Neutral Citation [2013] IEHC 234

THE HIGH COURT

[2012 No. 48JR]

BETWEEN/

NOEL CUNNINGHAM

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SLIGO COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 15th May, 2013

1. It is, perhaps, one of the curiosities of our legal system that the scope of exemption for agricultural purposes contained in s. 4(1)(a) of the Planning and Development Act 2000 ("the 2000 Act") has heretofore remained stubbornly unexplored. Given the huge importance of agriculture to our economy and way of life, why this should be so remains surprising. The proper scope of that exemption and that of a parallel exemption contained in Article 6 of the Planning and Development Regulations (S.I. No. 600 of 2001) ("the 2001 Regulations) is, however, centrally relevant to the issues presented by this application for judicial review.

2. The proceedings themselves arise in rather prosaic circumstances. The applicant, Mr. Cunningham, is a farmer who resides at Ballisodare, Co. Sligo and his holding consists of about 24 acres. It is not in dispute but that his lands and farm buildings are used for agricultural purposes. The present dispute, however, centres on whether the erection of a tractor shed constitutes exempted development. The shed in question is scarcely a thing of beauty and I am sure that even Mr. Cunningham would probably be the first to acknowledge that it will not win any architectural awards. The shed consists of a roof which has been erected over two supporting steel shipping containers at either side, along with a concrete block wall which encloses the eastern end. There is then an opening which faces west which allows for the storage of a tractor. The containers are of the kind which are routinely used by international hauliers. The entire structure comes to about 120sq. metres.

3. The structure is approximately 7 metres from a post and wire fence marking the southern boundary of the site. This fence is itself about three metres or so from the edge of the N59, a national secondary road running between Sligo and Galway which passes the site. Access to the site is via two public gates set back from the public road. The sightlines are restricted from 3m. back at the roadside edge by reason of hedgerows and trees.

4. The present case may be said to start with a decision of Sligo County Council on 24th January 2008 to refuse to grant planning permission to Mr. Cunningham for the retention and completion of an upgraded entrance to his farm lands. In refusing permission, the Council noted that the additional traffic generated would interfere with the safety and free flow of traffic on the N59 and would accordingly endanger public safety by being a traffic hazard. There are no sightlines of any significance on the road, yet the standard 100km per hour speed limit applies.

5. Following an unsuccessful enforcement prosecution in the District Court which had been taken by the Council, the question of whether the shed constituted exempted development was ultimately referred by the Council to the Board on 21 July 2011 under s. 5 of the 2000 Act. The Board ruled that it was not so exempt by a decision dated 23rd November 2011 and it is this decision which is the subject of challenge in the present judicial review proceedings.

6. Before examining this decision and the reasons given for it, it is, however, first necessary to examine the preliminary claim made by the applicant, namely, that the erection of the shed is exempt by reason of the general agricultural exemption contained in s. 4(1)(a) of the 2000 Act. This was not an argument which was directly addressed by the Board in its decision, although it did state in its decision that it had regard to this sub-section. Counsel for the Board, Mr. Connolly S.C., maintained that this sub-section has no real application at all to the present case.

The scope of the planning exemption

7. Section 4(1)(a) of the 2000 Act provides:

> "The following shall be exempted development for the purposes of this Act:-
>
> (a) development consisting of the use of any land for the purposes of agriculture and development consisting of the use for that purpose of any building occupied together with land so used."

8. The word "development" is given a specially extended meaning by s. 3(1) of the 2000 Act:

> " In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

9. There can be no doubt but that the erection of the shed would constitute "development" in this sense. It was, at the least, the "carrying out of works" over land. Next, taken literally, it could be said that such development consisted of a use of that building for agricultural purposes, thus attracting – on this argument - the exemption contained in s. 4(1)(a). Yet it can scarcely be denied that such a conclusion would be wholly absurd and would completely undermine the whole system of planning control in respect of the farming sector.

