Neutral Citation Number: [2006] IEHC 272

THE HIGH COURT
JUDICIAL REVIEW

2004 No. 694 J.R. / 2004 32 COM

BETWEEN

USK AND DISTRICT RESIDENTS ASSOCIATION LIMITED

APPLICANT

AND
THE ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

AND
GREENSTAR RECYCLING HOLDINGS LIMITED

NOTICE PARTY

Judgment of Ms. Justice Finlay Geoghegan delivered the 28th day of July, 2006.

1. This is an application for leave to issue judicial review seeking an order of *certiorari* of a decision of the respondent made on 8th June, 2004, to grant a waste licence to the notice party and related reliefs. The application is made on notice to the respondent and notice party as is required under s. 43(5)(a) of the Waste Management Act, 1996 ("the Act of 1996"). The motion was issued on 4th August, 2004. The unusual delay in the hearing of the application for leave was caused by applications and appeals in relation to security for costs.

2. The applicant is a company limited by guarantee. Its members are residents in the district of Usk, County Kildare, some of whom live close to the site of the proposed waste management facility. The applicant has participated in the relevant licensing procedure under the Act of 1996 which culminated in the granting of the licence to the notice party by the respondent by decision of 8th June, 2004.

Factual background

3. On 10th December, 2001, the notice party made an application for a waste licence to the respondent for the operation of a waste management facility at Usk, Dunlavin, County Kildare. With the application there was lodged an Environmental Impact Statement.

4. The site the subject matter of the application had been a quarry. Quarrying by a third party continued on the lands the subject matter of the application until approximately March, 2003. Those activities are alleged by the applicants to have been unlawful but nothing turns on this for the purposes of this application.

5. On 3rd October, 2003, the respondent issued a proposed decision on the application for a waste licence in accordance with the requirements of s. 42(2) of the Act of 1996. The applicant made a written objection to the proposed decision as permitted by s. 42(3) of the Act of 1996 on 30th October, 2003. A Technical Committee of the respondent made a report on the objections of the applicant and the notice party dated 24th May, 2004.

6. The waste licence was issued by the respondent on 8th June, 2004.

Statutory criteria for leave

7. Section 43(5) of the Act of 1996 provides that leave shall not be granted challenging the decision of the respondent to grant the licence "unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed". There was substantial agreement between the parties as to the proper approach of the court in determining what are "substantial grounds" within the meaning of s. 43 of the Act of 1996. It is in accordance with the approach of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125, where at p. 129 she stated:

> "In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfying myself that the grounds are "substantial". A ground that does not stand any chance of being sustained (for example, where the point has been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in this argument at the next stage to those which I believe may have some merit."

8. The above approach was approved of by the Supreme Court in Re the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360.

9. I was referred also to the helpful consideration of the meaning of the phrase by McKechnie J. in *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565 and his reference at p. 572 of the judgment to the observation of Finlay C.J. in *KSK Enterprises Limited v. An Bord Pleanála* [1994] 2 I.R. 128 that the similar threshold provided for in s. 19(3) of the Planning and Development Act, 1992 was intended "to result in a different and higher threshold than that normally applicable to an application for judicial review under the Rules of the Superior Courts, 1986". However, I also agree with McKechnie J. as he stated following his consideration of the meaning of the phrase that one cannot do better than return to the words used by Carroll J. in *McNamara* that the ground be reasonable, arguable and weighty. It is the requirement that it be "weighty" which appears to put the threshold higher than that required for an *ex parte* application under the Rules of the Superior Courts in accordance with the decision of the Supreme Court in *G. v. D.P.P.* [1994] 1 I.R. 374. It is not clear to me that one can describe in a comprehensive but abstract manner this heightened threshold.

