Neutral Citation [2015] IEHC 356

THE HIGH COURT

COMMERCIAL

[2014/487JR]

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

BETWEEN

PEOPLE OVER WIND, ENVIRONMENTAL ACTION ALLIANCE IRELAND

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

LAOIS COUNTY COUNCIL, COILLTE TEORANTA AND THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT

NOTICE PARTIES

JUDGMENT of Mr. Justice Haughton delivered the 11th day of June, 2015

1. I delivered my final judgment in these judicial review proceedings on 1st May, 2015, dismissing the applicants' claims. The first named applicant by notice of motion dated 3rd June, 2015 now seeks *inter alia* the following two reliefs: firstly "reconsideration by this Honourable Court of the Court's judgment…to take into account that the third named notice party was not served with the appeal lodged to the respondent and that it, and in particular, its servants or agents, The National Parks and Wildlife Service (NPWS) were not on notice of the appeal contrary to National and European law and in particular Article 69 of the Planning and Development Regulations 2000-2015"; secondly, if necessary an order allowing the first named applicant to amend its grounds of review to include the failure of Laois County Council and/or the respondent to notify the third named notice party of the appeal lodged with the respondent.

Reconsideration of Judgment

2. The circumstances in which the Court may review its own judgments were addressed by the Supreme Court in *Re Greendale Developments Ltd* [2000] 2 I.R. 514. After reviewing the jurisprudence and approving the opinions expressed in *Ainsworth v. Wilding* [1896] 1 Ch. 673, Hamilton C.J. at p.527 stated:-

> "The court in this case was dealing with an order made by the High Court and consequently was not concerned with the provisions of Article 34.4.6 of the Constitution[1].
>
> However, it set out in detail the common law principle concerning the question, holding that where a final order has been made and perfected it can only be interfered with
>
> (1) in special or unusual circumstances, or
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> (2) where there has been an accidental slip in the judgment as drawn up,
>
> or
>
> (3) where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.
>
> The restriction on the power of a court to amend or vary an order which has been made and perfected, therein set forth, must apply to an application to set aside an order.
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> At the conclusion of the passage from the said judgment set forth herein, it is emphasised that the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached."

At p.529 the Chief Justice stated:-

> "These passages emphasise the fundamental importance of the finality of proceedings to the certainty of the administration of law. Public policy requires a definite and decisive end to litigation."

Denham J. at p.542 stated:-

> "The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it will only arise in exceptional circumstances. The burden on the applicants to establish that exceptional circumstances exist is heavy."

3. The Supreme Court returned to this subject in the context of a planning dispute in *Abbeydrive Developments Limited v. Kildare County Council* [2010] IESC 8, a decision relied upon by the first named applicant herein. The applicant there sought planning

permission for a housing development, and the application was accompanied by an environmental impact statement. An Taisce made an initial submission to the respondent in respect of the proposed development, but received no further correspondence from the respondent until four years later when it received a letter stating that the s.175 application had been withdrawn. This representation to An Taisce, which was repeated in a subsequent letter, was incorrect as the application had in fact never been withdrawn. The respondent then failed to make a decision on the application within the eight week period allowed by s.34(8)(a) of the Planning and Development Act, 2000 as amended ("PDA 2000"), and the applicant sought a declaration that the respondent was deemed to have granted a permission under s.34(8)(f). On appeal, the Supreme Court held that the applicant was entitled to the declaration sought and adjourned the matter to allow for submissions on the form of the order. An Taisce was alerted to the decision, and the fact that the application for planning permission had not been withdrawn from reports in a national newspaper, and applied to the Supreme Court to be represented. It wanted to make the argument that the grant of a default permission was contrary to European law as the European Court of Justice had ruled in *Commission v. Belgium (Case C-230/00)* [2001] ECR I-4591 that developments that are subject to the requirements of the E.I.A. Directive cannot be authorised by way of tacit permission or refusal.

4. In allowing the application by An Taisce Kearns P. delivered the unanimous decision of the Court stating at p.403:-

> "…*In re Greendale Developments Ltd (No.3)* provides a useful guide as to the principles which should apply when trying to resolve the kind of difficulty which has arisen here. It undoubtedly involves the invocation of a special jurisdiction. In considering whether or not the threshold has been reached for the invocation of this special jurisdiction, it is necessary to consider the overall importance of the point sought to be raised. Clearly it must be a point which, if valid, would as a matter of probability have affected the outcome of the case. It is also important for the court to consider whether or not the particular point could have been raised in the High Court by a party who had opportunity to argue the point in that court. This might be described as an application or example of the doctrine in *Henderson v. Henderson* (1843) Hare 100, which requires the parties to litigation to bring forward their entire case at the time of trial. While this latter consideration does not apply to An Taisce, which was unaware of the proceedings, it would, in my view, greatly weaken the strength of its application in the present instance if the point in question could have been raised by the respondent."

