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THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 823 J.R.]

BETWEEN

SWORDS CLOGHRAN PROPERTIES LIMITED

APPLICANT

AND
FINGAL COUNTY COUNCIL

RESONDENT

Judgment of Mr. Justice Herbert delivered on the 29th day of June 2006

Facts

1. On 22nd December, 2004, the applicant herein made an application to the Respondent seeking a grant of planning permission for:-

> (a) A 3 to 4 storey, 100 bedroom hotel with a 200 seat restaurant, bar and conference facilities and parking space for 181 motor cars, and,
>
> (b) A 3 level park and ride facility, constructed partly below ground level and rising to 5.3 metres above ground level, with 2,038 parking spaces, a bus and ticket station, a service block and a café, and 24 all-weather "5 aside" playing pitches and a clubhouse on the third level.

2. On 24th February, 2005, the Respondent made a decision refusing planning permission for this development.

3. On 21st March, 2005, the Applicant made, what is described as, "a planning application for a revised development", for:-

> (a) a similarly described hotel but with 272 rather than 181 car parking spaces, and,
>
> (b) 6 all-weather tennis courts, 5 all-weather "5 aside" playing pitches, 1 all-weather hockey pitch, 58 car parking spaces and 625 square metre sports administration centre, (including a 70 square metre shop).

4. With this, "revised application" the Applicant furnished an opinion from senior counsel advising that it was not in breach of the provisions of s. 37(5) (a) of the Planning Development Act, 2000.

5. On 22nd March, 2005, the Applicant lodged an appeal to An Bord Pleanála against the decision of the Respondent of 24th February, 2005, refusing the initial application for planning permission.

6. On 19th April, 2005, the Respondent determined that it could not consider the "revised application" of 21st March, 2005, because of the appeal lodged with An Bord Pleanála on 22nd March, 2005, against the refusal of the initial planning application and, returned the application and all other information furnished therewith to the Applicant.

7. On 12th May, 2005, the Applicant returned the application of 21st March, 2005, to the Respondent and insisted that the Respondent make a determination either to grant or to refuse planning permission on or before 2nd June, 2005. On 16th May, 2005, the Respondent again returned the application and all accompanying documents to the Applicant stating that it could not consider the application in the circumstances.

8. A Memorandum dated 18th April, 2005, from Gina Haye, and Executive Planner to Anne-Marie Farrell, a Senior Executive Officer of the Respondent was exhibited in affidavit evidence. It is entitled, "Compliance with s. 37(5) Planning Development Act, 2000" and *inter alia* it states as follows:-

> "It is considered that the proposal detailed in F05A/0354 is substantially the same as that of F04A/1835, which is currently on appeal to An Bord Pleanála. This relates to the fact that the hotel appears identical to that in the previous application, and that the proposal also makes reference to organised recreational facilities. The only substantial point of difference is that the current application omits the park-n-ride scheme."
>
> As stated previously, it is considered that any development of the nature proposed would impact on the extent to which there is a green belt providing a clear definition between Swords and Dublin City. It is this principle on which the Board's decision will be crucial, and which I consider that we cannot pre-empt by accepting Reg. Ref. F05A/0354, as it is substantially the same development, ie. a hotel and recreational facilities. As such, I would advise that the proposal is the same under the meaning of s. 37(5) of the Planning Development Act, and recommend that the application be returned to the Applicant until such time as a decision of An Bord Pleanála on Reg. Ref F04A/1835 is forthcoming.
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> Should the Applicant choose, he also has the right to appeal to An Bord Pleanála regarding the Council's decision on this matter."

9. By Order made 29th July, 2005, the High Court (O'Sullivan, J.) granted leave to the applicant to seek the following principal reliefs *inter alia*, by way of Judicial Review:

> 1. An Order of Certiorari, by way of an application for judicial review quashing the decision of the Respondent made on or about 19th April, 2005, that the application for permission submitted by the Applicant under register reference F05A/0354 was an application for the same Development or for development of the same description as an application for permission for development which was the subject of an appeal to An Bord Pleanála (the "decision").
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> 2. A Declaration, by way of an application for judicial review, that the Respondent in purporting to make the Decision acted ultra vires and/or without or in excess of jurisdiction.
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> 3. A Declaration by way of an application for judicial review, that the Decision is null and void and of no legal effect.
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> 4. A Declaration by way of an application for judicial review that at decision by the Respondent to grant permission on

foot of the application lodged by the Applicant under register reference F05A/0354 is deemed to have been made on 2nd June, 2005.