10. In relation to an application for leave on notice to the proposed respondents I agree with the observations of Clarke J. in *Arklow Holidays Limited v. An Bord Pleanála and Wicklow County Council* (Unreported, High Court, 18th January, 2006), where in respect of such an application he stated:

> "…The process envisaged is that, with the assistance of argument from all sides, the court has to form a judgment as to whether notwithstanding the points raised by those opposing leave there remains substantial or weighty arguments in favour of the challenge…

11. Thus where, even after having had the benefit of argument on both sides, the court remains of the view that there are substantial or weighty arguments either way, the court should not express any view on the relative strengths of those arguments. Rather leave should be granted and it is for court dealing with the substantive application to weigh the strengths of the relevant

arguments."

Alleged substantial grounds
12. Counsel for the applicant in submission did not pursue all the grounds as set out at paragraph E of the statement of grounds. He confined the challenge to the validity of the decision to grant the licence to three grounds which may be summarised as follows:

> 1. Non compliance of the Environmental Impact Statement (EIS) with the relevant statutory requirements.
>
> 2. The invalidity of condition 3.12 of the waste licence.
>
> 3. The respondent acted ultra vires in granting the licence as it failed to comply with s. 40(4)(c) of the Act of 1996 in relation to the best available technology not entailing excessive costs relative to the buffer zone between the proposed waste disposal facility and sensitive receptors including private residences.

EIS
13. It is common case between the parties that on the facts of this application article 13(1) of the Waste Management (Licensing) Regulations 2000 required the notice party to submit with the application an EIS which complied with the Environmental Impact Assessment Regulations 1989 - 1999 and in particular article 25 thereof.

14. An EIS was submitted with the application in December, 2001. The applicant makes no complaint about the compliance of the EIS with the relevant statutory provisions in December, 2001. The alleged ground of invalidity is that as quarrying continued on the site until at least March, 2003 (and certain processing activities continued after that date) that the information about the site contained in the EIS was by the end of 2003 out of date and accordingly the respondent was not in a position to carry out the environmental impact assessment in connection with the application as it is required to do so under the relevant statutory provisions.

15. It was not submitted on behalf of the applicant that there was any statutory obligation on the notice party to submit an updated Environmental Impact Statement in circumstances such as occurred here where the conditions of the site may have altered between the date of application and the date upon which the respondent came to consider and make a decision on the waste licence application.

16. The statutory obligation on the respondent is contained in s. 40(2)(b)(ii)(I) of the Act of 1996 as amended. In considering the application for the waste licence it is to have regard to "any environmental impact statement in respect of the proposed development comprising or for the purposes of the waste activity concerned, which is submitted to the Agency under and in accordance with a requirement of, or made pursuant to, regulations under section 45." It is not contended on behalf of the applicant that the respondent failed to have regard to the EIS submitted therein.

17. It is also common case on the facts that the respondent was aware of the continued quarrying. Also, that there are a number of High Court decisions which make clear that the adequacy of an EIS which in its terms appears to provide the information required under article 25 of the Environmental Impact Assessment Regulations 1989 - 1999 is a matter for the respondent. See for example *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565. The respondent has a power to request further information of the applicant. It did not exercise that power in this application in relation to the information contained in the EIS. That was a decision which was within its discretion.

18. The applicant has not made out a substantial ground for contending that the decision to grant the waste licence was invalid by reason of any failure on the part of the respondent or the notice party to comply with their respective statutory obligations in relation to the EIS.

19. Having regard to my conclusion on this ground it is unnecessary for me to consider the respondent's submission that the applicant had no locus standi to make an objection to the validity of the licence on this ground.

Condition 3.12 of the Licence
20. The licence at paragraph 3.12 states:

> 3.12 Buffer Zone
>
> 3.12.1 The licensee shall maintain a minimum distance of 100 metres between the non-hazardous landfill footprint and any dwelling house (occupied or unoccupied) present at date of issue of licence. Waste deposition within the 100m zone, between the quarry face and the non-hazardous landfill liner, will be restricted to inert waste.
>
> 3.12.2 A zone in which no waste shall be landfilled, shall be provided and maintained within the facility as shown on Figure 5.2 *Contours of Completed Site* of the Environmental Impact Statement subject to the landscaping requirements of Condition 5.

21. The objection made to the validity of this condition is that a number of the terms therein are not defined; that it is contradictory in its terms and is uncertain and consequently void for uncertainty.