5. At p.407 Kearns P. stated:-

> "26. I am satisfied that these authorities suggest clearly that the point raised by An Taisce, namely, that the failure to carry out an assessment of the environmental impact statement is a point going to the very heart of a decision to grant permission, be it on a "deemed" basis or otherwise, and, further, is one of substance which would, if upheld, have affected the outcome of the proceedings herein….
>
> 28. While obviously one is always reluctant to revisit a judgment which in ordinary circumstances would be regarded as bringing matters to a conclusion, the exceptional and unusual circumstances of this case really leave the court with no alternative if it is to do justice."

6. The circumstances in which the first named applicant learnt that the Department of Arts, Heritage and the Gaeltacht ("the Department")/NPWS was unaware of the appeal by Coillte to An Bord Pleanála are averred to in affidavits sworn by Dr. Evelyn Moorkens on 2nd June, 2015 and by Ms. Lucy Haggan, a solicitor acting for the first named applicant, on 3rd June, 2015 and 8th June, 2015. After delivery of my judgment Dr. Mookens made enquiries and avers that she discovered that the NPWS "were completely unaware of the making of the appeal" and that "the NPWS were never notified of the appeal by either Laois County Council or An Bord Pleanala". A review of Laois County Council files referred to in correspondence exhibited by Ms. Hagan tended to confirm this.

7. The first named applicant's solicitors promptly notified the respondents and Coillte's solicitors, and also the NPWS and Chief State Solicitors Office ("CSSO") of this development. Arthur Cox solicitors for Coillte replied on 25th May, 2015 expressing the view that "… we do not believe it has any impact on the judgment delivered by the Court on 1 May, 2015…".

8. Barry Doyle and Company on behalf of the respondent replied on 27th May, 2015 stating:-

> "Notification is a matter which the Council carries out after the Board notifies the Council of the existence of the appeal, and is not covered in the documents submitted by the Council to the Board in accordance with Section 128 of the 2000 Act.
>
> Accordingly, the Board was not aware of the alleged failure to notify the National Parks and Wildlife Service to which you refer, and all submissions to the Court were based on the assumption that Council had complied with its notification obligations.
>
> It would appear that any failure by the Council should have been discoverable long before the Board took its decision, and the time for bringing any judicial review has therefore long since expired. There appear to be no grounds for maintaining that the circumstances relating to your client's failure to bring proceedings in respect of such alleged failure within the time limit of 8 weeks was outside its control.
>
> In addition, the Court has already delivered judgment in the matter without any reference being made to any alleged failure to notify.
>
> In the circumstances, we should suggest that the court is functus officio in the matter…"

9. In an initial response by email on 4th June, 2015 Ms. Cliona O'Brien on behalf of the Department indicated that "the information provided in the appeal was not sufficient, in its view, to form a conclusive appropriate assessment". However on the same day Ms. O'Brien by email indicated that this was issued in error and did not represent the views of the Department, and by letter also dated 4th June, 2015 the CSSO on behalf of the Department/NPWS issued a full response making the following points relevant to the motion before the Court:-

> (1) that the applicants chose to name the Department as a notice party to the proceedings, notwithstanding that it was not a mandatory party and no relief was sought against the Department, and the Department advised by letter from the CSSO dated 14th October, 2014 that it did not propose to participate in the proceedings[2].
>
> (2) that the Department had made a written submission to Laois County Council, but had no record of being notified of the refusal of permission, or the appeal, but that its submissions would have been copied to the Board in accordance with statutory requirements.

(3) that the "first time the Department was formally put on notice of the appeal, and the board's decision to grant planning permission, was when it received copies of the pleadings in the judicial review proceedings".

(4) that "the Department's decision not to participate in the proceedings was made with the knowledge of the non-notification."

(5) that not having participated in the proceedings to date the Department did not intend to appear at, or make submissions, on the present application.

In a further letter dated 5th June, 2015 the CSSO added:-

> "Turning to the final two paragraphs of your letter, any question as to the validity of the appropriate assessment is a matter for the courts alone and not for the Department. The appropriate assessment in this case was carried out by An Bord Pleanála, which is the designated competent authority under Part XAB of the PDA 2000. Your clients, as they are entitled to, sought to challenge that appropriate assessment. The High Court has ruled that the appropriate assessment was lawful. Subject to any appeal to the Court of Appeal, this ruling is binding on all parties to the proceedings."

