Neutral Citation Number: [2011] IEHC 324

THE HIGH COURT

JUDICIAL REVIEW

2008 967 JR

BETWEEN

PATRICK GOLDEN

APPLICANT

V.

KERRY COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 29th day of July 2011.

1. The applicant is a businessman and the owner of lands at Knocknaeyouloo, Kells, Co Kerry. The respondent is the County Council with responsibility for the administrative area of County Kerry.

2. The relief's sought are as follows:-

> (i) An Order granting leave to seek *Certiorari* by way of Judicial Review, of the Respondent's purported invalidation, dated the 25th June 2008 of the Applicant's Planning Application of the 12th June 2008 to the Respondent.
>
> (ii) An Order granting leave to seek an Order of *Mandamus* compelling the Respondent to issue an unconditional Grant of Permission to the Applicants in respect of the development proposed by the Applicants Planning Application dated the 12th June 2008.
>
> (iii) An Order granting leave to seek a Declaratory Order to the effect that on the 12th day of June, 2008 the applicant made a Planning Application, as defined by Section 2 of the Planning and Development Act, 2000 to the Respondent.
>
> (iv) An Order granting leave to seek a Declaratory Order to the effect that the Respondent failed, in relation to the said Planning Application, to comply with the statutory duty imposed upon it by certain provisions of Section 34 of the Planning and Development Act, 2000.
>
> (v) Such further, or other, relief's as to This Honourable Court may seem just.
>
> (vi) The costs of, and incidental to, the Application herein.

3.1 The within proceedings are judicial review proceedings under Section 50 of the Planning and Development Act 2000, as amended by the Planning and Development (Strategic Infrastructure) Act 2006. The applicant in these proceedings seeks to quash the respondent's decision of the 25th June, 2008, to invalidate a planning application lodged by the applicant on the 12th June, 2008. The applicant also seeks an order to compel the Council to issue an unconditional grant of planning permission in respect of the proposed development and various declaratory relief's.

3.2 The applicant lodged a planning application with the Council on the 12th June, 2008, for the extraction and processing of stone from the applicants lands at Knockaneyouloo, Kells, County Kerry. The Council informed the Applicant, by letter dated the 25th June, 2008, that the planning application was invalid as it had not been lodged within the period of two weeks from the date of the publication of the newspaper notice and the erection of the site notice, as required under article 17(1) of the Planning and Development Regulations 2001. The site notice had been erected on the 29th May, 20080 and the newspaper notice was published in the Kerry Eye on the 29th May, 2008.

3.3 The applicant argues that the planning application was lodged within the two week period following the publication of the newspaper notice and the erection of the site notice and that accordingly the Council acted *ultra vires* in invalidating the planning application. The applicant claims that he is entitled by law to a default planning permission, under section 34(8) of the Act of 2000. Of relevance are sub sections 8(a) and (f).

> (8)(a) Subject to paragraphs (b), (c),(d), and (e), where-
>
> > (i) an application is made to a planning authority in accordance with the permission regulations for permission under this section, and
> >
> > (ii) any requirements of those regulations relating to the application are complied with,
>
> a planning authority shall make its decision on the application within the period of 8 weeks beginning on the date of receipt by the planning authority of the application.
>
> (f) Where a planning authority fails to make a decision within the period specified in paragraph (a) (b), (c),(d), or (e),a decision by the planning authority to grant the permission shall be regarded shall be regarded as having been given on the last day of that period."

The applicant points out that 34(8) of the Act of 2000 is not a discretionary remedy. These proceedings are by way of telescoped hearing therefore the issue of whether leave should be granted is addressed and assuming leave is granted the submissions proceed to deal with the substantive matter.

4. Submissions of the Applicant

4.1 In seeking leave to apply for judicial review the applicant maintains that there are substantial grounds for contending that the decision of the respondent is invalid and ought to be quashed. The applicant submits that on the facts of the case there are two questions which the Court must determine. First, whether the application made on the 12th June, 2008, is a valid one as per the Planning and Development Regulations 2001. Secondly, if the answer to question one is yes, does a default permission arise under Section 34 (8) of the Planning and Development Act 2000. In answer to the first question the applicant submits that the application was valid as the newspaper notice and the site notice were made within 2 weeks of the application. Under Article 17(1) of the Planning and Development Regulations 2001, an applicant shall within the period of 2 weeks before the making of a planning application give notice of the intention to make the application in a newspaper and by the erection of a site notice. The applicant submits that the use of the word "before" indicates that the day the application was made i.e. the 12th of June, 2008 is not included in any calculation of the two week time period. The calculation of the period must therefore work back from the 11th of June, 2008. Using this method of calculating the two week time period, the 29th of May 2008 is within two weeks of the 11th June, 2008, therefore the Council erred in determining that the newspaper and site notices were out of date and so the application is a valid one.