22. In response the respondents and notice party submit that whilst they acknowledge that certain of the terms are not defined and even arguably are not used in their normal meaning that the actual meaning of this condition in the context of the application and EIS is capable of clear understanding.

23. The principles according to which the condition should be construed are not in dispute. They are those set out by the Supreme Court in the judgment of McCarthy J. in *XJS Investments Limited* [1986] I.R. 750, where at p. 756 he stated:

24. Certain principles may be stated in respect of the true construction of planning documents:-

> (a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.
>
> (b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal

training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicates some other meaning.

(c) …

(d) …

25. The respondents and notice party make the commonsense submission that the applicant did not appear to have any difficulty in understanding the meaning of the equivalent condition 3.12 in the proposed decision dated 3rd October, 2003. This was in similar terms save that it did not include the words after "dwelling house" in the first sentence. No objection is based upon these words.

26. In response to the proposed decision, the applicant, as it was entitled to do, lodged an objection. This was lodged on its behalf by Mr. Jack O'Sullivan who is also a deponent for the applicant in these proceedings. The objection made to condition 3.12 was in the following terms:

27. Condition 3.12.1 requires the licensee to maintain a minimum distance of 100 metres between the landfill footprint and any dwelling house, and to deposit only inert waste within the 100 metre buffer zone between the quarry face and the landfill liner. We would submit that no waste should be deposited within the buffer zone, otherwise it ceases to be a buffer zone as understood by the normal meaning of the term. Condition 5.7.1 also refers to the deposit of inert waste within the buffer zone, and we would submit that the deposit of any kind of waste, if permitted, would be inconsistent with the function of a buffer zone.

28. The applicant maintains its objection to the use of the heading "buffer zone". It is not disputed on behalf of the respondent that a buffer zone as normally understood may mean a zone in which no waste shall be deposited. As normally understood, this is only the zone referred to at para. 3.12.2, not the distance of 100 metres referred to in 3.12.1. Notwithstanding, it does not appear to me that the use of the term buffer zone as a heading of itself creates any uncertainty as to the meaning of condition 3.12.1.

29. The primary objection now made is the absence of any special definition for the term "non-hazardous landfill footprint" and the submission that, having regard to the type of waste to which the licence applies and the definition of landfill, that this term in its ordinary meaning refers to the area of the site where all non-hazardous waste is disposed of by placement on the ground or on other waste. It is common case that the licence only relates to non-hazardous waste. Further, landfill is defined in the licence as:

"Refers to the area of the facility where the waste is disposed of by placement on the ground or on other waste."

30. The licence defines inert waste. It is accepted on behalf of the respondent and notice party that inert waste is a subset of the non-hazardous waste to which the licence relates.

31. Construing the first sentence of condition 3.12.1 alone and in accordance with the ordinary meaning of the term "non-hazardous landfill footprint" in the context of this licence the condition appears to provide that there is to be a minimum distance of 100 metres between the landfill footprint of the facility and any dwelling house (occupied or unoccupied) present at the date of issue of the licence. However, the next sentence in condition 3.12.1 then permits "waste deposition within the 100 metre zone, between the quarry face and the non-hazardous landfill liner" but provides that such waste deposition is to be "restricted to inert waste".

32. However, construing the two sentences of condition 3.12.1 together as should be done and in the context of the waste disposal activities licensed as set out in Part I of the licence, it becomes clear that the term "non-hazardous landfill footprint" in the first sentence of condition 3.12.1 is not being used in accordance with its ordinary meaning but rather means the area of the facility in which non-inert or active waste is to be deposited.

33. Whilst I accept the submission of the applicant that condition 3.12 does not mean that there is a minimum distance of 100 metres between any dwelling house (occupied or unoccupied) present at the date of issue of the licence and the non-hazardous landfill footprint in the ordinary meaning of that term, it does not appear to me that a reading of 3.12.1 as a whole gives rise to any uncertainty as to the nature of the landfill footprint which must be 100 metres from any such dwelling house. It is clearly intended to be the landfill footprint in relation to the deposit of non-inert, non-hazardous waste which elsewhere in the licence is required to be in specially engineered lined cells. Only inert waste may be deposited outside of this footprint and within the quarry face. It is also clear from the objection made on behalf of the applicant to the proposed licence that the condition was so understood by Mr. O'Sullivan.