10. Counsel on behalf of the first named applicant emphasised the role of the Department as a statutory consultee, and as the department having responsibility on behalf of the government for the State's obligations under the Habitats Directive. He argued that in their submissions to the Court at the substantive hearing the respondent and Coillte both relied on the absence of any submission by the Department/NPWS to An Bord Pleanála on the appeal as indicative of their support for the appeal and the mitigation measures proposed by Coillte in respect of the possible adverse affect of the proposed development on the habitat of the Nore Freshwater Pearl Mussel. He argued that the Court in its judgment relied in part on these submissions, and that this is evident from para.187, where the fact of no submission by the Department on the appeal is recited, and para.208 the last sentence of which reads:-

> "Dr. Mookens fails to note [in her affidavit] that the DAHG did not see fit to make any submission or observation in response to Coillte's appeal to the Board."

Counsel also contended that the fact that the Department's submission to the Laois County Council 'travelled with' the appeal and somehow validated the process was not tenable. This was because the effect of the Department in not making any submission on the appeal was to lead the respondent to think that the Department was not participating.

11. Accordingly, Counsel contended that had the Court been aware that the Department did not make any submission on the appeal due to lack of notification it would have affected the outcome, and that this was a special or unusual circumstance sufficient to warrant the Court reopening/reconsidering its decision. In this regard Counsel argued that as no appeal lies to the Court of Appeal without certification by this Court under s.50A of the PDA 2000, this Court is effectively the last court of recourse and so the jurisprudence of the Supreme Court referred to above applies to consideration of the present application.

12. Counsel for the respondent argued that the non-notification point now raised would have made no substantive difference to the outcome; that the Department submission to the Laois County Council was before the respondent at the appeal stage; that the failure of notification was a failure of the county council, not the respondent; that the Department, as is apparent from their letter of 4th June, 2015, was aware of the non-notification of the appeal when the judicial review proceedings were served and yet chose not to participate; that the use of the phrase 'formally put on notice' in that letter suggests the Department may have been aware of the non-notification at an earlier date. Counsel further contended that if the Department chose not to complain in these proceedings then it was not for the first named applicant to pursue this issue; that Inland Fisheries Ireland, although notified of the appeal, also did not make any fresh submission on the appeal; that the first named applicant was now overstating the importance attached by Counsel for the respondent and Coillte in argument at the substantive hearing to the effect that in making no submission on the appeal the Department was implicitly supporting the mitigation measures proposed by Coillte. Counsel for the respondent also emphasised that in any case the Court was neutral in its attitude to this argument; that the sentence at the end of para.187 of the judgment was taken out of context – which was the Court's analysis of the weight to be attached to Dr. Moorkens' affidavit sworn on 23rd January, 2015 – and that the Court's *ratio decidendi* on this issue appears later and in particular in para.212 and that this did not mention reliance on any inference from non-participation in the appeal.

13. While not disputing the law applicable to this application for review, Counsel argued that the circumstances that led to the Supreme Court's decision in the Abbeydrive were very different. Firstly, An Taisce was actively misled by the planning authority as to whether the planning application had been withdrawn. Secondly, An Taisce was unaware of the true position and the existence of court proceedings until after the Supreme Court decision. Thirdly, the case concerned a 'default permission', so An Taisce's submission to the planning authority was not given any effective consideration. Fourthly, the unlawfulness as a matter of European law of a default permission in such circumstances had not been raised or argued before the High Court or Supreme Court – whereas in the present proceedings the issues of 'best scientific evidence' and 'restoration' as a NPWS objective for the Nore Freshwater Pearl Mussel and its habitat were litigated, and all parties accepted that its current status was one of extreme vulnerability.

14. Counsel for Coillte adopted the respondent's submissions but also emphasised the *dicta* of Kearns P. in *Abbeydrive* that the point raised by the first named applicant should 'as a matter of probability have affected the outcome of the case', and that it is important for the Court to consider whether the point 'could have been raised in the High Court by a party who had opportunity to argue the point in that court.' He referred the Court to para.258 onwards of my decision as containing the reasons for the decision as to the validity of the appropriate assessment, and suggested that there was no reliance by the Court on the submissions at the substantive hearing to the effect that an inference could be drawn from the absence of an appeal submission from the Department.

