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THE HIGH COURT

JUDICIAL REVIEW

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

[2011 No. 242 J.R.]

BETWEEN

MAXOL LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CLONAKILTY TOWN COUNCIL AND JOHN CROWLEY

NOTICE PARTIES

JUDGMENT of Mr. Justice Clarke delivered the 21st December, 2011

1. Introduction

1.1 The applicant ("Maxol") and the second named notice party ("Mr. Crowley") had, sometime ago, a property dispute which was resolved on the basis that an area of land in Clonakilty, Co. Cork came to be owned as to one part by Maxol and as to the other part by Mr. Crowley. Mr. Crowley had operated a petrol station on the lands in question and continues to operate a separate station, on a temporary basis, from a neighbouring site. Maxol secured planning permission to build a modem petrol station on their portion of the lands which station has since been built and is fully operational.

1.2 Mr. Crowley applied to the first named notice party ("Clonakilty Council") for planning permission to build a second station on his portion of the site. The permission in question was granted, subject to conditions by Clonakilty Council. Thereafter, Maxol appealed the grant of that permission to the respondent ("Bord Pleanála").

1.3 In these judicial review proceedings, Maxol seeks to challenge the decision by Bord Pleanála to grant the permission in question. It is also of some relevance to note the precise time at which the application in question was brought in the light of a number of recent changes to the statutory regime which applies to proceedings involving a challenge to the validity of planning decisions.

1.4 It will be recalled that under the provisions of the Planning and Development Act 2000 (as amended from time to time) as it applied until recent times, s. 50A of same (as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006) required an application for leave to be brought by motion on notice and further required the applicant to establish substantial grounds (s. 50A(3)(a)) and a substantial interest (s. 50A(3)(b)(i)) in "the matter which is the subject of the application". Those matters have, of course, been the subject of a significant amount of judicial interpretation since originally enacted.

1.5 Two changes have, however, in recent times, been separately brought to that regime. First, the Planning and Development (Amendment) Act 2010, ("the 2010 Act") in s. 32 substituted a new section s. 50A(2) which brought the situation, procedurally, back to one where the application for leave was brought *ex parte* (although the relevant new provision does allow the court, in an appropriate case, to direct that the application be on notice). That legislative intervention did not bring about any change to the substantial grounds or substantial interest requirements set out in section 50A(3)(b)(i).

1.6 Subsequently s. 20 of the Environment (Miscellaneous Provisions) Act 2011 (the "2011 Act") amended that subsection by removing the requirement of substantial interest and, in substance, provided for the test reverting to the previous threshold of sufficient interest. However, the 20 II Act came into force on the 23rd August, 2011, on foot of the Environment (Miscellaneous Provisions) Act 2011 (Commencement of Certain Provisions) Order 2011 [S.I. No. 433/2011].

1.7 These proceedings were commenced in March of this year. The position is, therefore, that the amendment brought about by the 2010 Act (which allowed for an *ex parte* application for leave) was in force at that time but the amendment to the substantial interest test to which I have referred was not in force. It was accepted by all the parties that the questions raised fell to be considered under the law, as amended by the 2010 Act, but not as amended by the 2011 Act.

1.8 In that context, it should be noted that the application for leave to apply for judicial review was first moved *ex parte* on the 7th March, 2011, before Peart J. who ordered, under s. 50A(2)(b), that the application for leave should proceed on notice. The parties, thereafter, consented to a combined hearing of the leave and substantive applications- a so called telescoped hearing. Clonakilty Council did not participate. I am, therefore, concerned with both the question of whether Maxol should be entitled to leave and, if so entitled, whether Maxol can succeed in obtaining judicial review. It is also accepted that, unlike the position that would obtain in relation to a judicial review commenced after the 2011 Act came into force, I am concerned with whether Maxol has a substantial interest in the matter at issue.

