Neutral Citation [2016] IEHC 448

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 170 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

IRISH SKYDIVING CLUB LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KILKENNY COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

SKYDIVE IRELAND LIMITED

SECOND NAMED NOTICE PARTY

AND

CONOR FOLEY/KILKENNY AIRFIELD CONCERN GROUP

THIRD NAMED NOTICE PARTY

AND

MARY CASS

FOURTH NAMED NOTICE PARTY

AND

RICHARD CASS

FIFTH NAMED NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 29th day of July, 2016.

1. This is my judgment in the trial of a modular issue in this judicial review, whether the applicant is out of time to review a decision of An Bord Pleanála by reason of s. 50 of the Planning and Development Act, 2000, as amended, ("the Act").

2. The applicant seeks judicial review of the decision of An Bord Pleanála made on a referral by Kilkenny County Council under s. 5 of the Act by which the Board determined that the use by the applicant of Kilkenny Airfield for sponsored parachute jumping was a development and not an exempted development. The applicant is a limited liability company and carries out the activities of sports parachuting from the aerodrome and is a registered aerodrome license holder for that purpose.

3. The decision of the Board was made on 14th January, 2015. Leave was given by Eager J. on 27th March, 2015 to seek an order of *certiorari* by way of an application for judicial review quashing the decision, and for various reliefs *inter alia* on the grounds that despite the fact that the applicant is the approved operator and holder of the license, and that it is involved in carrying out the activities in respect of which the referral was made, it was not a notice party to the referral. Relief is also sought on the grounds that the Board had disregarded the recommendations of its inspector.

4. The respondent argues by way of preliminary objection that the applicant is out of time and following submissions made to me on the first day of the hearing, I determined that the matter would proceed by way of modular hearing and that I would first determine the procedural time question. This decision was made following an application for an adjournment by Eoin Nevin, a director of the applicant company, who sought to represent the company and after I had refused to permit him leave to do so. In those circumstances the matter was adjourned for a short a period to enable the applicant to obtain legal representation which it duly did, and having regard to the fact that the solicitor who came on record for the applicant had less than 48 hours to prepare his submissions, I considered that justice would be done to all parties were I to confine my deliberations to the question of time only.

5. My decision to try the modular issue was also made in the context of the position of the notice parties, Mary Cass and Richard Cass, who said that their enjoyment of their home and lands adjacent to the aerodrome was severely impacted by the ongoing parachuting and flight activity from the aerodrome, and that they were strongly opposed to the matter adjourning.

6. Section 50 of the Act, as substituted by s. 12 of the Act of 2002, provides the time limits for the bringing of a judicial review of any decision of An Bord Pleanála. It is not doubted that the decision of the Bord under s. 5 is governed by this provision. The section provides an eight week period beginning on the date on which the notice of the decision was first sent or published.

7. Section 50 (6) provides as follows:

> "(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2) (a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.

8. Time may be extended by the court subject to the requirements set out in section 50 (8):

> "(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

9. Section 50(8) (a) is a reflection of the inherent jurisdiction of the court to extend time when it considers that good and sufficient reason exists to so do, but sub paragraph (b) of the subsection contains a restriction on the power such that in addition to being satisfied that good and sufficient reasons exists, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant.

10. Thus, while the court has a discretion it is required by the cumulative provisions of subs. 8 to consider not merely the interests of justice, or the interests of all of the parties, but whether the applicant for the extension can show on the facts that the delay and the reason why he or she is out of time arose from matters outside his or her control. When a delay arises from circumstances which were within the control of the applicant, the court may not extend.

11. The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed. That this is justifiably so has been considered in a number of cases. In *Noonan Services Limited & Ors v. the Labour Court* (Unreported, High Court, 25th February, 2004) Kearns J. explained the policy for a strict approach:

> *"This approach does no more than reflect a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions and orders which have significant consequences for the public, or significant sections thereof."*

12. After listing a number of pieces of modern legislation which provide strict cut-off periods he explained that those provisions reflect the desire that legislation would function effectively, and in many cases comply with Ireland's obligations as a Member State of the EU.