15. Counsel also contended that the inquiry of the Department recently initiated by Dr. Moorkens could have been made by the applicant at an earlier point in time, if necessary by freedom of information request. In particular, checking of the planning file held by Laois County Council would have disclosed the position, and as the respondent's and Coillte's written submissions to the Court for the substantive hearing relied on an inference from the absence of any appeal submission by the Department, this inquiry could have been made before the substantive hearing.

Decision on Review

16. In the concluding sentence of my judgment on 1st May, 2015 I stated "The applicants fail on all grounds and accordingly this application is dismissed". I have subsequently determined all issues of costs. Those decisions are final and only appealable on certification by the Court under s.50A of the PDA 2000. Leaving aside any issue of certification in respect of appeal to the Court of Appeal, which cannot be regarded as part of the substantive hearing of the judicial review as it arises after a final decision has been made, the starting position must be that I am *functus officio* in respect of the challenge by way of judicial review by the applicants to

the validity of the respondent's decision.

17. I accept the law is as set out earlier in this judgment. It follows that my decision should only be reconsidered or reviewed –

(1) in 'special or unusual circumstances' or 'exceptional circumstances';

(2) if the point sought to be raised is of sufficient importance;

(3) if the point, if valid, would as a matter of probability have affected the outcome of the case;

(4) if the point is not one that could have been raised in the High Court by a party who had the opportunity to argue it.

I am also mindful of the public policy requirements of finality and certainty of court decisions in the interests of the administration of the law. This may also be an aspect of the Rule of Law in the wider sense that public policy requires respect for the finality and enforcement of decisions of the courts. This justifies a high threshold for any party seeking to reopen a decision of the Court, and of course the onus is on that party to satisfy the Court that it is appropriate to reopen its decision. This, as Denham J observed in *Greendale*, is a heavy onus.

18. I am not satisfied that the first named applicant has met this threshold or discharged this heavy onus for a number of reasons, any one of which would suffice to refuse this application.

19. Firstly, the Department was made a notice party at the commencement of these proceedings. It became aware at that time (if it was not already aware) that it had not been notified of the appeal to the respondent, and of the grant of permission. Notwithstanding this knowledge the Department decided not to participate. If it had concerns about the non-notification then it was the body most intimately concerned with the implications of that failure, and the appropriate party to take issue with the validity of the decision of the respondent in respect of appropriate assessment whether on grounds of non-compliance by Laois County Council with Article 69 of the Planning and Development Regulations 2000-2015, or on the substantive issues raised in the judicial review.

20. In this respect, the present case is materially different to the *Abbeydrive* case in which An Taisce was never on notice of the proceedings and only became aware of the relevant point and the proceedings after the Supreme Court judgment. It differs in that the Department took a conscious decision not to participate. It is also notable that the Department is not participating in this application, in stark contract to the involvement of An Taisce in *Abbeydrive*.

21. Secondly, I am far from persuaded that my decision would have been different in outcome if this point had been raised and argued in the course of the proceedings. While the absence of a submission by the Department is adverted to in para.187 of my decision, it is noted in a manner that is neutral, and that is the attitude that I took when interrupting Counsel for the respondent during argument at the substantive hearing. It is admittedly mentioned again in para.208, but this was in the context of analysis of Dr. Moorkens' affidavit, and my decision on her evidence and the weight to be attached to it took into account a number of matters which led me to conclude as follows:-

> "212. Accordingly, the Court takes into account Dr. Moorkens' evidence on affidavit in so far as it helpfully sets out and supports the legal case for asserting that the AA was flawed because it assessed the project with reference to the status quo and the deteriorated conditions of the catchment rather than from the point of view of the conservation objective of restoration and support of improved habitat conditions which the applicants say is required under Article 6(3) of the Habitats Directive. In so far as the affidavit contains new evidence that was not before the Board, the Court is compelled to disregard such evidence. In so far as it contains opinion evidence that does not on its face take into account the detailed mitigation measures proposed by RPS on behalf of Coillte and incorporated into the impugned decision by conditions and other conditions imposed by the Board, the Court does not consider such evidence helpful."

22. Moreover the overall *ratio decidendi* for my decision in respect of the appropriate assessment is set out in para.s 258-266, and these do not express reliance on the absence of any submission by the Department on the appeal to An Bord Pleanála, or any inference therefrom, or an inference in respect of Dr. Moorkens' affidavit.