10. If this were correct, it would mean that a farmer would be free to construct any building for agricultural purposes, irrespective of whether, for example, it posed a fire hazard or constituted a danger to road users or threatened water contamination through the anticipated discharge of effluents or any other number of considerations pertaining to proper planning and development. Here it may be recalled that the special and extended definition of "development" contained in s. 3 of the 2000 Act applies only so far "as the context otherwise requires." In *BUPA Ireland Ltd. v. Health Insurance Authority* [2008] IESC 42, [2009] 1 I.L.R.M. 81 Murray C.J. gave guidance on the circumstances in which the court is entitled to depart from the statutorily ascribed meaning of a particular word by reason of the presence of a special context elsewhere in the Act:

> "The only scope for construing community rating in s. 12 in a manner different from that required by s. 2 is on the basis of the general proviso contained in s. 2 in respect of all the definitions in it, namely, that a different meaning may only be given to the terms defined if the "context otherwise requires" (emphasis added). This is reflected in the provision of s. 20(1) of the Interpretation Act 2005 which provides that "Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except insofar as a contrary intention appears in" the enactment itself. Having adopted a permissive approach unrestrained by s. 2, the learned trial judge at no stage concluded that s. 12 *required* another meaning in that sense."

11. Unlike the situation which obtained in *BUPA* – where the Supreme Court refused to hold that a departure from the statutory definition of the term "community rating" was *required* simply to sustain the *vires* of a radical scheme reflecting a policy choice contained in a statutory instrument but not otherwise set out in the parent Act – I consider that there are by contrast two basic reasons why the present case should be regarded as one where the special context of the s. 4 exemption imperatively requires that a different interpretation of the word "development" should be given to that which appears in the statutory definition.

12. First, this departure from the statutory definition is signalled by the relevant words of s. 4(1)(a) itself ("...development consisting of the use…"). If, accordingly, one looked at s. 4(1)(a) *in isolation* it might be said that the exemption referred to a form of development which exempted the mere *use* of farm buildings for agricultural purposes. On that basis, therefore, the farmer who commences using a barn for storing hay does not require planning permission for this purpose, even if also this amounted to a "development."

13. Of course, one cannot normally look at s. 4(1)(a) in isolation and the employment of the term "development" in that subsection brings with it the extended statutory definition contained in s. 3, save in the most exceptional of circumstances. But the circumstances presented by this statutory example are, in truth, exceptional because if the definitional meaning in s. 3 were to be employed without qualification, it would expand the definition of "development" to include the carrying out of works, as well as in respect of development which consisted of the *use* of lands and structures. This would radically distort the exemption contained in s. 4(1)(a) where the Oireachtas plainly intended that the development in question must consist of only the *use* of the land and buildings for agricultural purposes. Taken literally, it would lead to the ultimately absurd conclusion that the carrying out of works on any building for agricultural purposes was exempt from planning control.

14. This brings us directly to the second reason why the statutory definition of "development" cannot be accepted in this context, precisely because it would lead to absurd consequences. If this wider definition were to be accepted, it would mean, for example, that a farmer who constructed a piggery enjoyed a full exemption from the planning process, since this would constitute "works on, in and over lands" for agricultural purposes and the development – on this argument – consisted of the use of the lands for agricultural purposes.

15. In these circumstances, one can fairly conclude that this is a case where, by reference to s. 3 of the 2000 Act itself, this is an instance of where the context does require that a more limited meaning should be ascribed to the meaning of the word "development" than would otherwise normally obtain. The invocation of the principle of interpretation enunciated by the Supreme Court in *Nestor v. Murphy* [1979] I.R. 326 and the similar principle contained s. 5(1) of the Interpretation Act 2005 ("the 2005 Act") provide further support for this conclusion. In *Nestor* Henchy J. rejected an interpretation of s. 3(1) of the Family Home Protection Act 1976 which would have required a spouse's consent to the sale of a family home when both were parties to the conveyance. While this might have been suggested by the literal language of the Act, such a conclusion would lead to a "pointless absurdity". Section 5(1) of the 2005 Act also permits the courts to depart from the literal interpretation if this would lead to an absurdity or where this "would fail to reflect the plain intention" of the section in question.

Conclusions on the scope of the exemption contained in s. 4(1)(a) of the 2000 Act

16. Whichever approach is adopted, it can be said that endorsing the wider interpretation of "development" contained in the definition in s. 3 of the 2000 Act in the particular context of the s. 4(1)(a) exemption would lead to an absurdity. One may also say that it would not reflect the plain intention of the Oireachtas, since by acknowledging in s. 3 that there might be circumstances where the context would otherwise so require, the Oireachtas envisaged that there might be circumstances where a narrower meaning must be ascribed to the word "development" in particular types of cases. The meaning to be given to the term "development" in the context of the agricultural exemption provisions of s. 4(1)(a) of the 2000 Act is one such case.