13. In *Kelly v. Leitrim County Council & Anor*. [2005] 2 I.R. 404 Clarke J. also concluded that provisions broadly similar to s. 50 had been introduced in other areas of the review of administrative or quasi-judicial decision-making in recent time, and quoted with approval the decision of Finlay C.J. in *K.S.K. Enterprises Limited v. An Bord Pleanála & Anor.* [1994] 2 I.R. 128 where at p. 135 he said:

> *"it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."*

That decision of Finlay C.J. was given before the amendment to s. 50 gave the court the power to extend time, but the principles therein explained remain valid.

14. The strictness of the time limit has being noted in a number of cases, and by way of example, Charleton J. in *MacMahon v. An Bord Pleanála & Anor.* [2010] IEHC 431 noted that the *"the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process".*

15. Finlay Geoghegan J. in *Linehan & Ors.v. Cork County Council & Anor.* [2008] IEHC 76 noted that the time limits were "*strict and short time limits*", and more recently Costello J. in *South-West Regional Shopping Centre Promotion Association Limited & Anor. v. An Bord Pleanála & Ors.* [2016] IEHC 84 also noted the "*strict limitation period of eight weeks*".

16. All of these judgments noted the public policy considerations reflected in the imposition of strict and short time limits.

17. Before I consider whether to extend time, I set out the relevant dates.

Chronology

18. 14th January, 2015, the Board decision was made.

19. 29th January, 2015, Mr. Eoin Nevin became aware through happenstance that a decision had been made that affected skydiving at the airfield. He confirmed that when he checked, the decision and the report of the inspector were available on the website of An Bord Pleanála. He made contact with the airport owner Mr. Byrnes, who was a notice party to the s. 5 referral, and he confirmed that he had been notified of the decision of An Bord Pleanála. The company held an extraordinary general meeting that evening to discuss the decision.

20. The company contacted the Board directly by email on that day, albeit the email was sent after close of business, and asserted that the Board had breached the rights of the company in not putting it put on notice of the s. 5 referral.

21. The Board replied to the email on 5th February, 2015 and said that its jurisdiction was "spent", and it has no power to review or alter its decision, and declined to comment further concerning the referral. On the same day the company wrote back to the Board with reference to s. 131 of the Act, and submitted that the decision was flawed having regard to the fact that an opportunity had not been afforded to the club to make a submission or observation on the referral. The Board was expressly advised in that email that

the company would seek relief from the court to "uphold its rights" and it would seek costs and damages in those proceedings.

22. The Board replied two weeks later on 19th February, 2015, where again it said its jurisdiction was "spent".

23. On 20th February, 2015 the company replied to the Board restating its concerns, and asserted that its "natural rights were seriously prejudiced" and that injunctive or other relief would be sought unless a "satisfactory response/proposal" was received from the Board within ten days. At that stage the applicant had 18 days within which to bring proceedings seeking judicial review of the decision.

24. Time expired on 10th March, 2015, and on that day, the company held a second extraordinary general meeting. Mr. Nevin in his affidavit says that at that meeting "it was agreed to obtain legal advice regarding a judicial review", but I regard it as important that the minutes of the meeting exhibited in his affidavit show that a decision was made by the board of the company at that stage to "instruct our solicitors to judicially review decision of Board", and not merely to take legal advice. Seven factors, some of them couched in terms resonant of the court's jurisprudence in judicial review, were set out in the minutes as the basis on which those instructions were to be given to the solicitors.

25. On 11th March, 2015 another email was sent by the company to the Board notifying it that the company had instructed its legal advisors to initiate proceedings for judicial review.

26. On 24th March, 2015 the Board replied that it had nothing further to add to the correspondence.

27. Leave was granted on 27th March, 2015.

28. Between 29th January, 2015 and 16th March, 2015 correspondence was had between the company and Kilkenny County Council in broadly similar terms to that engaged in with the Board.

