

THE HIGH COURT

RECORD NO. 2007 713 JR

IN THE MATTER OF SECTION 50 AND SECTION 261 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN:

PATRICK BROWNE

APPLICANT

-AND-

KERRY COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 9th day of October, 2009

1. The applicant is the owner and operator of a quarry, situate at Clounmellane, Furies, Killarney, County Kerry ('the quarry').
2. The respondent is a local authority with responsibility for the administrative area of County Kerry. Its functions include the management of building developments in the county, in particular by means of the grant or refusal of planning permission.
3. The applicant seeks the following relief, by way of judicial review:-

(a) An order of certiorari, quashing the decision of the respondent dated the 26th of April 2007 whereby the respondent imposed conditions on the operation of a quarry pursuant to section 261 of the Planning and Development Act 2000, as amended ('the 2000 Act'); and

(b) A declaration that the respondent determined the applicant's application outside the period prescribed by section 261(6)(a) of the 2000 Act.

I. Factual and Procedural Background

4. The facts of the present case are not in dispute. It is common case that the quarry, which commenced operation prior to the 1st of October 1964, was registered by the respondent on the 26th of April 2005. On the 26th of April 2007, the respondent purported to make a decision imposing conditions on the quarry, pursuant to section 261(6)(a) of the 2000 Act.
5. On the 2nd of February 2009, Cooke J. granted leave to the applicant to challenge the purported decision of the respondent on the basis that it had been made outside the relevant time period under section 261 of the 2000 Act.

II. The Legislative Regime

6. Section 261(6)(a) of the 2000 Act provides for the imposition of certain conditions on the operation of a given quarry. It provides as follows:-

"Not later than 2 years from the registration of a quarry under this section, a planning authority may, in the interests of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made pursuant to a notice under subsection (4) or (5):-

(i) in relation to a quarry which commenced operation before 1 October 1964, impose conditions on the operation of that quarry, or

(ii) in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963 restate, modify or add to conditions imposed on the operation of that quarry,

and the owner and operator of the quarry concerned shall as soon as may be thereafter be notified in writing thereof."

7. Section 251 of the 2000 Act deals with the calculation of time periods under the Act. It states:-

"(1) Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded.

(2) Subsection (1) shall not apply to any time period specified in Part II of this Act."

8. Section 141(1) of the 2000 Act provides for situations in which the last day of a time period falls on a public holiday. It states as follows:-

"Where a requirement of or under this Act requires a planning authority or the Board to give a decision within a specified period and the last day of that period is a public holiday (within the meaning of the Organisation of Working Time Act, 1997) or any other day on which the offices of the planning authority or the Board are closed, the decision shall be given on the next following day on which the offices of the planning authority or Board, as the case may be, are open."

III. The Submissions of the Parties

9. The applicant contends that the conditions which the respondent purported to impose on the quarry are unlawful since the decision to impose them was made outside the time limit provided for in section 261(6)(a) of the 2000 Act. The applicant further submits that this time limit is of a mandatory nature, as opposed to being merely directory. Finally, the applicant argues that section 251 of the 2000 Act ought not to apply to time limits of more than one year in duration because its application would result in patent absurdity.

10. The respondent contends that the time limit provided for in section 261(6)(a) of the 2000 Act is merely directory and, as such, the respondent was not bound to act within it. In the alternative, the respondent argues that it did act within time since section 251 of the 2000 Act has the effect of increasing the relevant time period by 18 days, owing to the period which it serves to exclude over the Christmas holidays.

IV. The Decision of the Court

11. The result of the present case depends entirely on the construction of section 261(6)(a) of the 2000 Act. As this Court has recently noted on a number of occasions, the default rule of statutory interpretation in Irish law is that a literal approach must be taken to the provision being examined. It is only in limited circumstances that this principle may be departed from. The primacy of the literal method was recognised by the Supreme Court in *Keane v. An Bord Pleanála* [1997] 1 IR 184. In that case, Hamilton C.J. pronounced as follows at page 215:-

"In the interpretation of a statute or section thereof, the text of the statute or section thereof is to be regarded as the pre-eminent indication of the legislator's intention and its meaning is to be taken as that which corresponds to the literal meaning."

12. Section 5 of the Interpretation Act 2005 ('the 2005 Act') now affords formal recognition to the power of the courts to depart from the literal meaning of a statute where it would produce obscure results or where it would undermine the plain intention of the legislature. It provides:-

"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction):-

(a) that is obscure or ambiguous, or

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

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

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

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

13. In *Monahan v. Legal Aid Board* [2008] IEHC 300, Edwards J. considered the significance of section 5 of the 2005 Act and held as follows:-

*"Section 5 implicitly recognises the literal rule as the primary rule of statutory interpretation, and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. The language of the Bill is close to that set out in the recommendations of the Law Reform Commission Report on Statutory Drafting and Interpretation: Plain Language and the Law, LRC 61-2000, at 21, which was largely derived from the judgment of Keane J. in *Mulcahy v Minister for the Marine* (unreported, High Court, 4th November, 1994) where he stated as follows:-*

"While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

As such, s.5 largely reflects the approach adopted by the courts prior to its enactment in any event. The main departure from the common law position occasioned by s.5 is the creation of an exception to the general rule where a literal interpretation would defeat the intention of the Oireachtas. This exception to the literal rule of interpretation now applies, together with the traditional common law ambiguity and absurdity exceptions. It is important to note that there is an important limitation built into the language of s.5; the purposive rule provided for in s.5 may only be applied where the intention of the Oireachtas "can be ascertained from the Act as a whole." Thus, the wording of the s.5 limits the possibility of reliance on external materials to ascertain the legislative intent behind a particular provision. Interpretation in light of the intention of the enacting body is permissible only "where that intention can be ascertained from the Act as a whole."

