Neutral Citation Number: [2010] IEHC 69

THE HIGH COURT

JUDICIAL REVIEW

2007 532 JR

BETWEEN

KELLS QUARRY PRODUCTS LIMITED

APPLICANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered on the 11th day of March, 2010

The applicant herein operates a quarry at Knockaneyouloo, Kells, County Kerry. The respondent is a local authority with responsibility for the administrative area of County Kerry.

The applicant seeks the following reliefs in these proceedings:

> "1. An order of *certiorari* quashing the decision of Kerry County Council on Quarry Registration Reference Number QY018, which imposed thirty-four numbered conditions on the existing quarry.
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> 2. A declaration that the letter dated 29th January, 2007, which invited submissions from the draft conditions failed to comply with the requirements of s. 261(5)(b) of the Planning and Development Act 2000, in that, it failed to accord the applicant the statutory time period in which to make the submissions in respect of the aforesaid conditions, and is, in those circumstances, *ultra vires* and void.
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> 3. A declaration that the respondent failed to determine the application in accordance with s. 261 of the Planning and Development Act 2000, and failed to have regard to the time limits set out therein. In the alternative, an order remitting the application back to the respondent so that the matters can be determined in accordance with the requirements of the Planning and Development Act 2000 (as amended)."

Background

The Planning and Development Act 2000 (hereinafter referred to as "The Act") introduced new provisions for the control of quarries. Section 261 in its provisions allows a planning authority to impose, restate, modify or add to conditions on the operation of a quarry. The provisions of s. 261 were commenced by Statutory Instrument in 2005. The applicant's quarry was one which had been in operation prior to 1st October, 1964, and, accordingly, was one which did not require planning permission. Section 261(1) provides:

> "The owner or operator of a quarry to which this section applies shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information, the planning authority shall, in accordance with section 7, enter it in the Register."

The operator of the quarry in this case was duly registered by the respondent on 23rd March, 2005. Subsequent to the registration of the quarry, the respondent had until 22nd March, 2007, to decide to impose conditions in respect of the quarry. By letter dated 20th January, 2007, the respondent enclosed draft conditions which it intended to impose on the applicant. There were some thirty-four draft conditions in relation to the operation of the quarry. Although the letter was dated 29th January, 2007, and stated that the applicant could: "make a submission or observation in respect of this proposed decision (and the conditions) on or before 16th March, 2007", it has been deposed on affidavit that the letter bearing a franked postmark of 9th February, 2007, was not received by the applicant until 14th February, 2007. That being so, the applicant had less than six weeks in which to respond to the letter of 29th January, 2007, and in those circumstances, the respondent has now agreed that the applicant is entitled to an order of *certiorari* quashing the decision of Kerry County Council referred to above.

In those circumstances, the issue which I now have to determine is whether or not there is jurisdiction to remit the matter to the respondent to allow the applicant to make the relevant submissions provided for in the legislation, and if there is such jurisdiction, whether the court should, in those circumstances, exercise its discretion to remit the matter to the respondent.

I should refer to the relevant legislative provisions for ease of consideration of the matters that arise herein. I have already referred to the provisions of s. 261(1) of the Act. Section 261(5)(a) provides:

> "Where a planning authority proposes to:
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> (i) impose, restate, modify or add to conditions on the operation of the quarry under this section, or

(ii) require, under sub-section 7, a planning application to be made and an Environmental Impact Statement to be submitted in respect of the quarry in accordance with this section, it shall, as soon as may be after the expiration of the period for making observations or submissions, pursuant to a notice under sub-section (4)(b),

(a) Serve notice of its proposals on the owner or operator of the quarry.

(b) A notice referred to in paragraph (a), shall state-

(i) the reasons for the proposals, and

(ii) that submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority within such period as may be specified in the notice, being not less than six weeks from the service of the notice.

(c) Submissions or observations made pursuant to a notice under paragraph (b) shall be taken into consideration by a planning authority when performing its functions under sub-section (6) or (7)."

Section 261(6)(a) provides:

"Not later than two years from the registration of a quarry under this section, a planning authority may, in the interest of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made, pursuant to a notice under sub-section (4) or (5) -
(i) In relation to a quarry which commenced operation before 1st October, 1964, impose conditions on the operation of that quarry, or

(ii) In relation to a quarry in respect of which planning permission was granted under Part 4 of the Act of 1963, restate, modify or add to conditions imposed on the operation of that quarry, and the owner operator of the quarry concerned shall, as soon as may be thereafter, be notified in writing thereof."