23. Thirdly, the failure to notify the Department of the appeal was a matter that the first named applicant could have discovered at an earlier point in time. The applicants did inspect the planning file held by the respondent before these proceedings were instituted. Counsel colourfully described it as being 'in a bit of a mess'. This featured in ground (14) which stated "This file is in disarray, follows no particular order, appears to be incomplete, and is impossible to follow". Whatever about the Board's file, it should have been possible for the applicants to ascertain from Laois County Council's planning file the record of notification of the appeal, or this information could have been obtained by a freedom of information inquiry. Such an inquiry, whether of the county council, the Department or the respondent, was something that the applicants could certainly have initiated after they received the respondent's and Coillte's written submissions for the substantive hearing, as these alerted the reader to an argument based on the Department having made no submission on appeal. The first named applicant cannot ignore that alert and now ask the Court to reconsider its decision in the light of information that it could have obtained before the case proceeded to trial.

24. Practitioners are well aware of the need to bring forward a party's entire case at the time of trial and the risk that to attempt to raise in fresh proceedings a claim or argument that ought to have been made in earlier proceedings will be treated as an abuse of process under the doctrine in *Henderson v. Henderson*. In asking the Court to reopen this case the first named applicant is in effect attempting to raise in fresh proceedings a point that could have been raised in the proceedings before the substantive hearing. As such, the exercise is impermissible.

25. Fourthly, my view is that the issue that is now raised is not of such importance as to justify acceding to the application. In *Abbeydrive* the European law issue raised by An Taisce was treated by the Court as 'going to the very heart of a decision to grant permission', and such that it would clearly have affected the outcome. This seems to me to be of a different order of magnitude to the issue now raised which, at its height, might have had some influence on the Court's consideration of the validity of the appropriate assessment.

Amendment

26. The first named applicant sought in the alternative an order pursuant to Order 84 of the Rules of the Superior Courts ("RSC") allowing amendment of the statement of grounds to include the failure of Laois County Council or respondent to notify the Department of the appeal lodged with the respondent.

27. Counsel for the first named applicant argued that insofar as there was a delay beyond the permitted eight weeks for seeking leave to seek judicial review this was explained by the fact that the first named applicant did not become aware of the non-notification until after my judgment was delivered.

28. The respondent and Coillte argued that there was no good or sufficient reason to amend; that the fact of non-notification was information that was within the 'control' of the applicants to obtain at a much earlier point in time, and that almost one year on and post-judgment the Court should not exercise its discretion to allow amendment.

Decision on Amendment

29. This alternative claim raises a fundamental issue of whether, when a Court has heard and determined a judicial review, it is open at all to the Court to amend the statement of grounds. How can a court have jurisdiction to amend if it is *functus officio*? This question, and the related issue of whether the amendment application is nothing more than a collateral attempt to circumvent a refusal by the Court to review its judgment, were not addressed in argument. However, it is not necessary for me to decide these issues as it is possible for me to determine this alternative claim upon the assumption that such a jurisdiction does exist.

30. The provisions of the PDA 2000 and the RSC (as amended with effect from 1st January, 2012) relevant to amendment of planning judicial reviews were referred to in my judgment at para.s 35-37 in the context of considering the scope of the substantive judicial review, but for these purposes it is only necessary to refer to three provisions. Section 50(8)(a) of the PDA 2000 provides that the High Court may extend the eight week period for seeking leave to seek judicial review:-

> "…but shall only do so if it is satisfied that –
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

31. Order 84 rule 21(3) empowers the Court to extend time for leave only when satisfied that there is "good and sufficient reason" and the circumstances surrounding the delay "either –(i) were outside the control of, or (ii) could not reasonably have been anticipated by" the applicant, and rule 21(5) requires that the application for extension be grounded on an affidavit setting out and verifying the reasons for the delay.

32. I am satisfied that it was within the control of the first named applicant to have ascertained the non-notification of the Department of the appeal to the respondent. As referred to above in the context of review, this could and should have been discovered by inspection of the county council's or (perhaps) the respondent's planning files at an early stage, or by freedom of information request at any time; alternatively, following receipt of the written submissions of the respondent and Coillte the applicants were put on notice of the issue and should have conducted appropriate inquiries at once.

33. Accordingly, the application to amend does not satisfy the requirements of s.50(8)(a) of the PDA 2000.

34. I also do not accept that the delay from 13th June, 2014 when the respondent's decision was made to the end of May, 2015 is acceptable or adequately or at all explained by the first named applicant, either on affidavit or in argument, and accordingly Order 84 rule 21(3) and (5) are not satisfied.

35. I therefore refuse the reliefs sought at para.s 1. and 2. of the first named applicant's notice of motion dated 3rd June, 2015.

[1] Which provides that the decision of the Supreme Court shall in all cases be final and conclusive.

[2] A solicitor from the CSSO in fact attended before this court at the commencement of the substantive hearing to advise the court of this position, and then withdrew.