34. The next objection made is that neither the location of the quarry face nor of the non-hazardous landfill liner is specified and accordingly there is and remains uncertainty as to the area in which inert waste may be deposited. Counsel for the respondent submits that the quarry face is ascertainable on the ground and its precise location will be identified in the course of preparation works. Also, that the non-hazardous landfill liner as used in condition 3.12.1 has the same meaning as the non-hazardous landfill footprint in the first sentence and therefore its location will be identified by compliance with the minimum distance of 100 metres from any dwelling house. It is submitted that the precise agreement on these locations, subject to compliance with the condition, is properly a matter to be agreed between the notice party and the respondent when the proposals for the Specified Engineering Works are submitted in accordance with condition 3.2.1 for prior agreement with the respondent prior to the commencement of works.

35. Again, whilst I accept that condition 3.12.1 does not specify the precise location of either the quarry face or the non-hazardous landfill liner, it appears to me that these are matters of detail which may properly be a matter for agreement between the notice party and the respondent in the course of approval of the relevant drawings and other specifications for the Specified Engineering Works pursuant to condition 3.2.1 of the licence.

36. Finally, it is suggested that the terms of condition 3.12.2 are uncertain as fig. 5.2 contours of completed site of the Environmental Impact Statement does not show the zone in which no waste shall be land filled. This appears to refer to the area between the landfill footprint as shown in fig. 5.2 and the site boundary. As this condition must be read in conjunction with the preceding paragraph the meaning appears clear. Waste may only be land filled inside the quarry face and the zone outside of that to the site boundary must be provided and maintained. There is no dispute that the site boundary is as shown in fig. 5.2. The final position of the total landfill footprint, including the area in which inert waste may be deposited, may be different as it is now fixed in relation to the quarry face. As already decided this is a matter of detail which it is permissible to leave for agreement on accordance with condition 3.2.

37. Accordingly, I would refuse leave on the ground that condition 3.12 is so uncertain as to be void. There are matters of detail in relation to the exact contour of the quarry face and the non-hazardous landfill liner as that term is used in relation to the area in which active waste may be deposited to be agreed in accordance with the procedure envisaged in condition 3.2 but that appears to

be a matter which it is

38. permissible to leave for agreement between the notice party and respondent.

Breach of section 40(4)(c) of the Act of 1996

39. The third ground advanced is that the licence was granted in breach of s. 40(4)(c) of Act of 1996. This provides:

> "40(4) The Agency shall not grant a waste licence unless it is satisfied that –
>
> …
>
> (c) the best available technology not entailing excessive costs will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity concerned."

40. Section 5(2)(a) and (b) of the Act of 1996 further defines what is required by sub-s.(40)(4)(c). It provides:-

> "5(2)(a) A reference in this Act to the use of the best available technology not entailing excessive costs to prevent or eliminate, or where that is not practicable, to limit, abate or reduce an emission from an activity, shall be construed as a reference to the provision and proper maintenance, use, operation and supervision of facilities which, having regard to all the circumstances, are most suitable for the purposes.
>
> (b) For the purposes of this subsection, regard shall be had to—
>
> (i) in the case of an activity other than an established activity—
> (I) the current state of technical knowledge,
>
> (II) the requirements of environmental protection, and
>
> (III) the application of measures for these purposes, which do not entail excessive costs, having regard to the risk of environmental pollution that, in the opinion of the Agency, or the local authority concerned, exists;
>
> (ii) in any other case, in addition to the matters aforesaid—
> (A) the nature, extent and effect of the emission concerned,
>
> (B) the nature and age of the existing facilities connected with the activity and the period during which the facilities are likely to be used or to continue in operation, and
>
> (C) the costs which would be incurred in improving or replacing the facilities referred to in clause (B) of this subparagraph in relation to the economic situation of activities of the class concerned."