1.9 In order to understand the issues, it is first appropriate to turn to a brief outline of the relevant facts.

2. The Facts

2.1 After the property dispute to which I have referred was settled and Maxol had obtained permission for, completed the development of, and opened a Maxol service station in March 2010, Mr. Crowley applied to Clonakilty Council on the 19th March,

2010, for planning permission for a petrol filling station with a retail shop and, of particular relevance to this case, carwash facilities being one automatic and two manual stations. The application was accompanied by the usual plans and specifications that might be expected. In addition, on the 29th March, 2010, Mr. Crowley's engineers wrote to Clonakilty Council suggesting, amongst other things, that water from all three carwashes would be recycled by use of a device called a Klargester Wash Down and Silt Separator, as envisaged by the original application, or by a Freylit Water Recycling System. It will be necessary to turn to the difference between those two systems in due course. A Mr. Bernard Fitzpatrick lodged an objection on behalf of Maxol on the 20th April, 2010. A wide range of matters were put forward as constituting legitimate reasons why the planning permission sought should not be granted including, in particular, an assertion that there was no need for any more service stations in the region. No issue was raised as to the suggestion that there was any material difference between the Klargester system and the Freylit system to which reference has already been made. There is some observation in relation to the proposals for the disposal of surface water.

2.2 Thereafter, Mr. Crowley's advisers sent a letter of the 13th July, 2010, which contained certain calculations based, it was said, on the assumption that a "closed recycling system" would be used. Clonakilty Council granted permission on the 6th August, 2010.

2.3 Maxollodged an appeal on the 2nd September, 2010, which appeal covers a large range of grounds. It should again be noted that no contention was made in the appeal documentation as to any inconsistency between the application of the 19th March, 2010 and the additional information supplied, on a non-solicited basis, by Mr. Crowley's advisers on the 29th March. In addition, no point was made concerning any apparent differences between the Klargester and Freylit systems. However, Maxol's advisers did, in the course of the appeal, raise the question of whether the waste water treatment plant at Clonakilty was adequate to deal with any additional waste water that might be generated by the proposed filling station. In that context, reference was made to a review published by Cork County Council in June 2010, which was concerned with the Skibbereen Local Area Plan and which noted that the Clonakilty Waste Water Treatment Plant had "no spare capacity".

2.4 Mr. Crowley's advisers, in a response, suggested that:-

> "The proposed development will contribute a sewage load equivalent to one domestic house to the existing sewage infrastructure, this is not a significant load."

2.5 Bord Pleanála's inspector, while dealing with this point, noted that:-

> "The planning authority are satisfied that there is existing capacity in the water and waste water treatment infrastructure to accommodate the proposed development. Having regard to the sewage load indicated in the response to the grounds of appeal, I have no reason to question adequacy of this capacity."

2.6 The appeal was rejected by Bord Pleanála by a decision dated the 11th January, 2011. The permission was, therefore, upheld but changes were made to the conditions. Condition 1, as imposed by Bord Pleanála, reads:-

> "The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars submitted to the planning authority on the 6th May, 2010 and the 14th July, 2010, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars."

2.7 In addition, Condition 2 provided as follows:-

> "Water supply and drainage arrangements, including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services."

The reason given for Condition 2 is that it is in the interest of public health.

2.8 Against the background of those facts, it is next necessary to turn to the grounds relied on by Maxol in support of their application for judicial review.

3. Maxol's Grounds

3.1 The first three grounds ("the capacity grounds") relied on by Maxol are variations on a theme. Each is concerned with the capacity of the Clonakilty Waste Water Treatment infrastructure. It is said that there was no evidence before Bord Pleanála to justify its finding that there was capacity, that Bord Pleanála failed to have regard to a relevant consideration being the absence of such capacity and what is said to have been an acceptance without analysis of the statement made by Mr. Crowley's advisers as to capacity.