5. An Order of Mandamus by way of an application for judicial review, requiring the Respondent to grant permission to the Applicant forthwith in the terms of the application lodged by the Applicant under register reference F05A/0354.

6. In the alternative, if necessary, an injunction (including an interim or interlocutory injunction) requiring the Respondent to grant permission to the Applicant in the terms of the decision made by the Respondent on 2nd June, 2005, to grant permission on foot of the application lodged by the Applicant under register reference F05A/0354.

The Issues

10. At the hearing of this application for judicial review Senior Counsel for the Applicant submitted, that the Respondent had erred in law including that the provisions of s. 37(5)(a) of the Planning and Development Act, 2000, applied to the application for planning permission, "made, received and registered on 21st March, 2005" Mr. Macken, Senior Counsel for the Applicant argued that what is prohibited by that subsection is the *making* of an application for planning permission for the same development or for development of the same description which is the subject of an undetermined appeal to An Bord Pleanála on the date on which the application is made.

11. Mr. Macken submitted that the development proposed in the planning application made on 21st March, 2005, was intentionally and significantly different in scale, type and composition from that made on 22nd December, 2004. The only element common to both, he said, was the hotel. In the application made on 21st March, 2005, the "Park-n-Ride" facility had been totally omitted, the sports facilities had been substantially re-designed and the floor area of the development had been reduced from 79,125 square metres in the application made on 22nd December, 2004, to 9,846 square metres in the application made on 21st March, 2005.

12. Mr. Macken argued that the second application for planning permission to the Respondent was made on 21st March, 2005, and that the appeal against the refusal of the first application for planning permission was not made to An Bord Pleanála until 22nd March, 2005, and therefore s. 37(5)(a) of the Act did not apply as there was no appeal to An Bord Pleanála in existence at the time the second application was made.

13. Mr. Macken submitted that s. 37(5)(c) of the Act, which provides that a dispute as to whether or not an application for planning permission is the same development or is for development of the same description as an application for permission which is the subject of an appeal to An Bord Pleanála, may be referred to An Bord Pleanála for determination, does not operate to deprive the Applicant of the relief sought. He submitted that the use in the subsection of the word "may" rendered the subsection merely optional so that the jurisdiction of the Court to determine the matter is not in any manner ousted. He further submitted that the issue of the proper construction and interpretation of s. 37(5)(a) and whether or not it has any application to the facts of the instant case is a matter of law appropriate to be resolved by this Court and not by An Bord Pleanála. He referred to the decisions in: *P. and F. Sharpe Limited v. Dublin City County Manager* [1989] I.R. 701 at 721, per Finlay, C.J; *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 at 534 per Barr, J, and *Ardoyne House Management Limited v. Dublin Corporation* [1998] 2 I.R. 147 per Morris, P.

14. Mr. Butler Senior Counsel for the Respondent accepted that the Respondent had concluded, as evidenced by the Memorandum of 18th April, 2005, that the application of 21st March, 2005, was for the "same development" as the application of 22nd December, 2004, against the refusal of which an appeal had been made by the applicant to An Bord Pleanála on 22nd March, 2005. He submitted that this was an issue of fact and not of law. Section 37(5)(c) he said, provided an alternative remedy whereby this very issue could be dealt with by a body uniquely qualified to deal with it. Instead of seeking to have the matter resolved by means of a reference to An Bord Pleanála pursuant to the provisions of s. 37(5)(c) of the Act, after 16th May, 2005, the Applicant had waited until the eight week period allowed by s. 34(8)(a) of the Act of 2000, to the Respondent to determine the application had expired before taking any step to address this issue. The Court he submitted should have regard to this tactic and exercise its discretion to refuse judicial review.