41. In summary, the argument of the applicant is firstly that an appropriate buffer zone between the landfill footprint and the nearest dwelling houses forms an important part of the best available technology not entailing excessive costs (BATNEEC) for the waste disposal activities sought to be licensed. On the facts of this application it is submitted that the respondent did not determine what buffer zone is BATNEEC for the activities and site sought to be licensed; hence it could not have been satisfied that BATNEEC would be used as required by s. 40(4)(c) of the Act of 1996 and accordingly the respondent was prohibited by the terms of the section from granting a waste licence. This submission was made in furtherance of grounds (9) and (12) of the statement of grounds.

42. The applicant also advanced a related submission in furtherance of grounds (10) and (11) in reliance upon the respondent's draft "manual on landfill site selection" of September, 1996 and the reference therein to a minimum distance of 250 metres between areas to be land filled and any occupied dwelling and the respondent's obligation under s. 62(1) of the Environmental Protection Agency Act, 1992 to specify and publish criteria and procedures for the selection, management, operation, and termination of use of landfill sites for the disposal of domestic and other waste.

43. In response to this latter submission, the respondent and notice party submit that this distance is a general indication and that the appropriate buffer zone must be considered and determined on a site-specific basis having regard to available guidance on relevant site issues and risk. I have concluded that the applicants have not discharged the onus of establishing that there exist weighty arguments that a site-specific approach in impermissible and accordingly would not allow leave on the grounds at paragraphs (10) and (11) of the statement of grounds.

44. I have concluded that notwithstanding, the evidence and submissions of the respondent and notice party the applicant has made out substantial grounds for contending that the licence is invalid as it was granted in breach of the prohibition in s. 40(4)(c) of the Act of 1996 by reason of the failure of the respondent to determine what buffer zone between the landfill footprint (in the sense of total footprint of all waste disposal activity) and the nearest dwelling house (occupied or unoccupied) is BATNEEC for the activities and site sought to be licensed.

45. Having reached the conclusion that the applicant has made out substantial grounds it is not appropriate that I set out my view as to the relative merits of the submissions made by the applicant and respondent and notice party on the issues concerned. I only propose setting out shortly my reason for concluding that the grounds at paragraphs (9) and (12) constitute substantial grounds.

46. It is common case between the parties that a buffer zone forms part of the necessary BATNEEC for the activities sought to be licensed. It is also undisputed that the nearest dwelling house at the north eastern boundary is approximately 20 meters from the site perimeter. Further that whilst the precise location of the quarry face referred to in condition 3.12 has not been determined the distance between the probable line of the quarry face and the site perimeter at such boundary is approximately 11.5 meters. Accordingly, at the north eastern side of the boundary the buffer zone, used in the sense contended for by the applicant will be in the order of 31.5 meters.

47. Whilst there is a dispute between the parties as to the purpose and nature of a buffer zone the applicants have established weighty arguments that both in its normal meaning and to be BATNEEC for the activities and site concerned it should be an area in which no waste deposit activity is carried on.

48. The applicant has satisfied me that there exist weighty arguments that before the respondent could be satisfied that BATNEEC will be used it must consider and determine what buffer zone (in the sense contended for by the applicant) is BATNEEC for the activities and site sought to be licensed.

49. If the applicant is correct in its submission that the respondent must consider and determine what buffer zone is BATNEEC for the activities and site sought to be licensed before it can be satisfied that BATNEEC will be used then there is a weighty argument that the recital by the respondent in the licence that it "is satisfied that the requirements of s. 40(4) of the Act of 1996 has been complied with" is not alone sufficient to demonstrate compliance with s.40(4)(c) of the Act of 1996.

50. I will grant leave to seek the reliefs sought at paras. D (i), (vi) and (vii) upon the grounds set out at paras. E (9) (as amended) and (12) of the statement of grounds. I will hear the parties in relation to the stay sought pursuant to O.84, r.20(7) of the Rules of the Superior Courts, 1986 and the relevant times for the issue and service of a notice of motion and delivery of a statement of opposition.