3.2 The next two grounds ("the contradiction grounds") assert that there is a contradiction between the contention on the part of Mr. Crowley's advisers as to the fact that the station would produce a very limited amount of additional waste water and the drawings and specifications lodged and, further, that Bord Pleanála failed to have regard to that conflict.

3.3 The final two grounds ("the ambiguity grounds") relate to what is said to be a material ambiguity in the permission granted or a failure to have regard to what is said to be a difference between the two means of waste water treatment referred to in respectively the original application and the unsolicited additional information supplied by Mr. Crowley's advisers.

3.4 It will be seen that all of the grounds, therefore, relate to the waste water treatment aspect of the planning permission. It must be recalled that the issues raised, both in the initial observations made on behalf of Maxol and in the appeal which Maxol pursued to Bord Pleanála, covered a whole range of issues. It is important to keep in mind the fact that the focus on the waste water treatment aspects of the proposal which now exists by virtue of the narrow basis of challenge put forward on behalf of Maxol in these proceedings, is not replicated in the issues which Bord Pleanála had to consider. That does not, of course, mean that Maxol are, on that basis, in any way disentitled to raise the challenge now brought. However, the challenge which the court now has to consider does need to be seen against the backdrop of the case made to Bord Pleanála by Maxol.

3.5 Insofar as the contradiction grounds and the ambiguity grounds are concerned, counsel for Bord Pleanála and counsel for Mr. Crowley both made the point that those issues, it is said, were available to be raised by Maxol on the occasion of the appeal to Bord Pleanála but were not so raised. In those circumstances it is argued that it is no longer open to Maxol to raise those issues in judicial review proceedings. It seems to me to be convenient to turn first to that legal question. In reality the question is as to whether

Maxol has issue specific standing to raise the questions to which I have just referred.

4. Does Maxol have *Locus Standi?*
4.1 In *Lancefort Limited v. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270, the Supreme Court determined that it would be an injustice to a party to be asked to defend proceedings on the grounds of an alleged irregularity which could have been brought to the attention of all concerned as part of the granting of the relevant planning permission, but which was not relied on until the application for leave to bring proceedings. In so deciding the Supreme Court was applying, in the planning context, principles which go back at least as far as *Dreher v Irish Land Commission* [1984]ILRM 94. While there may be some exceptions to that general rule, the fundamental principle remains part of the law and is independent of whether the test for standing is one of sufficient interest or substantial interest. It must be recalled that *Lancefort* was decided prior to the change in the law which introduced the requirement of substantial interest. It will be necessary to turn in due course to the extent to which, in order to be able to assert a substantial interest, a party must itself have raised the relevant issue during the planning process, That question is concerned with whether an applicant for judicial review may not have standing to raise a particular point not raised by that party in the planning process (even if the point concerned was addressed in the process by others) on the basis of having failed to establish a substantial interest in the point concerned.

4.2 Having set out that general proposition it is next necessary to turn to the facts of this case relevant to standing. The issue which arises in respect of waste water treatment can be simply put. In the original plans and specifications submitted on behalf of Mr. Crowley, the Klargester system is suggested. In the unsolicited additional information supplied by Mr. Crowley's advisers mention is also made of the Freylit system. Evidence was placed before the court on behalf of Maxol to the effect that there are significant differences between the two systems. In particular the systems differ as to what happens to the waste water which has been collected from car washes and has been put through the respective systems. In the case of the Klargester system, the remaining waste water is sent out into the public sewers. In the Freylit system, the cleansed water is reused.

4.3 It does also need, at this stage, to be noted that one of the issues that arose in the planning process was as to whether there was likely to be an excessive demand on the local water system to meet the requirements of the car wash as proposed. This "water in" issue was different from the "water out" issue which has already been mentioned and which was concerned about the capacity of the Clonakilty Waste Water System to take any water that might be released into it. As part of a possible solution to the "water in" problem, a suggestion was made that a recycling system could be put in place which would lead to a significant proportion of the demand for water being supplied by recycling rather than by placing a demand on the local water supply system. In dealing with that issue, in the course of the unsolicited additional information supplied by Mr. Crowley's advisers to which reference has already been made, either the Klargester or Freylit system was suggested as being appropriate.