Submissions of the parties
The respondent has contended that at all times since the commencement of these proceedings, it has been open and willing to have the matter remitted back to the respondent so that the matter can be determined in accordance with the requirements of the Planning and Development Act 2000 (as amended), and indeed, this is so stated in the statement of opposition filed herein. It is contended that that the court has jurisdiction to remit the matter to the respondent and that the court should, in its discretion, remit the matter back.

The applicant contends simply that the court has no jurisdiction to remit the matter back because the time limit for the imposition of conditions provided for in s. 261(6)(a) of the Act has passed, and accordingly, the court cannot remit back the matter to be re-determined in accordance with the requirements of the 2000 Act.

Decision
Before I look generally at the jurisdiction of the court to remit the matter back, I want to refer briefly to a number of the points raised by Mr. Gallagher S.C. on behalf of the respondent in relation to the question of the discretion of the court. A number of points were made by way of criticism of the applicant, both in terms of the affidavits sworn herein and in relation to details contained in the application to have the quarry at issue in these proceedings registered by the respondent. In the application to have the quarry registered, certain information was provided by the applicant as to the total site area of the quarry and the extraction area of the quarry. In each case, the area given was 3.5 hectares. The information given does not appear, as a matter of fact, to be correct. At the time of the application, it appears that the extraction area of the quarry was somewhat smaller than 3.5 hectares and it would appear that the total site area of the quarry was considerably larger. These issues are dealt with in the affidavits of Joe Golden on behalf of the applicant, and Michael McMahon on behalf of the respondent. It is to be noted that the information sought was information specified in s. 261(2) of the 2000 Act, and insofar as the respondent now criticizes the applicant for the apparent inaccuracy of that information, it has to be borne in mind that s. 261(3) provided that:

"A planning authority may require a person who has submitted information in accordance with this section to submit such further information as it may specify, within such period as it may specify, relating to the operation of the quarry concerned and, on receipt thereof, the planning authority shall enter the information in the Register."

Clearly, if any issue had arisen for the respondent in relation to the information provided, it could have exercised its statutory power to require further information to be submitted. The respondent raised no issue on this point prior to the commencement of these proceedings.

There were a number of other factual disputes in the affidavits exchanged between the parties, for example, in relation to an incident of blasting at the quarry and in relation to the use of photographs for the purpose of exhibiting the situation of the quarry, but I do not think that those factual issues are of any assistance in relation to the issues which I have to determine. Indeed, as Mr. Bradley S.C. on behalf of the applicant commented during the course of argument many of the matters raised in the affidavits on behalf of the respondent are matters which relate more to the question of enforcement than to the issues as to whether or not the matter can be remitted and, if so, whether the matter should be remitted."

In the course of his submissions, Mr. Gallagher referred to the provisions of O. 84, r. 26(4) which provides:

"Where the relief sought is an order of *certiorari* and the court is satisfied that there are grounds for quashing the decision to which the application relates, the court may, in addition to quashing it, remit the matter to the court, Tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the court."

In the course of the submissions, I was referred to the decision of the High Court in the case of *USK and District*

Residents Association v. An Bord Pleanála [2007] IEHC 86, in which Kelly J. discussed the discretion of the court in the exercise of its power of remittal, saying:

> "The discretion to remit proceedings is a wide one. There is not a lot of assistance to be gleaned from such case law as there is on the topic as to the factors to be taken into account in the exercise of that discretion. Many of the cases deal with the remission of criminal cases to the District Court. Those which involve the remission of cases such as the present one, deal with the topic in little more than a sentence
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> I think that the exercise of the discretion is a wide one and it would be both impossible and unwise to attempt to set out in a comprehensive fashion all the factors which the court ought to take into consideration. That will have to be developed on a case by case basis. The one thing that can be said is that the discretion must be exercised both judicially and judiciously with the overall object of achieving a just result."

In my view that passage is very helpful in dealing with the issue of discretion in circumstances where there can be no doubt but that the court has jurisdiction to remit a matter. In the course of the submissions, Mr. Gallagher, on behalf of the respondent, referred to a number of decisions in which the jurisdiction to remit has been exercised. They included *Devrajan v. District Judge Ballagh* [1993] 3 I.R. 377, *Dawson v. Hamill* (2) 1 I.R. 213, *T.N. v. Minister for Justice* [2007] 4 I.R. 553, *Dawson v. District Justice William Hamill* and *Director of Public Prosecutions v. Owen O'Neill* (Unreported, Supreme Court, Hederman J., 30th July 1984). Finally, reference was made to the decision in the case of *Murphy v. District Justice Wallace* [1993] 2 I.R. 138. I am satisfied that there can be no doubt that in an appropriate case, the court can and should remit matters to the appropriate court or Tribunal for the purpose of revisiting a decision which has been quashed.

