

THE HIGH COURT

[2015 No. 695 J.R.]

BETWEEN

MAURICE BROWNE AND EILEEN BROWNE

APPLICANTS

AND

KERRY COUNTY COUNCIL

RESPONDENT

AND

JEROME BROWNE

NOTICE PARTY

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered at Cork Court House on 21st day of March, 2017**Introduction**

1. Effectively, this is an application to determine that there is no point to the continuation of these Judicial Review proceedings given the earlier open concession to set aside the impugned decision of Kerry County Council with the proviso that the decision which is the subject of the application be remitted to Kerry County Council and then particularly given the decision of An Bord Pleanála in May 2016.

Context

2. I mention in order to put this in context, s. 37(1)(b) of the Planning and Development Act 2000, which provides that where an appeal is brought against a decision of a planning authority "*and is not withdrawn*", An Bord Pleanála shall determine the application as if it had been made to An Bord Pleanála in the first instance.

Chronology

3. The following is a short chronology which may be gleaned from the affidavits and exhibits:-

15.07.2105 His Honour Judge Tom O'Donnell in Kerry Circuit Court upheld the applicants' complaints pursuant to an application under s. 160 of the Planning and Development Act 2000, that the notice party (brother of the first named applicant) had breached a planning permission granted on 12th February, 2013, to demolish agricultural buildings, erect a new slatted unit, move a shed among other works. The Circuit Court Judge joined Kerry County Council to the proceedings due to its failure to take enforcement proceedings.

02.10.2015 The notice party applied for retention permission and forwarded a report dated 11th September, 2015, from a farm development service company ("*the September 2015 report*") to Kerry County Council.

26.11.2015 Kerry County Council decided to grant the retention planning permission ("*the November 2015 decision*").

4. On Monday, 21st December, 2015, two events occurred:-

(i) Humphreys J. on the *ex parte* application of counsel for the applicants granted leave on foot of the first named applicant's affidavit sworn on 10th December, 2015, (which ran to 115 paragraphs over sixteen pages), to seek an order of *certiorari* of the November 2015 decision along with a number of declarations including a declaration that Kerry County Council is not entitled to grant an application for retention where it has not complied with its statutory obligations; and

(ii) engineers for the applicants sent a cover letter with a report and the prescribed fee of €220 to An Bord Pleanála appealing the November 2015 decision.

5. On 6th January, 2016, the applicants issued a Notice of Motion with a return date of 9th February, 2016, which motion has been adjourned from time to time.

6. On 31st March, 2016, the solicitors to Kerry County Council wrote to the applicants' solicitors proposing to quash the November 2015 decision and remitting the matter back to Kerry County Council along with an offer to pay the applicants' costs.

7. The detailed correspondence which followed is testament to the ingenuity, tenacity and perhaps obduracy of the parties or their legal advisers whose expansive use of words in correspondence and affidavits is quite remarkable. By letter of 20th April, 2016, the applicants' solicitors openly agreed to:-

(a) an order of *certiorari* of November 2015 decision;

(b) a declaration that Kerry County Council has not complied with its statutory duties according to para. C (i) of the statement required to ground the application for Judicial Review; and

(c) costs.

8. The applicants' solicitors submitted in that letter that the remittal of the retention application to Kerry County Council would defeat the applicants' entitlement to correct Kerry County Council in the way it carries out its function.

9. Kerry County Council had made it clear that the error of not placing the September 2015 report and a letter from a Mr. O'Keeffe dated 2nd November, 2015, on the public file was its error and not that of the notice party. In those circumstances, Kerry County Council suggested that the notice party should not be visited with the Council's errors while Kerry County Council assured the

applicants' solicitors by letter of 20th April, 2015, that an official of Kerry County Council, without previous involvement with the application, would be engaged to process the application thenceforth.

10. By reply dated 29th April, 2016, the applicants' solicitors vehemently opposed the remittal suggestion alleging that it would be "*unjust and would give the appearance of objective unfairness*".

11. Then, on or just after 4th May, 2016, something like a week within the period allowed, according to An Bord Pleanála's policy to determine appeals, the applicants were informed of An Bord Pleanála's decision to grant retention permission with conditions and reasons including a reference to the Kerry County Council Development Plan 2015.

The Application

12. In view of this decision of 4th May, 2016, and given the failure to agree the terms of a proposed order in these proceedings as sought to be negotiated in the lengthy correspondence summarised earlier, Kerry County Council issued a Notice of Motion on 3rd June, 2016, seeking directions in relation to the future conduct of these proceedings, particularly in view of s. 37(1)(b) of the Planning and Development Act 2000, recited at the beginning of this judgment.

13. In brief, the question facing this Court is whether the applicants can now ever in these proceedings successfully seek the plethora of declarations which they originally sought. It is a given that Kerry County Council's application for directions to ending these proceedings should be taken by this Court as if the applicants can establish the facts as asserted in the most favourable way to their claim.

14. Ms. Murphy, counsel for the applicants, emphasised that the merits of the substantive claims should not be adjudicated upon at this stage. She also submitted in reply to my question about the failure to seek a Judicial Review of An Bord Pleanála's decision that the applicants' lawyers could be accused of "*costs gathering*" if a separate application had been made and pursued when, in fact, such an application was really before the Court by the request to join An Bord Pleanála to these proceedings. Furthermore, it was argued that the applicants, unlike Kerry County Council, knowing of An Bord Pleanála's appeal, could not apply to stay the determination of that appeal because s. 50(4) of the Planning and Development Act 2000 (as inserted by the Planning and Development (Strategic Infrastructure) Act 2006) confined such a right to the regulatory authority. Lastly, there was some reliance placed on s. 129(b) of the Planning and Development Act 2000, which precludes any elaboration of submissions following the lodgement of an appeal to An Bord Pleanála.