4.2 The applicant submits that the Council unlawfully invalidated his planning application and that he is entitled to a "default planning permission" under section 34(8) of the Planning and Development Act 2000. The applicant cites the case of *Paul Maye v. Sligo Borough Council* [2007] 4 IR 678. In this case while the respondent was found to be in breach by failing to determine the planning application within the time period specified in section 34(8) the Court decided to use its discretion and not give an order that a default permission came into existence. This was on the basis that the proposed development was a material contravention of the development plan. The applicant argues that his case can be distinguished from *Maye* as the respondent has only stated that the application may have been invalid as no EIS was submitted, the Court would have to decide if it may use its discretion in this case in relation to a default planning permission.

5. Submissions of the Respondent

5.1 At the outset the respondent opposes the applicant's application for leave to apply for judicial review on the basis that there are no substantial grounds for contending that the Council's decision is invalid or ought to be quashed. On the basis that leave is granted the central issue in the case is the interpretation of article 17(1) of the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2006. Article 17(1) contains the requirement to give notice of the making of a planning application in a newspaper and in a site notice and provides as follows:

> (1) An applicant shall within the period of 2 weeks before the making of a planning application-
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> (a) give notice of the intention to make the application in a newspaper in accordance with article 18, and
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> (b) give notice of the intention to make the application by the erection or fixing of a site notice in accordance with article 19.

The respondent calculates this two week time period as commencing on and including the day the advert is published in the newspaper and the notice is erected on site and that the last day for lodging the planning application is 14 days from that date. The day the planning application is lodged is included in the 14 day period. In the instant case the newspaper notice was published on the 29th May, 2008, and the site notice was erected on site on the same date. The planning application was lodged on the 12th June 2009, i.e. 15 days after notification was given. It is submitted that the respondent was correct to invalidate the planning application in these circumstances.

5.2 The applicant seeks an order of *Mandamus* compelling the Council to issue an unconditional grant of planning permission in respect of the proposed development. The applicants argument is that if the Council unlawfully invalidated the planning application then the provisions of section 34(8) apply and that he is entitled to what is referred to as a "default planning permission". Under Section 34(8) (a) where a planning authority fails to make a decision within a period of 8 weeks a decision by the planning authority to grant the permission shall be regarded as having been given on the last day of that period.

It is submitted that the planning application lodged by the applicant was invalid for two reasons and accordingly section 34(8) (f) simply does not arise. Firstly, the time period provided for in article 17(1) of the Regulations of 2001 has not been complied with. Secondly, the planning application was not subjected to an environmental impact assessment ("EIA") as required under the EIA Directive which is transposed into Irish Law by the Regulations of 2001 which provides in Part 1, Schedule 5 paragraph 2 (b) that an EIA is mandatory for:

> "Extraction of stone, gravel, sand or clay where the area of extraction would be greater that 5 hectares"

In this case the site area is stated to be 5.71 hectares therefore an EIA was mandatory, accordingly the planning authority could not make a decision to grant planning permission for a development which required an EIA, but for which none had been carried out. The European Court of Justice has held in Commission v Belgium Case C 230/00 [2001] E.C.R. 1-4591 that a system of tacit authorisation is incompatible with the EIA Directive 85/337. It is accepted that the Council did not invalidate the planning application on the basis that no EIS was submitted. Despite this it is submitted that the respondents are not estopped from raising this issue the context of these judicial review proceedings. It is submitted that in the instant case the Court cannot order a default planning permission to issue as to do so would be contrary to the EIA Directive.

5.3 If the Court is of the view that the planning application was valid it is submitted that the Council's decision to invalidate the planning application was still a decision and that such a decision stops the time running for the purpose of section 34(8) of the Act of 2000. This was accepted in *State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381 where Walsh stated as follows at p.397

> "In my view, the default provisions were enacted for the purpose of compelling a planning authority to direct its mind to an application. They do not amount to a statutory decree that every decision must be one which is sustainable in law. In my view a decision which, when questioned, is found to be *ultra vires* or unsustainable in law for any reason is nonetheless a decision for the purposes of the default provisions."

5.4 The applicant is wrong in his assertion that a Court is required where it finds that the Council have unlawfully invalidated a

planning application to order a default permission to issue. In *Maye v. Sligo Borough Council* [2007] IEHC 146, the Court accepted that the respondent had failed to determine the planning application within the time period specified in section 34(8) of the Act of 2000. Despite this the Court went on to refuse the applicant the relief sought on the basis that the proposed development was a material contravention of the development plan. The Court also considered that it had a discretion to refuse the relief sought notwithstanding that the decision of the planning authority was not taken in time and notwithstanding that the proposed development was a material contravention of the development plan.