15. Mr. Butler submitted that even though the application was registered by the Respondent as made on 21st March, 2005, the Respondent had eight weeks within which to consider it and to give a decision. He argued that s. 37(5)(a) of the Act of 2000, must be given a purposive interpretation. The mischief which the Legislature intended to prevent by enacting the subsection was the simultaneous existence before the Planning Authority and An Bord Pleanála of applications in respect of the same development or development of the same description with the possibility of different outcomes thereby bringing the planning legislation into disrepute and undermining the appellate status of An Bord Pleanála. Therefore, he submitted, the Respondent was correct and acted intra vires in declining to consider the application and in returning to the Applicant all the documents furnished with the application made on 21st March, 2005, on the Respondent becoming aware of the appeal lodged by the Applicant with An Bord Pleanála on 22nd March, 2005, against the refusal of the planning application made on 22nd December, 2004. There was therefore no application before the Respondent to which the default permission provisions of s. 34(8)(f) of the Act of 2000, could apply. Mr. Butler further submitted, relying upon the decision *in State (Abenglen Properties Limited) v. Mayor Aldermen and Burgesses of Dublin* [1984] I.R. 381, that even if the Respondent should be held to have been in error in declining to consider and decide the application for planning permission made by the Applicant on 21st March, 2005, it was still a "decision" and as there are no express provisions in the Planning Development Act, 2000, to the contrary, accordingly, he said, even if the refusal to consider the application of 21st March, 2005, was set aside by this Court, time did not run so as to entitle the Applicant to a planning permission by default. In addition he pointed out that s. 34(8)(f) of the Act 2000, makes no reference to s. 37(5)(a) of that Act and, s. 34(8)(f) must be regarded as intended by the Legislature to be exhaustive of the circumstances in which a planning permission by default might be obtained.

16. While accepting that s. 34(8)(f) of the Act 2000, contains no reference to s. 37(5)(a) of that Act, Mr. Macken replied that s. 34(8)(a) of the Act, - requiring a Planning Authority to make its decision within a period of eight weeks beginning on the date of receipt by it of the application, - applies to all situations where a decision is not made in the time allowed other than those where an extension of the eight week period is specifically provided for by the other paragraphs of subsections 34(8),- that is, (c), (d), and (e), and by s. 34(9).

17. Mr. Macken submitted that s. 37(5)(a) refers expressly to "the making" and not to, "the determination" of the application by the Planning Authority before An Bord Pleanála has made its decision or the Appeal is withdrawn, or the Appeal is dismissed by An Bord Pleanála pursuant to the provisions of ss. 133 or 138 of the Act of 2000. In the instant case he said that the application was so made before the appeal was taken to An Bord Pleanála. The language of the subsection is, he said, clear and unambiguous and if the provisions of the subsection are insufficient to deal with the sort of situation presented by the instant case, it is a matter for the Legislature and not for this Court to remedy the shortcoming.

18. Mr. Macken argued that the decision in *Abenglen Properties Limited* relied upon by the Respondent was distinguishable on its facts from the instant case. In that case, he said, the Planning Authority had given notice of a decision to grant planning permission and had done so within the period of two months from the date of receipt of the planning application, the period that was then allowed by s. 26(4) of the Act of 1963. The Planning Authority had fully considered the application on its merits but had acted *ultra vires* their powers in changing the essential character of the application from mostly office space with some residential units to an essentially residential development with some subsidiary office accommodation. In the instant case, he said, the Planning Authority had misdirected itself in law and had on two occasions declined to make a planning decision and had returned a planning application and all associated documents to the Applicant.

The Law

19. Section 34 subsections (a) and (f) of the Planning Development Act, 2000, provide as follows:-

> "(a) Subject to paragraphs (b), (c), (d) and (e) where –
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> (i) An application is made to a Planning Authority in accordance with the permission regulations for permission under this section, and
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> (ii) Any requirements of those regulations relating to the application are complied with,
>
> (b) A Planning Authority shall make its decision on the application within a period of 8 weeks beginning on the date of receipt by the Planning Authority of the application."
>
> "(f) Where a Planning Authority fails to make a decision within the period specified in paragraph (a), (b), (c), (d), or (e), a decision by the Planning Authority to grant the permission shall be regarded as having been given on the last day of that period."

20. Section 34(9) of the Act of 2000, is in the following terms:-

> "Where within the period of 8 weeks beginning on the date of receipt by the Planning Authority of the application, the Applicant for a permission under this section gives to the Planning Authority in writing his or her consent to the extension of the period for making a decision under subsection (8), the period for making the decision shall be extended for the period consented to by the Applicant."