4.4 Against that factual background, Maxol suggests that there is an inconsistency between the Klargester and Freylit systems in that only the Freylit system is, in reality, a recycling system. On that basis, the range of arguments set out under the contradiction grounds and the ambiguity grounds are made. It is said that the plans and specifications show piping arrangements that do not make any provision for waste water which has been through whichever system might be used returning to any location from which it might be recycled and used again in car washes. On that basis, it is said that there is a conflict between the drawings and the written information given on behalf of Mr. Crowley and that the planning permission, containing a condition, in the usual form, requiring the development to be carried out in accordance with the specifications and submissions is contradictory or ambiguous.

4.5 However, all of the materials, insofar as the planning process is concerned, that are relied on by Maxol for any of the grounds under these two general headings were available to Maxollong before the planning permission was granted whether by Clonakilty Council or Bord Pleanála. The fact is that the plans, which did not show piping bringing treated water back into the system, were available. Both the original submission and the unsolicited additional information were also available. References to both the Klargester and Freylit systems were to be found in those documents. If there was a point to be made about the fact that there is a material difference between those two systems, then that point was available to be made, on behalf of Maxol, at any stage. Likewise, if there was a point to be made about the alleged inconsistency between the Frey lit system and the plans showing the relevant piping, that point also could have been made at any stage. If there were points to be made that a permission granted, in the usual and standard form, which required the development to be conducted in accordance with the plans and specifications submitted, would be ambiguous by virtue of the points already addressed, then that argument was similarly open to be made on behalf of Maxol at any time.

4.6 It seems to me to be clear, therefore, that any of the points under those two headings on which Maxol now seeks to rely could easily and readily have been made on behalf of Maxol as part of the planning process whether at the stage when that process was being considered by Clonakilty Council or by Bord Pleanála. There are no countervailing factors, on the facts of this case, which would suggest that the fundamental rule should not apply. Maxol could have made any or all of those points prior to the planning permission being granted. Having failed to make the points at that time, it seems to me that Maxol lacks standing to argue those points at this stage. In those circumstances it seems clear that grounds four to seven must be rejected on the basis that Maxol lacks standing.

4.7 The same point does not, however, apply to the capacity grounds which are, as I have indicated, variations on a theme arising out what is said to be the way in which Bord Pleanála considered whether the Clonakilty Waste Water System was adequate to take whatever level of additional waste water might be placed into it by Mr. Crowley's service station. Against that background, it is appropriate to set out with some precision the precise issues which now arise in relation to those questions.

5. Waste Water - The Issues
5.1 The starting point has to be to note, as previously mentioned, the fact that Maxol, in its appeal to Bord Pleanála, did raise, amongst many other issues, the question of the capacity of the Clonakilty Waste Water system to absorb further waste water such as might be expected from Mr. Crowley's proposed development. I have already quoted the response by Mr. Crowley's advisers and the text of the relevant passage from the report of the inspector appointed by Bord Pleanála. No evidence was put before the court to suggest that the view adopted by Bord Pleanála itself differed from the view contained in the inspector's report. In those circumstances it seems to me that the appropriate inference to draw is that the reasoning of Bord Pleanála was the same as the reasoning of the inspector. In cases where Bord Pleanála has different reasons for its conclusions to those contained in the relevant inspector's report, then it seems to me that it is incumbent on Bord Pleanála to place those different reasons before the court in an appropriate form whether by arranging for the swearing of an appropriate affidavit or exhibiting relevant documentation in evidence. In the absence of Bord Pleanála taking any such course of action, it seems to me that the court is entitled to assume that Bord Pleanála's reasoning is the same as its inspector's.