17. It follows, therefore, for these reasons that the general exemption for agricultural purposes contained in s. 4(1)(a) of the 2000 Act does not apply, because that exemption only applies in the case of development (in the more limited sense of that term) which consisted of the use of a structure for agricultural purposes. It does not apply in the case of the *construction* of such a structure.

The scope of the Article 9(1)(a) exemption contained in the 2001 Regulations

18. We may next consider the scope of the exemption provided by the 2001 Regulations since this, after all, constitutes the precise ground on which the Board arrived at its decision that the structure in question was not so exempt. Article 6(1) of the 2001 Regulations provides:-

> "Subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule II shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1."

19. Class 9 of Part 3 of the Second Schedule to the 2001 Regulations provide:-

> "Works consisting of the provision of any store, barn, shed, glass-house or other structure, not being of a type specified in Class 6, 7 or 8 of this Part of this Schedule, and having a gross floor space not exceeding 300 sq.m."

Among the conditions specified in the adjoining column of the Regulations for the full application of this particular exemption are that the structure cannot be used for the purposes other than agriculture or forestry, "but excluding the housing of animals or the storing

of effluent". The structure cannot, moreover, be situate within 10m of any public road and any structure within 100m of any public road may not exceed 8m in height. As we have seen, the Board concluded that these conditions were generally satisfied in the present case.

20. Yet the reason why the Board concluded that the development was not exempt was by reason of Article 9(1)(a)(iii) of the 2001 Regulations which provides:-

> "Development to which Article 6 relates shall not be exempted development for the purpose of the Act –
>
> (a) if the carrying out of such development would - ….
> (iii) endanger public safety by reason of traffic hazard or obstruction of road users…"

With a view to understanding the rationale ultimately adopted by the Board, it is necessary first to examine the views first put forward by the Board's Inspector.

The report of the Board's Inspector
21. In her report for the Board dated 18th October, 2011, the Inspector appointed by the Board, Ms. Deirdre MacGabhann, observed that:-

> "Due to the extent of the block wing walls, and to a lesser extent, roadside vegetation, sightlines at the access to referred structure are severely restricted at 3m back from the road edge, in both directions. At 1m back from the edge of the road, improved sightlines available, *i.e.*, to the bend in the N59 to east for circa 150m to the west. However, for most vehicles, this would only be achieved with the front of the vehicle protruding into the road carriageway. Further, given the high speeds which vehicles travel on this stretch of the road, it would hazardous to be waiting on the carriageway to turn into the site, when travelling from the east, with vehicles approaching at speed from the east around the bend of the bend. (this stretch of the N59 has no road margins). Similarly a slow moving vehicle exiting the site and turning west could pose a danger to vehicles travelling at speed from the east.
>
> While I accept that the landowner did not intend to increase stocking rates on his land, over and above rates used to date, I am concerned that the substantial increase in the size of the structure on the site formed by the roof structure over the existing containers, will increase the capacity of the structure for storage and hence lead to a direct intensification of the use of the access to the site. Further, to do so would increase the risk of a road traffic accident due to the seriously sub-standard access to the site upon which the development is located."

22. Ms. MacGabhann then concluded that the while development in question constituted development within the meaning of the 2000 Act, it was nonetheless not exempt "having regard in particular to Article 9(1)(iii) of the Planning and Development Regulations 2001".

23. Ms. MacGabhann then prepared a draft order in respect of the s. 5 reference for the consideration of the Board which was exhibited in an affidavit prepared on its behalf. That draft order had stated:

> "The proposed works will substantially increase the size of the storage area on site and are likely to intensify the use of the sub-standard access to the site [and] the carrying out of the proposed works would, therefore, endanger public safety by reason of traffic hazard or obstruction of road users."

24. What is of interest is that these words were expressly deleted by an authorised Board representative from the proposed draft order and the order actually adopted does not contain these words. In effect, therefore, the Board favoured a conclusion which justified the disapplication of the Article 6 exemption solely by reference to the presence of an existing traffic hazard at the access point.