29. These proceedings were instituted 17 days outside the prescribed period, albeit this calculation takes the relevant date as being the date of the application for leave, and not the date some days later on which the motion was served. The jurisprudence of the courts would suggest that the relevant date is the date the of service of the notice of motion, but counsel for the Board accepts that in ease of the applicant the argument may be considered on the basis that the applicant was 17 days outside the prescribed period, and not longer.

The arguments

30. The applicant makes an application for an extension of the period within which to bring an application for judicial review in reliance on the powers of the court contained in s. 50(8) of the Act.

31. The applicant argues that it was a party particularly and specially affected by the decision but that the "time available to put its material basis for these proceedings together was too limited for the statutory period to suffice". It says it was not until 5th February, 2015 that it received confirmation as to the "nature" of the decision, and only on 19th February, 2015 did it receive "a detailed explanation". It is argued that the delay of the respondent in replying to its correspondence expeditiously was contrived to ensure that the applicant would miss the deadline set by section 50(6). He says the Board gave its "final word" on the matter after the deadline had expired.

32. In those circumstances it is argued that the delay was necessitated entirely by reason of having to do detailed preparatory work to establish the case, and to take advice with regard to the substantive findings and whether there were grounds of challenge.

33. The applicant contends that time began to run at the earliest on 5th February, 2015, the day the Board replied to the first email from the company and said that "its jurisdiction in the matter is spent". The respondent says that from that date the applicants had 33 days to commence an application for judicial review, although the applicant says that the correct number of days is 34.

34. The respondent argues that time began to run when the decision of the Board was made on 14th January, 2015 and therefore the 8-week time limit expired on 10th March, 2015. The applicant contends that the correct date is either 29th January, 2015 which was the date when Mr. Nevin first heard of the decision, or the later date of 5th February, 2015, the date of the first letter from the Board to the company in which it said that its jurisdiction in the matter was spent.

35. The applicant argues that the Court should adopt an approach to the running of time by reference to "a date of knowledge" type test, and that such may be required to achieve justice in an individual case. The respondent argues that the time limit is clearly by statute made referable to the date of the decision under s. 50(6).

36. The Board also makes the point that a "date of knowledge" test is one that has been rejected in other areas of the law and the Supreme Court in particular in *Hegarty v. O'Loughran* [1991] I.R. 148 refused to consider that a test of "discoverability" was implicit in the Statute of Limitations Act, 1957. The legislature did indeed legislate in respect of certain classes of claims in the Statute of Limitations (Amendment) Act, 1991 and provided a "discoverability" test for the running of time for the class of action to which it applied.

37. There is no ambiguity in the simple terms of the legislation which would permit me to interpret it as suggesting that time began to run when an aggrieved or potentially aggrieved party came to know of the decision. Time is stated to run from the date the decision is made.

38. The particular facts show that the company did know of the making of the decision before the time limit expired. It is clear from the affidavit of Eoin Nevin, and in particular from the minutes of the meeting held at 5.30pm on the day of the chance encounter on 29th January, 2015 that the company became aware on that date that a decision had been made, adverse to the parachuting activity conducted by the company at the airstrip. The company was aware also of the date the decision was made as this is clearly set out in the minutes of the meeting. There is no doubt on my reading of the minutes, that the company was surprised that the Board had reached this decision, and Mr. Nevin's evidence that the company was not put on notice of the s. 5 reference by Kilkenny County Council is not disputed. It seems that Kilkenny County Council by a letter of 6th May, 2014 had confirmed that planning enforcement would not issue in regard to the company's use of the airfield. It is also clear that An Bord Pleanála knew that the company held a licence for use of the club. At its height, the minutes suggest that the company was, on 29th January, 2015, not quite clear "what this decision means for the club", and the company determined to write to the planning authority and to An Bord Pleanála and address the fact that it had not been given any chance to make submissions, and that as a consequence its rights had been breached.

39. Thus it seems to me unequivocal that the company knew on 29th January, 2015 that a decision of the Board had been made which it regarded as having been made in breach of its right to be heard. There is nothing in the minutes or in Mr. Nevin's affidavit that suggests to me that the company believed on 29th January, 2015 that the decision of the Board had crystallised with regard to the company's use of the lands only on the date when the company became aware of the determination. It is clear from the email that the company's complaint related to the approach of the Board which led up to its decision on 14th January, 2015.