Decision of the Court

6.1 In the within proceedings the applicant seeks to quash the decision of the respondents dated the 25th June, 2008, in which it was held that applicants planning application did not comply with the Planning and Development Regulations 2001 and was therefore invalid. The application was in respect of the extraction and processing of stone from the applicants lands at Knockaneyouloo, Kells, County Kerry. The invalidity alleged is that the applicant did not lodge the application in time. Article 17 (1) of the Planning and Development Regulations 2001, as amended requires an application to be lodged within two weeks from the date of the publication of the newspaper notice and the erection of the site notice. The notices were given on the 29th May, 2008 and the application was made on the 12th June, 2008. The applicant argues that the planning application was lodged within the two week period and that accordingly the Council acted *ultra vires* in invalidating the planning application. The applicant further claims that as a result of the respondent's failure to comply with the law in relation to his planning application he is entitled by law to a default planning permission, under section 34(8) of the Act of 2000.

6.2 In order to fulfil the statutory requirement for leave to apply for judicial review, the applicant is required to show that there are substantial grounds for contending that the decision of the respondent was invalid. In *McNamara v. An Bord Pleanala* [1995] I.L.R.M 125, Carroll J. considered the meaning of the phrase "substantial grounds" and held that:-

> "In order for a ground to be substantial it must be reasonable, it must be weighty. It must not be trivial or tenous"

I am satisfied that a reasonable question has been raised by the applicant concerning how the period of two weeks is to be calculated. I am further satisfied that the applicant has a substantial interest in the matter which is the subject of the application as required under section 50A (3) of the Act of 2000 as amended, the applicant therefore fulfils the statutory requirement for leave to apply for judicial review.

6.3 Turning to the substantive review it seems to me that the first matter to be determined is how the period of two weeks is to be calculated. Article 17(1) of the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2006. Article 17(1) provides that:-

> "(1) An applicant shall within the period of 2 weeks before the making of a planning application-
>
> (a) give notice of the intention to make the application in a newspaper in accordance with article 18, and
>
> (b) give notice of the intention to make the application by the erection or fixing of a site notice in accordance with article 19.

The issue which arises here is whether the period of two weeks includes the date the notices were published and the date the application was made.

6.4 A similar issue arose in *Mulhaire v. An Bord Pleanála* [2007] IEHC 478. Although the point considered by the Court in the *Mulhaire* case is different to that which arises in this case, the conclusions of the Court on this point are of some assistance. Birmingham J. held at 484:-

> "The argument made is that the day on which the application is submitted cannot be regarded as being within the two week period. It is said that this is so by analogy with the Statute of Limitations. However, it seems to me that the Statute of Limitations jurisprudence does not assist the applicant. In *Mc Guiness v Armstrong Patents Limited* [1980] I.R. 289, McMahon J. held that the day on which the cause of action accrues is included."

Mulhaire suggests that the day the planning application is lodged is to be regarded as being within the two week period and time begins to run from the publication of the newspaper notice and the placing of the notice.

6.5 Section 18(h) of the Interpretation Act 2005 set out how a statutory provision which deals with a period of time is to be construed. Section 18(h) states:-

> "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"

I am therefore satisfied that the two week period must run from the placing of the advert in the newspaper and the notice on site, therefore the 29th of May is included in the calculation of the two week period. Section 18 (h) goes on to deal with whether to include the day on which a period of time is expressed to end. Section 18(h) states:-

> "where a period of time is expressed to end on or be reckoned to a particular day, that day shall be included in the period."

In the context of this planning application it seems to me that the date the planning application was lodged is also included when calculating the two week period. The notices were placed on the 29th of May the application was lodged on the 12th of June. Calculating the two week period based on the section 18(h) of the Interpretation Act the application was lodged 15 days after notification was given. It seems to me that the Council were obliged to invalidate the applicants planning application on the basis that it was lodged one day outside the two week period.

6.6 The applicant in this case has sought an order of *certiorari* quashing the respondent's decision to deem his planning application invalid. On the basis that he was successful in convincing the Court that the respondents decision was invalid the applicant sought an Order of *Mandamus* compelling the respondent to issue an unconditional Grant of Permission. As the applicant has not been successful in convincing the Court that the respondent was wrong to decide his application was lodged outside the specified period the issue of a default permission does not arise. I am satisfied that the applicant is not entitled to the relief sought. This application is therefore refused.