reason of the foregoing, the applicant is not entitled to reliefs sought in the notice of motion.