15. These submissions tend to allow confusion to reign. Without taking away from the ingenious arguments of Ms. Murphy, I find that matters need not be as complicated as the applicants may desire to betray. It is quite clear to the Court that the applicants but particularly their advisers were and remain familiar with the intricacies of planning law. There is no getting away from the fact that once An Bord Pleanála made a decision upon the appeal of the November 2015 decision, that that was the operative decision and as Binchy J. said in *Callaghan v. An Bord Pleanála & Ors* [2016] IEHC 488 at para. 25:-

"the decision of the planning authority would no longer be of any relevance, and consequently nor would the judicial review of that decision."

16. If the applicants wanted, they could have applied for a stay of some sort on a determination by An Bord Pleanála prior to 4th May, 2015. I am not for one minute suggesting that they would have succeeded or that it would have availed them. Clarke J. at para. 14 of *Harding v. Cork County Council* [2008] 4 I.R. 318 at 325, quite aptly in this regard mentioned:-

"As pointed out by Kelly J., if an order is not made which would have the effect of staying the progress of the planning appeal then the applicant's proceedings will become moot. At this stage it is equally clear that the appeal, which the applicant wishes to bring, would be moot if the second respondent was to determine the planning appeal prior to the result of the Supreme Court judicial review appeal. If anything, this side of the scales is even weightier in favour of a stay, having regard to the fact that I have now certified that the point of law which will arise for consideration in the appeal to the Supreme Court is a point of law of exceptional public importance and that it is in the public interest that it may be determined. To render such an appeal moot is a step which should not be taken lightly."

17. Despite my repeated question about the reason for not seeking a review of An Bord Pleanála's decision, other than by way of the "*backdoor*" mechanism as characterised by Mr. Keaney, counsel for Kerry County Council in these proceedings, I was met with an answer of a potential suggestion of "*costs gathering*". I believe that this is a rather shallow excuse for failing to comply with the very strict requirements which apply to the review of An Bord Pleanála's decisions as is well known to practitioners familiar with the planning regulatory framework.

18. Nothing which has been submitted has persuaded me that the applicants are entitled to ignore the cumulative and mandatory test to be met for an extension of the strict time limits under s. 50(6) of the Planning and Development Act 2000 (as amended).

19. Giving all the bounces of the ball which I could give to the applicants, there are no circumstances disclosed which justify me in ignoring the regime which pertains to seeking leave to review An Bord Pleanála's decisions by now seeking to join An Bord Pleanála as an additional named respondent. For the sake of clarity, I am not deciding that the applicants cannot apply for an extension of time but I am not, in this application to bring these proceedings to an end, allowing the applicants to join An Bord Pleanála in order to keep these proceedings alive.

20. I should now deal with one further submission made on behalf of the applicants and that relied upon the penultimate paragraph of Denham J.'s judgment in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 at 218. In that case, it was made clear that an applicant was entitled to a primary decision in accordance with fair procedures and an appeal from that decision "*a fair appeal does not cure an unfair hearing*", is the oft quoted sentence. In the case of the applicants before this Court now, it was open to them to take the offer of an order of *certiorari* with a remittal back which would have allowed them to withdraw the appeal to An Bord Pleanála. The applicants decided not to avail of this route because according to their solicitor's statement, it would be "*objectively unfair*". Despite Ms. Murphy's efforts, I fail to understand the alleged objective unfairness given the panoply of redress procedures available which are clearly known to the applicants or at least their legal advisers.

21. I clarify also that I agree with the submission that there is no longer an issue which this Court needs to address about the November 2015 decision. No exceptional circumstances in respect of a matter of exceptional public importance or in the interest of the proper administration of justice requires this Court to determine the grounds for setting aside the November 2015 decision. I repeat that Kerry County Council will be open to challenge if it fails to comply with its duties and the requirements to process any application whether for retention or otherwise in the future.

22. I take support for my decision that the determination of these proceedings with or without further protraction in complication by joining An Bord Pleanála will merely be effected in a sort of vacuum – there is no “*live controversy*” using the words of Ryan P. in *Copymore Limited v. Commission of Public Works* [2015] IECA 119. Kerry County Council is obliged to comply with the law and it is open to the applicants to narrow the focus of any future challenge to whatever they perceive is an error on the part of Kerry County Council in determining any application including a retention application.

23. The reliance by counsel for the applicants on *Abenglen Properties Limited v. Dublin Corporation* [1984] 1 I.R. 318 and the “*line of authority*” since then does not stand up to scrutiny when one considers the import and meaning of s. 37(1)(b) of the Planning and Development Act 2000. The applicants availed of their right to appeal to An Bord Pleanála and to seek an order of *certiorari* of the November 2015 decision. Nothing wrong with that – there came a time for them to choose to accept the annulment of the November 2015 decision and withdraw the An Bord Pleanála appeal – they insisted through their lawyers on a right to have declarations made by this Court when this Court should take it that Kerry County Council will act lawfully. The plaintiffs are effectively asking for an advisory judgment in declarations when it has been long established that the courts will only do so in exceptional circumstances.

24. The Court having regard to its own resources and the potential benefit of allowing these proceedings to continue purely for some form of anticipatory declarations has an inherent jurisdiction to consider the mootness and futility arguments. Without seeking to repeat myself, I do not see any material benefit for the applicants in continuing these proceedings against Kerry County Council for all of the reasons outlined.

25. I will hear the parties about whether it is now necessary or relevant to make an order setting aside the 2015 decision by consent and such other order as to costs up to a date in May 2016 being the date of the notification of An Bord Pleanála’s decision and for the period thereafter it as the parties may agree or seek. Therefore, I will allow counsel to mention these proceedings before me next week in order to fix a date on which further submissions can be heard if necessary.