21. Section 37(5) of the Act of 2000, provides as follows:-

> "(a) No application for permission for the same development or for the development of the same description as an application for permission for development which is the subject of an appeal to the Board under this section shall be made before –
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> (i) The Board has made its decision on the appeal,
>
> (ii) The appeal is withdrawn, or
>
> (iii) The appeal is dismissed by the Board pursuant to s. 133 or 138.
>
> (b) Where an application for permission referred to in paragraph (a) is made to a Planning Authority, the Planning Authority shall notify the Applicant that the application cannot be considered by the Planning Authority and return the application and any other information submitted with the application in accordance with the permission regulations, and any fee paid.
>
> (c) A dispute as to whether an application for permission is for the same development or is for development of the same description as an application for permission which is the subject of an appeal to the Board may be referred to the Board for determination.

Conclusions

22. In my judgment the Planning Authority did not fail to make a decision in this case within the period of eight weeks beginning on the date of receipt by it of the application for planning permission. The determination by the Planning Authority on 19th April, 2005, and, on 16th May, 2005, that it was precluded from considering the planning application of 21st March, 2005, because of the provisions of s. 37(5)(a) of the Act of 2000, was in my judgment "a decision" for the purposes of s. 34(8)(a) of the Act of 2000, whether or not that decision was correct or incorrect. I am satisfied that the principles of law expounded in *State (Abenglen Properties Limited) v. Mayor Aldermen and Burgesses of Dublin* (above cited), apply to the measures taken by the Planning Authority in the instant case and the facts of the instant case though different from those in the *Abenglen Properties Limited* case are not so essentially different as to render that decision distinguishable.

23. In that case the Planning Authority made a decision on the merits, - even though subsequently determined to have been invalid, - within the period permitted by the statute. In the instant case the Respondent made a decision that the planning application of 21st March, 2005, could not be considered by it on its interpretation of the facts and having regard to the provisions of s. 37(5)(a) of the Act of 2000. This was a form of decisions specifically provided for by the provisions of s. 37(5)(b) of the Act of 2000. In my judgment whether that decision was correctly or incorrectly taken it was still a decision taken which it was open to the respondent to take and which was taken within the period permitted by s. 34(8)(a) of the Act of 2000. In view of the clear statutory provisions of s. 37(5)(a) of the Act of 2000, I find that the "decision" referred to in s. 34(8)(a) of that Act is not confined to a determination of an application for planning permission on the merits. In these circumstances I must decline to accept the argument of Senior Counsel for the applicant that the decision in *Abenglen Properties Limited* (above cited) is distinguishable on the grounds that the respondent failed in the instant case to make a "decision" within the permitted time.

24. I find that the decision of the respondent to notify the applicant that the application for planning permission of 21st March, 2005,

could not be considered by it because it considered that the Appeal lodged with An Bord Pleanála on 22nd March, 2005, also by the applicant, was for the "same development" and, that the provisions of s. 37(5)(a) of the Act of 2000 therefore applied, was incorrect. I find that the fact, that the proposed development for which planning permission was sought on 21st March, 2005, was not the "same development" for which planning permission was sought on 22nd December, 2004. It may well have been, "development of the same description", but Senior Counsel for the respondent accepted in argument and, I am quite satisfied, correctly accepted, that the basis of the decision by the respondent to apply the provisions of s. 37(5)(a) was that it was the "same development" and not that it was, "development of the same description", - a very much wider and more flexible concept. These terms are given no definition in the Act of 2000, which is scarcely surprising for, I find that for an application to be "the same" it must, on a consideration of the facts be in every material respect an exact repetition of a previous application for planning permission. On the facts of the instant case I find that this is clearly not the case. There are very significant differences in the scale and design of the sports and vehicle parking facilities and the "Park-n-Ride" feature of the development, a very significant feature of 22nd December, 2004, application is abandoned in the application of 21st March, 2005.

25. If the dispute between the parties related solely to this issue, having regard to the provisions of s. 37(5)(c) of the Act of 2000, I would have declined to exercise the discretion of the Court to grant judicial review. An Bord Pleanála is an independent statutory body uniquely equipped to resolve the essentially factual issue of whether an application for planning permission is for "the same development" or for "development of the same description" as an application for planning permission which is the subject of an Appeal to itself. While undoubtedly the terms of s. 37(5)(c) are permissive rather than mandatory the existence of this alternative remedy would militate strongly and, in my judgment conclusively against the exercise by this Court of its discretion in favour of the applicant. The appropriate remedy would have been for the applicant to have immediately and, certainly within the period of eight weeks provided by s. 34(8)(a), to have sought a ruling from An Bord Pleanála. If this had been the sole issue between the parties I am satisfied that it would fall to be resolved in favour of the respondent by the application of the principles set out by the Supreme Court per Denham J. in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 at 217, as further applied by that Court in *O'Donnell v. Tipperary (South Riding) County Council,* (decision given 18th March, 2005) and, reported at [2005] 2 I.R. 483 at 488, and by Costello J. (as he then was), in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660.