40. Further, I consider that the applicant has shown me no basis on which I can come to the conclusion that the Board deliberately delayed its response to correspondence from the applicant in the knowledge that time would run, and that the approach of the Board was contrived in a way to protect its decision from challenge. These assertions are extraordinary and not based on any foundation. No authority has been advanced for the proposition that the Board ought to have identified to the applicant in the course of the correspondence in February, 2015, that the time for seeking judicial review was short and fast approaching its statutory limit. The applicant was under no legal disability. The minutes of its meeting and its correspondence with the Board show it had a degree of legal knowledge and within a few hours of coming to know of the decision, the company was in a position to articulate a complaint regarding the procedures adopted by the Board and that its rights to fair procedure had been infringed by the absence of notice.

41. I reject the argument by counsel that the applicant required to understand fully the substance of the decision before time ran against it. To put it another way, the applicant did not in my view need to engage engineering considerations before making a determination whether to challenge the decision of the Board by judicial review. The challenge now made is pleaded along classic judicial review grounds, namely that fair procedure was not afforded and that the Board wrongly disregarded the view of its inspector. While all of the grounds pleaded are not procedural, the language used by the company itself in its correspondence with the Board, and the disquiet expressed at the meeting held within hours of the decision having come to the attention of the company show an awareness of the pleaded frailty.

42. The applicant essentially asserts the proposition that it was not until it understood the basis of the decision, or had a clear picture of what the decision meant, that it could be required to formulate a response up to and including making a determination to apply for judicial review. That is not the basis on which the Oireachtas has provided for the running of time for judicial review under s.50. Time is linked expressly to the date of the decision.

43. Counsel for the applicant makes the point that had it been on notice of the referral it would have had the period between May and December, 2014 to obtain the necessary professional advice. It is argued in those circumstances that the discretion of the Court under s. 50 (8) must be exercised to take account of the fact that had it been afforded the rights for which it contends, it would have had have had sufficient technical knowledge and expert advice to formulate an approach to the application within the statutory limit.

44. The applicant calls in aid a decision of Hedigan J. in *McCaughey Developments Limited v. Dundalk Town Council* [2011] IEHC 193 in which a developer was informed by a local authority that an erroneous zoning of his land had been corrected, but where the erroneous zoning was retained by vote of the council two months later. The Court considered the relevant date of the decision to be the date when the developer was informed by the applicant of the second vote. Hedigan J. noted that the applicant moved immediately once he became aware of the second decision. I do not consider that the same can be said of the approach of the applicant in the present case, and the delay from 29th January, 2015 to the date nearly two months later is not explained, and the applicant cannot be said to have acted immediately or promptly.

45. The applicant also relies on the decision of McCarthy J. in *Talbotgrange Homes Limited v. Laois County Council & Ors.* [2009] IEHC 535, where he held that as soon as the applicants "*actually became aware of the orders they had no need of additional information to move*".

46. I consider that the judgment in *Talbotgrange Homes Limited v. Laois County Council & Ors* is not of assistance to the applicant, and can be argued against its proposition and as McCarthy J. took the view that the applicant:

> *"Cannot be entitled to rely on its own ignorance of the making of the direction. In addition, when the applicant first became actually aware of the Ministerial direction on the 22nd March, 2007, it was still within time to issue proceedings. Notwithstanding this, it waited until the 1st June, 2007, to do so, a period in excess of two months from the time it first found out about the direction. It claims that it was forced to wait pending the arrival of the information from the Department of the second named respondent. I am unconvinced that it was necessary to wait until the receipt of this information given that the applicant knew that it was not notified or consulted prior to the making of either of the impugned orders, or at least to wait an entire month when so much time had elapsed. …"*

47. Finally, the applicant relies on another judgment of Hedigan J., in *Pearce v. Westmeath County Council* [2012] IEHC 300 where a delay of 8 days outside the 8 week deadline was considered excusable. However, that decision was made on the basis that the High Court accepted that members of the public had been misled into believing that the decision had been made on a different date. The question there, was whether the decision of the County Council was an actionable decision or "merely an internal memo". No evidence is before me in the present case that the applicant was in any way misled as to the making of the decision or its effect.