15. Another provision which is of significance for present purposes is section 18(h) of the 2005 Act. It provides as follows:-

"Periods of Time: Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period."

16. Turning first to the issue of whether the time period in section 261(6)(a) of the 2000 Act is mandatory as opposed to directory, it is important that the Court should remain cognisant at all times of the constitutional right, which the applicant holds under Article 43 of Bunreacht na hÉireann, to the quiet enjoyment of his property. With this in mind, it is necessary to analyse the wording of the provision with a view to discerning its plain and literal meaning.

17. The opening words of section 261(6)(a) of the 2000 Act – "Not later than two years from the registration of a quarry..." – are certainly emphatic and would weigh heavily in favour of a mandatory construction of the provision. However, this phrase is tempered to some extent by the subsequent use of the word "may" prior to the description of the respondent's powers. In *Dolan v. O'Hara* [1975] NI 215, Lowry L.C.J. considered the position of provisions creating time limits and offered the following guidance:-

"Certain principles, although they are not rules, may at least be adopted as guides:-

1. A time limit is likely to be imperative where no power to extend time is given and where no provision is made for what is to happen if the time limit is exceeded;
2. Requirements in statutes which give jurisdiction are usually imperative;
3. Where the act is to be done by a third party for the benefit of a person who will be damaged by non-compliance, the requirement is more likely to be directory;
4. Impossibility may excuse non-compliance even where the requirement is imperative."

18. Applying these interpretation criteria to the present case, it seems clear to me that section 261(6)(a) of the 2000 Act must be construed as being mandatory in nature. As to the first of Lowry L.C.J.'s principles, it is evident that no power to extend time exists, nor is there any provision to indicate what is to happen if time is exceeded. With respect to the second principle, the provision has the effect of conferring an important jurisdiction on the respondent to interfere with the constitutional rights of individual citizens. The third and fourth principles are not relevant to the circumstances of the present case. I am satisfied, therefore, that the use of the word "may" can readily be justified within a literal interpretation as affording a discretion to the respondent as to whether it should, within prescribed time limit, impose conditions on a quarry as well as the point, within the time limit, at which such imposition should occur.

19. Having established that the respondent is obliged to act within the two year time limit prescribed by section 261(6)(a) of the 2000 Act, it is necessary to determine whether it in fact did so. In light of section 18(h) of the 2005 Act, it is evident that the registration date of the quarry must be included within the two year period. Time, therefore, started to run from the 26th of April 2005. As to when it concluded, I am guided by the decision of Lavan J. in *McCann v. An Bord Pleanála* [1997] 1 IR 264, in which he considered the equivalent provision of section 11 of the Interpretation Act 1937. It was held that the appropriate date in cases of time limits expressed in weeks, months or years was not the 'corresponding date' within the particular week, month or year, but rather the 'corresponding date, minus one day'. Applying this principle to the present case, the final date upon which the respondent was entitled to impose conditions was *prima facie* the 25th of April 2007. As noted above, it is not disputed that the respondent's determination was not reached until the following day, the 26th of April 2007.

20. The question for the Court therefore is whether section 251 of the 2000 Act may be applied in such a fashion as to effectively extend the two year time period by 9 days in respect of each year, giving rise to a total extension of 18 days. The provisions of section 251 are plain and unambiguous. It is expressly provided that the period between the 24th of December and the 1st of January each year, both days inclusive, shall be disregarded in the calculation of time limits. The applicant has contended that to apply this provision to time limits of more than one year would result in patent absurdity; for example, a time limit which was nominally 12 years on the face of the statute would in fact be calculated at the considerably lengthier period of 12 years and 108 days. He thus argues that the provision can only logically be applied to time limits of less than one year. However, I am unable to agree with this submission. There is no basis within the wording of the 2000 Act or otherwise for the imposition of such a specific limitation on the effect of section 251 by this Court. The provision is undoubtedly capable of effecting a quite serious extension of more lengthy time limits, and such extension will no doubt be of significance in many cases such as the present one. This effect could be described as curious, and its merit might well be open to debate, but it cannot in my view be construed as 'absurd' within the meaning of the 2005 Act.

21. I am satisfied that section 261(6)(a) of the 2000 Act is mandatory in nature and that, as such, the respondent is bound to act in compliance with it in the imposition of conditions on a given quarry. However, on the facts of the present case, I am equally satisfied that the time limit was adhered to, having made the necessary extensions mandated by section 251 of the 2000 Act. I will therefore refuse the relief sought.