5.2 On that basis it appears that Bord Pleanála had regard to two matters in reaching its conclusion on the adequacy of capacity of the waste water system in Clonakilty. First, it had regard to the fact that the local authority seemed satisfied. Second, it had regard to the apparent acceptance by the inspector of the contention put forward by Mr. Crowley's advisers to the effect that the

additional load was the equivalent of that which might be expected to be produced by one house.

5.3 It should, in passing, be noted that it would appear that Maxol's advisers did not receive a copy of the response of Mr. Crowley's advisers prior to Bord Pleanála issuing its decision. Maxol's advisers did not, therefore, have an opportunity to counter the contention made on behalf of Mr. Crowley as to the one household equivalent volume of waste likely to be produced. It should be noted that Maxol did not raise any question of fair procedures in these proceedings. I merely mention these facts to make it clear that Maxol did not, therefore, have an opportunity to contest the assertion by Mr. Crowley's advisers and thus, cannot be taken to have lost any standing which they might otherwise have by virtue of not having raised such a contest.

5.4 Be that as it may, Maxol has placed before the court expert evidence which suggests that the waste water treatment process intended to be applied by Mr. Crowley (whether the Klargester or Freylit system) would have been likely to have produced a volume of waste water far in excess of that which might be attributed to one household and that the contention of Mr. Crowley's advisers to which reference has been made was, therefore, incorrect. Indeed, a review of all of the papers submitted during the planning process on behalf of Mr. Crowley suggests that the one household analogy was intended to refer to the waste that might be expected to come from the service station building/shop and had no reference whatsoever to whatever additional waste might be expected to come from the car washes, irrespective of which system was used. In addition, it seems clear that there would be at least some difference in the amount of waste water which might need to be disposed of into the public system dependent on whether a recycling system (such as the Freylit) or a filtering system (such as Klargester) was used. It does, of course, have to be noted that the expert evidence now tendered on behalf of Maxol was not before Bord Pleanála. However, even on the basis of the materials which were before Bord Pleanála, it seems to me that the inspector did make a mistake. The inspector was undoubtedly induced into making that mistake by the assertion made by Mr. Crowley's advisers. lt remains, however, the case that a mistake was made.

5.5 In that context it seems to me that two issues potentially arise for consideration. The first is as to whether Maxol has a substantial interest sufficient to allow Maxol to raise any issues which might derive from that mistake in these judicial review proceedings. In the event that Maxol has sufficient standing, then the question arises as to whether the grant of planning permission by Bord Pleanála is invalid by virtue of that mistake. I, therefore, turn first to the question of whether Maxol has standing.

6. Does Maxol have standing to rely on the Mistake?
6.1 In *Harding v. Cork County Council* [2008] 4 I .R. 318, the Supreme Court was required to consider the meaning of "substantial interest" as used in the 2000 Act as amended. That term had given rise to a significant amount of judicial determination up to that point. For the reasons set out earlier, the question of the precise meaning of substantial interest is unlikely to be of any great relevance into the future having regard to the provisions of the 2011 Act, which revert the test to one of sufficient interest.

6.2 In *Harding* differing views were expressed by the three members of the Supreme Court on at least certain aspects of the interpretation of the term "substantial interest". However, the differences do not seem to me to be relevant to the question which I have to address in this case. In the course of his judgment Murray C.J. expressed the view that, in addition to a substantial environmental interest, an applicant might have standing by virtue of a substantial interest arising out of a breach of statutory procedure which was personal and peculiar to the applicant him or herself (rather than of a generalised nature). Kearns J., at p. 359, expressly disagreed with the views expressed by Murray C.J. on "the scope of the objector's entitlements". Finnegan J. considered that the only procedural point which the applicant in the case in question could make which was peculiar to himself was insubstantial as a point in itself and could not, therefore, form the basis of leave to seek judicial review. In those circumstances Finnegan J. found it unnecessary to decide whether process grounds could, of themselves, be sufficient to establish a substantial interest so as to give standing. There is, therefore, no definitive ruling by the Supreme Court as to whether process grounds can confer standing under the substantial interest test. However, no process grounds are relied on in this case so that the difference between the judgments of the Supreme Court in *Harding* is not material to the question which arises in these proceedings.

