Neutral Citation Number: [2006] IEHC 197

**THE HIGH COURT**

**[2005 No. 1012 JR]**

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000**

**BETWEEN**

**BEN KELLY**

**APPLICANT**

**AND**
**ROSCOMMON COUNTY COUNCIL**

**RESPONDENT**

**AND**
**MICHAEL GRIFFIN**

**NOTICE PARTY**

**Judgment of Mr. Justice McGovern delivered on the 20th day of June, 2006**

1. This is an application for judicial review by way of order of *certiorari* quashing the decision of the Respondent to grant to the Notice Party retention permission dated 8th August, 2005, (planning registrar reference 05/495) on the grounds that such application was invalid due to non-compliance with the requirements of Article 19 of the Planning and Development Regulations, 2001.

2. On 14th November, 2005, leave was given to the Applicant to apply by way of application for judicial review for the relief set forth at paragraphs D1, D2 and D3 on the grounds set out in paragraphs E1, E8 inclusive in the statement of grounds filed on the 20th September, 2005. The order refers to the statement filed on 25th September, 2005, but it appears from the date of the stamp that it was the 20th September, 2005.

3. At the commencement of the hearing Mr. Paul O'Higgins S.C. on behalf of the Applicant informed the court that he was not proceeding with any claim for damages.

4. It was agreed between the parties that the matter for consideration by the court was a net issue, namely whether or not, in the circumstances arising in this case, the Applicant was obliged to erect a site notice inscribed or printed in indelible ink on a yellow background as provided for in Article 19(4) of the Planning and Development Regulations, 2001.

**The Facts**

5. The Applicant is the owner of lands at Rooskagh, Bealnamulia, Athlone, Co. Roscommon. The Notice Party owned lands adjacent to the Applicant. On 13th January, 2005, the Notice Party applied for permission for development comprising the raising of the original ground level of his lands by the importation of excavated material. The planning reference no. for this application was 05/011. The Notice Party also applied for a waste permit in respect of the same activity. Two notices were erected at the site, one underneath the other. One was a site notice in respect of a waste permit application and the second was a site notice in respect of the planning permission. Both were on a white background. The application for permission reference 05/011 was made at the same time as the application for a waste permit.

6. The Applicant objected to the application being brought by the Notice Party and retained the services of Peter Sweetman and Associates to assist him in opposing the application. His agent made a submission together with the appropriate fee in respect of the application. The application is stated to have been made on the 22nd January, 2005, by the Applicant in his affidavit but the stamp from the County Council was received on 20th January, 2004. It is clear that the reference to 2004 cannot be correct. There is a manuscript note at the top of the submission which suggests it may have been received on 13th January, 2005. In my view nothing turns on this. It is clear that at some time in January 2005 the Applicant's agent made a submission and the submission included an allegation that the application was invalid as it did not contain an application for retention. It was pointed out that the site notice was therefore "wrong". On the 8th March, 2005, the Respondent deemed the planning application reference 05/011 to be invalid pursuant to Article 26(3)(b) of the Planning and Development Regulations 2001, on the basis that the contents of the site notice were misleading. The Applicant says that after the declaration of invalidity his agent Mr. Sweetman indicated to him that any subsequent application for permission made within six months of the previous application would require a site notice on a yellow background. The Applicant says he duly maintained a watch over the site but no such notice was erected.

7. It appears that in fact a second notice was erected on the site after the Respondent had declared the first site notice to be invalid. The Applicant failed to notice the erection of a new site notice making an application for retention. This is entirely understandable as the new notice reference 05/495 replaced the earlier notice and above it there remained the site notice for the waste permit. In other words, in the absence of detailed scrutiny, there remained two site notices both on a white background which, for all intents and purposes, looked the same as the position before. As a result of this the Applicant didn't make any submissions or observations in respect of the application 05/495 and in due course discovered that the Notice Party had been granted permission for retention. The retention permission was given on 8th August, 2005.

8. When he realised that retention permission had been granted the Applicant contacted his agent with a view to an appeal but because he had not made any submission or observation in respect of the application he was precluded in the normal way from appealing to An Bord Pleanála. He was informed by his agent that as an adjoining landowner he was entitled under s. 37(6) of the Planning and Development Acts, to apply to the Board for leave to appeal the decision of the Respondent. This is a restricted form of relief and the Applicant duly applied. On 31st August, 2005, the Board refused his application for leave to appeal against the decision of the Respondents as the application did not fall within the ambit of ss. 37(6)(d)(i) or (ii).

9. Since the Applicant was unable to appeal the decision for retention he seeks, in these proceedings, to have the decision of the Respondent quashed on the basis that the site notice in respect of the application reference 05/495 having been erected within six months of the original application, should have been on a yellow background and was therefore invalid. He argues that as a result the decision made by the Respondent in granting retention was invalid and that his right to challenge the application and appeal it were frustrated.

10. It is agreed by the parties that this application turns on a net issue which is whether the failure of the Notice Party to erect a site notice on a yellow background in respect of application 05/495 was in breach of the provisions of the Planning and Development Act, 2000 and the Planning and Development Regulations, 2001 and was therefore invalid.

11. Section 2 of the Planning and Development Act, 2000, (hereinafter referred to as "the Act") sets out the interpretation of words

and phrases in the Act. It states *inter alia*:

> "Planning application" means an application to a planning authority in accordance with permission regulations for permission for the development of land required by those regulations."