The Board's decision
25. In the Board's order of 23rd November, 2011, the Board stated that it had regard to s. 4 of the Planning and Development Act 2000, Articles 6 and 9 of the Planning and Development Regulations 2001 – 2011, and Class 9 of Part 3 of Schedule II of the Planning and Development Regulations. It then went on to say:-

> "AND WHEREAS An Bord Pleanála have concluded that:
>
> (a) while the development would generally come within the scope of Class 9 of Part 3 of Schedule II of the Regulations,
>
> (b) access to the development is via a gateway onto the N59, a national secondary road, in a location where the 100km/h speed limit applies. Sightlines at the junction of the access and public road was severely restricted in both directions,
>
> (c) accordingly, the restriction on exempted works under Article 9(1)(iii) of the Planning and Development Regulations 2001 applies;
>
> NOW THEREFORE An Bord Pleanála in the exercise of the powers conferred on it by s. 5(4) of the 2000 Act hereby decides that the erection of a roof over two containers to form a shed at Lugawarry, Ballisodare, Co. Sligo is not an exempted development."

26. Here it is important to stress that the Board's decision was simply based on its conclusion that the access point to the development lies on a national secondary road and that this currently presented a traffic hazard due to the fact that the road has a 100km/hour speed limit, with restricted sight lines due to foliage and vegetation. Judging by the terms of the Inspector's report, the Board had abundant evidence to support its conclusion regarding the nature of the traffic hazard. This is precisely the type of assessment on planning grounds which lies pre-eminently within the expertise of the Board and in respect of which it is entitled to a high degree of deference: see *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39, 71-72, *per* Finlay C.J.

27. In this respect, therefore, the Board's assessment and conclusions regarding the nature of the traffic hazard presented by the sub-standard nature of the access point cannot be faulted. Yet the actual result arrived at by the Board regarding the disapplication of the exemption does not directly follow in law from this particular premise.

28. The shed itself has been erected to facilitate the storage of Mr. Cunningham's tractor and to shield it from the elements. If, for

example, Mr. Cunningham had elected to leave the tractor out in the open in the precisely the same spot on which the shed now stands, no planning issue would arise, even though the tractor would still (lawfully) be making use of the very same access point which the Board considered to be a traffic hazard. Indeed, his counsel, Mr. Bradley S.C., submitted with some justification that the construction of the shed was more likely to bring about a situation where Mr. Cunningham made less use of the access point to the public road, precisely because the tractor could be stored in the shed. Absent the shed, Mr. Cunningham would probably find that it was necessary to store the tractor elsewhere, thus actually increasing the use by him of the very access point which the Board found to be a hazard.

29. Here it is necessary to stress again that this usage is perfectly lawful, even if the present access point does indeed constitute a traffic hazard. Yet if one poses the central question, namely, what is the actual basis for the Board's decision, the answer must be that it is contained in recital (c) of that decision: "...accordingly, the restriction on exempted works under Article 9(1)(iii) [of the 2001 Regulations] applies".

30. But here lies the conundrum. Article 9(1)(iii) does not permit the disapplication of the exemption *simply* by reference to considerations of road safety in the abstract. Instead, as the language of that provision shows, it is rather the "carrying out" of the development which must pose the threat to public safety by reason of the presence of a traffic hazard or the obstruction of road users.

31. In other words, while the Board (correctly) identified the nature of the traffic hazard (recital (b) of the decision), it did not demonstrate that there was any connection between this finding and the ultimate conclusion (recital (c)) that the exemption was disapplied by Article 9(1)(iii). In the present case, it would accordingly have been necessary for the Board to go further and thereby identify how the carrying out of the development (*i.e.*, in this instance, the construction of the shed) would endanger public safety. It is true that the Inspector had endeavoured to make this connection – by positing a direct connection between the construction of the shed and the future projected vehicular use of the access point to the N59 road - but the nature of the changes made by the Board to the draft order which had been prepared by its Inspector leads ineluctably to the conclusion that this particular reasoning had been disavowed by the Board.

Conclusions on the Article 9(1)(iii) exemption

32. For the reasons stated, the Board's decision really proceeds on the basis that the access point simply presented a traffic hazard. That, however, is in itself insufficient to justify the disapplication of the exemption, since Article 9(1)(iii) requires that not simply the Board identify the presence of a traffic hazard, but rather that "the carrying out of such development would ….endanger public safety by reason of traffic hazard." This latter test represents an altogether different test from that actually posed by the Board.

33. It is clear, therefore, that the Board asked itself the wrong question and applied the wrong test so far as the application of Article 9(1)(iii) is concerned and this fact alone is fatal to the validity of the decision: see, e.g., the comments of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193, 201-202 and those of Keane J. in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218, 229.

34. In these circumstances, the Board's decision cannot therefore stand and must be quashed. I would accordingly propose to remit the matter to the Board pursuant to O. 84, r. 27(4) for further consideration of this question.