48. No explanation has been given by Mr. Nevin as to why the company continued to correspond with the Board after it had made it entirely clear as early as 5th February, 2015 that its jurisdiction was spent, and that it could not, and would not, engage any further. It could not have hoped in the light of that very clear statement to have persuaded the Board to reopen the matter. Mr. Nevin does not explain why once it received that letter the company did not take steps immediately to seek legal advice and assistance and to apply for judicial review. It is also clear that the applicant company was aware that an issue had arisen with regard to planning in 2014 and that the owner of the airstrip had attended meetings with Kilkenny County Council. The circumstances do not, in my view, point to the applicant being entirely in the dark as to certain concerns, to use a neutral word, that might have arisen with regard to its use of the lands.

Conclusion

49. The test that an applicant must meet in an application for an extension of the strict time limits under s. 50(6) of the Act is cumulative and mandatory. The Court shall not extend the time unless it is satisfied that both tests are met. The applicant has not persuaded me that the circumstances which resulted in the application for judicial review not being made until 27th March, 2015 were outside the control of the applicant. The applicant had knowledge, which it clearly articulated in correspondence with the respondent, of the matters in respect of which it complains. It had clear knowledge from the email of the Board of 5th February, 2015 that the Board's jurisdiction was spent. The company has not explained in any convincing way why it chose to continue to engage in correspondence with the Board after it received that email. A threat of litigation was made on 5th February, 2015, and no explanation is given as to why, when the company had 34 days left to bring proceedings, it did not then move.

50. The running of time in judicial review is not based on a consideration of when an applicant became aware of the decision sought to be challenged, and in my view the legislation clearly links the running of time to the making of the decision. The company knew from its search on the website of the Board, at some time during the day on 29th January, 2015, that a decision which it regarded as flawed and serious for its ongoing land use had been made, and at that point in time it knew the date of the decision and the basis for it, which were transparent and obvious from the documents on the website.

51. The public policy interest in strict time limits in planning matters would not be furthered were a party who knew that his or her rights had arguably been breached, and who knew of a decision well within time to bring an application for judicial review, could seek to argue that time began to run only when it had formulated a decision to bring the challenge. The formulation of a decision to bring a challenge is in the normal way one that would be made on legal advice, but the date when legal advice is taken, considered, or decided to be adopted, is not and cannot be the date at which time begins to run, and to consider otherwise would be to ignore the very clear language of the subsection which fixes the time limit by reference to the date of the decision, and not either to the date of knowledge or the date when a party impacted by the decision became aware that rights might have been infringed, or the extent to which that person might be successful in bringing a judicial review.

52. What the applicant contends, it seems to me, is for a test which fixes the running of time with not merely the date of knowledge of the making of a decision, but the date at which an applicant, having taken legal advice, comes to a decision to take the risk of commencing the litigation. That assertion has no basis in the authorities.

53. Having regard to the fact that the test is cumulative, and that the applicant has in my view failed to satisfy me that it meets the second part of the test, I do not propose entering into a consideration of whether the applicant meets the first part of the test, whether there is good and sufficient reason for extending the time. However, I do note that the arguments advanced by the applicant with regard to this ground for the extension of time are focused on what is argued to be the frailty in the decision-making process, and not on whether there is good and sufficient reason to extend the time as such, and the applicant has made no argument or advanced no evidence that justifies an extension of time.

54. I consider that the applicant was in possession of all of the relevant facts and information at the latest on 5th February, 2015, or probably earlier on 29th January, 2015. It had control of all of the relevant factors at that stage and had sufficient information and knowledge to instruct solicitors to advise and to act on its behalf. As the Supreme Court said in *S. v. Minister for Justice Equality & Law Reform* [2002] 2 I.R. 163:

> *"Circumstances must exist to excuse such a delay and to enable the matter to be considered further."*

55. No excusing circumstances have been shown and I propose making an order refusing to enlarge the time for the bringing of this application.