One of the decisions opened to me in the course of this case was the decision of the High Court in the case of *Brown v. Kerry County Council* (Unreported, Hedigan J., 9th October, 2009). That court considered the provisions of s. 261(6)(a) of the 2000 Act. The question in that case concerned whether or not the two-year period referred to in s. 261(6)(a) could be extended. In that case the provisions of s. 251 which provided for the exclusion of certain dates in the calculation of time limits were also of relevance. At issue, was whether or not the provisions of s. 261(6)(a) of the 2000 Act, had to be construed as being mandatory in nature or directory. It was concluded by Hedigan J. as follows:

> "I am satisfied that s. 261(6)(a) of the 2000 Act, is mandatory in nature and that, as such, the respondent is bound to act in compliance with it in the imposition of conditions on a given quarry. However, on the facts of the present case, I am equally satisfied that the time limit was adhered to, having made the necessary extensions mandated by s. 261 of the 2000 Act."

The relief in that case was therefore refused. That case is a clear authority for the proposition that the time limit fixed in s. 261(6)(a) is mandatory. That being so, I cannot see any point in remitting this matter to the respondent for the purpose of going through the exercise of allowing the applicant to furnish submissions on the conditions to be imposed, given that the time for the imposition of conditions has now passed and that there is no provision in the legislative scheme of the Act for the extension of the two-year period. In other words, no purpose would be served by the remittal of the matter to the respondent.

I note that in the written submissions, the respondent referred to the fact that a strict interpretation as to the requirement to give six weeks to an individual operator to make submissions would undermine the effectiveness of the legislative scheme. It was contended that if the time period contained in s. 261 was to be regarded as mandatory, it could give rise to a type of default planning. I can well understand the concerns of the respondent to ensure that there is proper planning in relation to the operation of quarries but I think that the words referred to in the decision in the case of *Flynn v. Dublin Corporation* [1997] 2 I.R. 558, at p. 567 are apposite:

> "In my view, the sole and exclusive cause of this litigation was the behaviour of the respondent in leaving until the last day but one the making of its decision and then adopting on the last day of the appropriate period a method of communication of the decision which made certain that the decision would not be communicated to the applicant within the appropriate period. Like O'Hanlon J. in *Freeney v. Bray UDC* [1982] ILRM 29, I am of the view that the respondent must suffer the consequences of resorting to the method of service which it did. Had it been timeous in effecting service of the notice, this difficulty would not have arisen. The fact that the applicant now has a default permission is, in my view, entirely brought about by the respondent's own behaviour."

In this case, the circumstances that have occurred and the litigation that has ensued have been brought about by the fact that the respondent waited until the two-year period had almost elapsed before furnishing the applicant with the proposed conditions it intended to impose. It did so by means of a letter dated 29th January, 2007. It gave a six-week period in that letter, providing that the applicant could furnish submissions by 16th March, 2007. On the face of it, the letter gave the applicant a six-week period of time. However, in circumstances that have not been controverted or explained, the letter of 29th January, 2007 enclosing the proposed conditions was not posted until 9th February, 2007 and was not received until 14th February, 2007 thus ensuring that the applicant did not have the minimum six-week period within which to make submissions. That is a situation brought about entirely by the respondent in waiting until the 11th hour to deal with this matter.

As I mentioned earlier, reference was made in the course of the hearing to various matters relating to the manner in which the quarry is operated. Mr. Bradley commented on the fact that these matters were irrelevant to the issue before the court. I accept that that is so. However, the fact that the respondent did not operate the provisions of s. 261 in such a way as to enable it to impose conditions, does not mean that the applicant is at large in the manner in which it operates the quarry. Undoubtedly, the applicant is entitled to operate the quarry, having been doing so prior to 1st October, 1964. Any material change of use or further development at the site is subject to the normal planning requirements. The respondent can, if necessary, take appropriate steps to prevent any breach of planning laws by the applicant.

In conclusion, the applicant is entitled to the order of *certiorari* sought herein. I am satisfied that having regard to the mandatory nature of s. 261(6)(a), and bearing in mind that the time for imposition of conditions has long since passed, there is no basis for remitting the matter to the respondent. The respondent is, at this stage, precluded from registering any conditions by virtue of s. 261(6)(a). Therefore, no purpose would be served by remittal of the matter to the respondent.