12. Article 19(4) of the Planning and Development Regulations, 2001, reads as follows;

> "Where a planning application is made in respect of any land or structure, and a subsequent application is made within six months from the date of making the first application in respect of land substantially consisting of the site or part of the site to which the first application related, in lieu of the requirements of sub-article (1)(b), the site notice shall be inscribed or printed in indelible ink on a yellow background and affixed on rigid, durable material and be secured against damage from bad weather and other causes."

13. The reference to sub-article (1)(b) is to the site notice being printed in indelible ink on a white background in respect of other applications.

14. Was the application reference 05/495 the first application having regard to the fact that the earlier application reference 05/011 had been declared by the local authority to be invalid? That is the issue in this case.

15. Mr. Paul O'Higgins S.C. for the Applicant has argued that the court should give a purposive interpretation to the Act and regulations so as to achieve what was intended by the legislature. He argues that it was clearly the intention of the legislature to ensure that interested parties would not be taken by surprise by the nature of site notices erected when planning permissions are sought. The whole purpose of requiring a site notice with a yellow background where a similar application is made in respect of the land within six months from the date of the first application, is to alert interested parties that the application is different to the original one. He argues that in the present case it would be contrary to the intention of the legislature to permit the Applicant to be disadvantaged in view of the fact that the second notice was on a white background and, effectively, looked the same as the first notice which had been deemed invalid. I have been referred to the decision of *Mulcahy v. Minister for Marine*, (Unreported, High Court, Keane J., 4th November, 1994) and *Minister for Justice Equality and Law Reform v. Dundon* (Unreported, Supreme Court, 20th June, 2005).

16. In the *Dundon* case reference was made to *Howard v. Commissioner of Public Works* [1994] 1 I.R. where at page 151 Blayney J. referred to the general principles to be applied in the interpretation of statutes and cited Craies on *Statute Law* (1971) 7th ed. at p. 65:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense."

17. In that case Blayney J. went on to refer to Craies on *Statutory Interpretation*, 3rd ed. at p. 40.

> "In determining the meaning of any word or phrase in a statute the first question to ask is always what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

18. In the *Mulcahy* case Keane J. stated:

> "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."

19. I have been referred to the Interpretation Act, 2005. Section 19 of the 2005 Act states:

> "A word or expression used in a statutory instrument has the same meaning in the statutory instrument as it has in the enactment under which the instrument is made."

20. In the Interpretation Act 1937, the words "unless the contrary intention appears" were included but have been deleted in the 2005 Act. Section 5(2) of the 2005 Act states:-

> "In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction – either (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 s. 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 the intention can be ascertained from the Act as a whole."

21. In this case the definition of "planning application" in s. 2 of the Act is clear and unambiguous. It has to be an application "….in accordance with the permission regulations …". It seems to me that once the original application was deemed to be invalid, because the application description was incorrect and because the site notice was misleading and not in accordance with the regulations it ceased to be a "planning application" within the meaning of the Act.

22. The Applicant knew that the application was deemed to be invalid and he did at all times have the benefit of advice from an agent. Greater vigilance on his part would have established that a new notice had been erected. In saying this it is entirely understandable how the Applicant failed to notice the change in character of the second notice as it was on a white background, but it seems to me that the Notice Party was complying with the regulations in putting up such a notice. Even though the Applicant would have required to be particularly diligent, the fact is that a site notice visible to the Applicant and other members of the public was put up in respect of application 05/495 and, had the Applicant or his agent been aware of this, they would have had available to them all

the rights of objection and appeal provided for in the legislation. I hold that the definition of a "planning application" set out in s. 2 of the Act is neither "obscure or ambiguous" within the meaning of s. 5 of the Interpretation Act, 2005. The burden of providing that giving a literal interpretation to the definition "planning permission" in the Act would be absurd or fail to reflect the plain intention of the legislature as referred to in s. 5(b) of the Interpretation Act, 2005 rests on the Applicant. While the Applicant has undoubtedly established good reasons as to why he didn't become aware that a new notice had been put up by the Notice Party, I don't accept that he was left unprotected by the legislation and regulations as all remedies provided by the legislation would have been open to him if he had exercised greater vigilance. I am not satisfied that the interpretation contended for by the Respondents or that a literal interpretation of the words "planning application" as defined in the Act amount to an absurdity or failure to reflect the plain intention of the legislature.

23. Even when the Applicant realised he had missed the opportunity to make an objection a further remedy was open to him, namely to lodge an appeal to An Bord Pleanála under s. 37(6) of the Planning and Development Act, 2000. He made such an application but did not make it on either of the grounds set out in s. 37(6)(d)(i) or (ii). This would have afforded him the right to appeal if he could have shown that:

> "(i) the development for which permission granted will differ materiality from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject or,
>
> (ii) at the imposition of such conditions will materially affect the Applicant's enjoyment of the land or reduce the value of his land."

24. It cannot be said therefore that the legislation as it exists would totally exclude a right of appeal to the Applicant in the circumstances which arise in this case. It seems that the reason why the Applicant was not allowed to appeal to An Bord Pleanála was that his appeal was based on an invalid notice, served by him.

25. In conclusion I hold that the application of the 13th May, 2005, reference 05/495 was the first and only "*planning application*" within the meaning of the Act and that accordingly the site notice on a white background was in compliance with Article 19(1)(e) of the regulations and accordingly I refuse the relief sought.