6.3 So far as environmental interest is concerned there was no difference between the members of the court. Murray C.J. indicated that he agreed with the views of Kearns J. on the question of the proper approach to an assessment of a substantial environmental interest. At p. 354 Kearns J. noted that the approach which I had identified in this Court in *Harding*, at para. 3.11, was the correct approach to be adopted by the court in assessing whether a particular applicant has or has not a substantial interest. At para. 3.11 of my judgment in *Harding v. Cork County Council* [2006]JEHC 295, I found that:

> "It seems to me, therefore, that having identified the interest which an applicant has either expressed (or might be taken to have been prevented from having expressed) the court should, by reference to that interest, identify the importance of the interest by reference to criteria such as:
>
> > (a) the scale of the project and the extent to which the project might be said to give rise to a significant alteration in the amenity of the area concerned. The greater the scale and the more significant the alteration in the area than the wider range of persons who may legitimately be able to establish a substantial interest;
> >
> > (b) the extent of the connection of the applicant concerned to the effects of the project by particular reference to the basis of the challenge which he puts forward to the planning permission and the planning process;
> >
> > (c) such other factors as may arise on the facts of an individual case."

6.4 Of particular relevance to this case seems to me to be subpara. (b) where it is indicated that the extent of the connection of the applicant to the effects of the project by particular reference to the basis of the challenge which he puts forward to the planning permission and the planning process is a significant factor in assessing the applicant's standing. The challenge put forward in this case is to the effect of the grant of planning permission to Mr. Crowley on the general Clonakilty Waste Water Treatment Facility. There is no suggestion in the evidence that the relevant effect on Maxol would be any greater than the effect on any other person or business living or operating in the catchment area of the Clonakilty Waste Water system. While it is true, therefore, that Maxol is next door to Mr. Crowley's proposed development, the effect on Maxol "by particular reference to the basis of the challenge" is no different to the effect on anyone else in Clonakilty.

6.5 If, therefore, Maxol had challenged the decision of Bord Pleanála by reference to some of the other issues which were raised in the planning process (such as whether there should be a filling station in the location in question in the first place), then there could be little doubt that Maxol would have standing. Similarly any questions concerning the configuration and layout of the station would have a particular and peculiar effect on the occupiers of neighbouring properties and also would thus give Maxol standing. However, none of those questions arise in these proceedings. The only issue raised concerns the capacity of the Clonakilty Waste Water Treatment facility. That is an issue which applies equally to all residents and businesses within the Clonakilty catchment area and is in no way personal or peculiar to Maxol in the sense in which those terms have been used in many of the authorities.

6.6 In those circumstances it does not seem to me that Maxol has established a substantial interest in the specific issues which are sought to be raised in these proceedings. It follows that Maxol lacks standing to maintain these proceedings. It follows, in turn, that it is inappropriate to give Maxol leave to seek judicial review and I, therefore, decline to grant that leave. In those circumstances the substantive judicial review simply does not arise. Likewise it is unnecessary to address the question of whether the mistake made in this case would have been sufficient to render the planning permission invalid.

7. Conclusions

7.1 In summary, I am not satisfied that Maxol has made out a case for having a substantial interest sufficient to maintain the capacity grounds having regard to the fact that those grounds apply equally to any other resident or business in Clonakilty. By virtue of the fact that Maxol did not raise the issues which constituted the inconsistency grounds and the ambiguity grounds during the planning process, Maxol also lacks the capacity to raise those grounds in these judicial review proceedings.

7.2 It follows that Maxol lacks standing to maintain these proceedings and that leave to seek judicial review must accordingly, be refused. It further follows that it is unnecessary to deal with the substantive judicial review application.