Neutral Citation Number [2012] IEHC 196

THE HIGH COURT

2012 No. 71MCA

BETWEEN

CATHERINE BRACKEN, BRIAN BYRNE, CAROLINE BYRNE AND SHELLY RAFFERTY

APPLICANTS

AND

MEATH COUNTY COUNCIL

FIRST RESPONDENT

NAVAN TOWN COUNCIL

SECOND RESPONDENT

AND

JAMES NOEL BURNS, KATHLEEN BURNS AND NUALA BURNS

THIRD RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 27th day of April, 2012

1. Before the Court is an application brought by the respondents seeking to dismiss judicial review proceedings commenced by the applicants on the basis that those proceedings have been brought outside the time provided by s. 50(6) of the Planning and Development Acts, 2000 to 2010 and that there is no basis for an extension of time for the bringing of proceedings pursuant to s. 50(8).

2. To put the application now before the Court in context, it should be explained that judicial review proceedings have been issued by the applicant seeking to challenge a decision of the respondents pursuant to s. 5 of the Planning and Development Act, declaring certain developments to be exempted development. I am referring to the declaration of the respondents without being more specific, though there is some controversy whether the decision was that of Meath County Council or Navan Town Council, the matter is complicated by boundary changes, but the issue is of no particular significance in the context of the present application. The effect of the declaration under challenge was to permit the substitution of two glass windows on a gable end with obscured glass with a single window, also with obscured glass.

3. The statutory provisions in issue would appear to be these. Section 50(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) [questioning the validity of a decision] applies shall be made within the period of eight 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.

Section 50(8)

4. 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 application for leave within the period so provided were outside the control of the applicant for the extension."

5. The chronology of events with which we are concerned is as follows.

> (1) The 20th April 2011- an application for a declaration pursuant to s.5 of the Planning and Development Act 2010 as amended is submitted by the notice parties.
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> (2) The 9th May 2011 - a decision by the respondents in the present proceedings to declare the development exempt.
>
> (3) The 10th May 2011 - details of decision entered upon the planning register.

Having regard to the provisions of s. 50(6) any challenge was required to be brought by the 4th July 2011. No such challenge was brought. That no such challenge was brought is explained by the fact that the applicants for judicial review were completely unaware of the fact that there had been an application for a declaration pursuant to s. 5 or any knowledge of the decision made on it by 4th July, 2011.

6. The next development of some relevance is that on the 8th September 2011, the first named applicant noticed activity at the gable end in the form of the removal of bricks.

7. What was observed happening on the gable end resulted in a letter being sent by the solicitors for the applicants in the judicial review proceedings seeking undertakings and threatening proceedings in default of a satisfactory response. In the absence of any response, on the 24th October 2011, proceedings pursuant to s .160 of the Planning and Development Act were issued by the applicants against the notice parties. These proceedings were made returnable on 29th November 2011, before the Circuit Court.

8. There was a very significant development on 17th November 2011, in that on that day the solicitor for the notice parties informed his opposite number, the solicitor for the applicants that as. 5 declaration had been sought and obtained and that the notice party would be relying on it. This was confirmed by fax.

9. On the same day the applicant's solicitor went to the planning section of Meath County Council and confirmed that the position was indeed as he had been told.

10. At that stage the applicants were already out of time by some four months and would require an extension of time if judicial review proceedings were to be launched successfully. One might have thought that proceedings would have been launched immediately and that there would have been an application to extend time. That did not happen. Instead, it seems a decision was taken to defer action until a replying affidavit from the notice parties became available in the Circuit Court proceedings. That happened on the 19th January 2012. The procedure followed thereafter was slightly unusual in that the applicants issued a Motion on Notice dated 28th February 2012, made returnable for the 26th March 2012. However on the 12th March 2012, the matter was brought before Ryan J. on a *ex-parte* basis, who directed that the application should proceed on notice.

11. The respondents and moving party point to the period of time that has been permitted to elapse and says that in these circumstances there is no good or sufficient reason for extending time and that it cannot be said that the circumstances that resulted in the failure to make an application were outside the control of the applicant's for judicial review. It is said this is clearly so if one has regard to the time that was allowed elapse since the 4th July 2011, which was the statutory deadline for bringing the judicial review application, but that even if one was minded to indulge the applicants and take the view that the period until the 17th November 2011, when the applicant's solicitor was informed of the fact that a declaration had been made, should be excluded from consideration, then even on that basis there had been very considerable delay since then which ought not be excused.

12. The applicants on the other hand, object to the procedure that has been adopted by the moving party and say that this is not one that was ever contemplated by the rules of the Superior Courts. The procedure adopted is one that seeks to circumvent the rules, they contend.

13. The applicants say that the Court should have regard to the merits of their case, which they contend is a particularly strong one, in deciding how to deal with the issues raised in relation to time limits. They say that the Order which they seek to challenge was clearly made in breach of Regulation 9 of the Planning Regulations 2001 which provides that:-

> "Development to which Article 6 relates [exempt development] shall not be exempted development for the purpose of the Act
>
> (a) If the carrying out of such development would-
> (i) Contravene a condition attached to a Permission under the Act or be inconsistent with any use specified in a Permission under the Act.

They contend that the development in respect of which a declaration of exemption has been granted, contravenes the condition of the Planning Permission which required the development to be carried out in accordance with the plans submitted. The plans which were submitted had provided for two windows, while what was now being authorised was a single larger window.

14. Furthermore, it is argued on behalf of the applicants that it was reasonable for them to await the replying affidavit. They urge that the requirement that the circumstances that caused the application to be out of time should be beyond the control of the applicant's should be interpreted in a liberal manner, favourable to applicants. They say that if this is done, then the circumstances were outside the control of the applicants, as they were not in control of when the notice parties would deliver a replying affidavit in the Circuit Court proceedings.

15. In my view the notice of motion that has been issued tends to conflate two issues:(1) proposing that the applicants' request for an extension of time be dealt with as a preliminary issue and (2) deciding whether the application to extend time should succeed or whether the proceedings should be dismissed, as the respondents urge. In my view, this is not a procedure to be encouraged. In the case of *B.T.F v. The DPP* [2005]2 I.R. 559, the Supreme Court reversed the decision of the High Court to deal with the issue of delay on the part of the prosecutor in applying for judicial review as a preliminary issue. The Supreme Court was of the view that having regard to the list of factors that a court had to consider in an application to extend time it would not normally be appropriate to try such a matter as a preliminary issue. It must be said that the case was a complex one raising for consideration questions relating to both prosecutorial delay and applicant delay. In the course of his judgment (at p. 566) Hardiman J. commented:

> "This error [Considering the applicant's delay in initiating the judicial review proceedings in isolation from the facts of the case as a whole] in turn, was I think caused by the prior decision to treat the question of the applicant's delay as a preliminary issue. Having regard to the range of matters which fall to be considered under this heading and the six specific factors mentioned in *De Róiste v. Minister for Defence* [2001]1 I. R. 190 are expressly stated not to be exhaustive of the matters to be considered- I doubt whether it will normally be useful to deal with alleged applicant delay as a preliminary issue. Except perhaps in the very plainest of cases, the necessity to inquire into other matters such as those listed by Denham J. will render it inappropriate to deal with the matter by way of preliminary issue."

16. In this case it is plain and not in dispute that the application for judicial review was not brought in time and that the applicants require an extension of time which can only be granted if there are good and substantial grounds for doing so and if the circumstances that resulted in the failure to apply in time were outside the control of the applicants. The second requirement has the capacity to render very plain how the matter should be approached.

17. On the 5th April, 2012 in response to an affidavit sworn on the 21st March, 2012 by a senior executive officer of the planning department of Meath County Council, the solicitor for the applicants swore an affidavit, the conclusion of which was in these terms:

> "The sequence of events detailed in the grounding affidavit and submissions as to the delay in bringing proceedings should be heard in the overall context of the application for the reliefs sought and I respectfully submit that the order sought by the respondents in seeking the applicants' application for an extension of time to bring the within judicial review proceedings to be dealt with as a preliminary issue be refused."

When the motion came on for hearing, counsel for the respondents and moving parties moved her application without objection, presenting her oral arguments and expanding and commenting upon the written submissions which had been furnished in the ordinary way without objection. It was only when counsel for the applicants responded to her submissions, which as it happened was following

an overnight break, the hearing of the motion having commenced very late in the afternoon, that it emerged clearly that there was a significant disagreement as to whether the moving parties application should be entertained at this stage. Given that the matter has been fully argued, that a number of affidavits have been filed on all sides and written submissions have been presented, it is undesirable to defer a conclusion, unless that was required to allow full consideration of the various factors to which a court is required to have regard in the context of an extension of time application.

18. Turning to the substantive issue, in this case the applicants were completely unaware of the declaration that has been made until the 17th November, 2011. In the circumstances of this case and, in particular, given the history surrounding the development which had seen Circuit Court proceedings commenced by the applicant's late mother and compromised, there can be no question of the applicants being out of time and refused an extension, before they were aware of the declaration. However, once they learnt of the Declaration of Exemption it was incumbent on them to move with all possible expedition. This they singularly failed to do. I find the explanation of waiting for a replying affidavit in the Circuit Court proceeding quite unconvincing. In mid/late November the applicants found themselves affected by a decision made more than six months earlier. If they were to succeed in mounting a challenge, no further time could be lost, but instead further time was allowed to pass, including approximately five weeks after the replying affidavit was delivered in the Circuit Court.

18. In my view the good and substantial reasons which would have justified extending time ceased to have effect around the 8th December or thereabouts and thereafter there were not good and substantial reasons in existence justifying an extension of time. Moreover, from a date fairly shortly after the 17th November, 2011 it was very plainly, to echo the language of Hardiman J., not the situation that the failure to commence judicial review proceedings was due to circumstances beyond the applicants' control. Far from that being the case, the applicants, on their own account, consciously and deliberately decided to defer action. In these circumstances it is very plain that the applicants cannot hope to meet the requirements of s. 50(8)(b) and in these circumstances I must accede to the respondents' application.