26. However, this question of "same development" was not the sole issue between the parties. It was submitted by Senior Counsel for the applicant that even if the application of 21st March, 2005 was found to be for the "same development" as the application of 22nd December, 2004, the respondent had still misdirected itself in law in concluding that it could not determine the application by reason of the provisions of s. 37(5)(a) of the Act of 2000. He submitted that since the Appeal of the applicant to An Bord Pleanála was made on 22nd March, 2005, the day following the application of 21st March, 2005, to the respondent, when the latter was made the former was not then the subject of an Appeal to An Bord Pleanála. He argued that the phrase, "which is the subject of an Appeal to the Board", could reasonably be only interpreted as relating to the situation existing at the moment when the application in question was made and not at some subsequent date.

27. While I am prepared to accept that this issue could not properly be the subject of a reference to An Bord Pleanála pursuant to the provisions of s. 37(5)(c) of the Act of 2000, I am unable to agree with the submission. As a matter of grammar "is" with an active or perfect participle or in a particular context, is capable of connoting former, present and future time and an instant or continuing situation. In my judgment the subsection clearly provides that the time before which the application may not be made is:

> (1) before the Board has made its decision on the Appeal,
>
> (2) before the Appeal to the Board is withdrawn, or
>
> (3) before the Appeal is dismissed by the Board pursuant to s. 133 or 138 of the Act.

28. It identifies the Appeal in question as that relating to an application for permission for the same development which is the subject of an appeal to the Board. I find nothing in the language of the subsection which requires that this Appeal to An Bord Pleanála must necessarily have predated the application to the Planning Authority for planning permission for the same development. Considering the purpose of the subsection in the context of the statute read as a whole I am satisfied that "is" may properly be read as referring to either an instant or a continuing situation, a situation that is, where the Appeal either predates the application for planning permission or is lodged before the application for planning permission has been considered by the Planning Authority for the purpose of reaching its decision. If the Appeal to An Bord Pleanála is lodged after the application for planning permission the statute requires, (s. 37(5)(b)), that the Planning Authority, "shall notify the applicant that the application cannot be considered by the Planning Authority" and, return all documents, information and fees paid by the applicant. Paragraph (c) of subsection (5) of s. 37 of the Act is capable of applying whether the Appeal to An Bord Pleanála is lodged before the application for planning permission to the Planning Authority or vice versa.

29. If there was any ambiguity in the wording of s. 37(5)(a) of the Act of 2000 and – I am satisfied that on a careful reading of that paragraph in the context of the Act as a whole, there is none, - the Court must apply the principles of statutory interpretation as expounded by Denham J. in *Director of Public Prosecution (Ivers) v. Murphy* [1999] 1 I.R. 98 at 109-111, (Supreme Court) and by Hardiman J. delivering the judgment of the Supreme Court *in E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 538 at 541 and, "adopt a purpose of approach which seeks to give effect to the true nature of this legislation.", (Per Griffiths L.J., in *Pepper v. Hart* [1993] A.C. 593 at 617), "But without encroaching on the constitutional role of the Oireachtas as the legislative organ of the State." (per Denham J., case cited p. 111).

30. In my judgment the narrow and strict constructionist interpretation of s. 37(5)(a) contended for by the applicant would be to defeat the manifest intention of the Oireachtas in enacting that paragraph. I am satisfied that the purpose of the Legislature was to assert the primacy of the decision of An Bord Pleanála as the appellate body and to prevent the altogether inappropriate circumstance of the same issues being simultaneously considered by the Planning Authority and by An Bord Pleanála with the unacceptable possibility of divergent conclusions. Such a situation would bring the extremely important planning process into inevitable disrepute and undermine public trust and confidence in it.

31. In the case of *Re M. (a minor)* [1994] 3 A.E.R. 319 (H. of L.), Lord Templeman referred to, "The tyranny of language."

32. when interpretating the phrase, "Is suffering significant harm." in the context of a Child Care Order. Lord Templeman said:

> "The purpose of the Act [Children Act, 1989 s. 3] could not have been that temporary measures taken to protect the child should preclude a long-term discussion about the child's welfare. Accordingly it was inappropriate to be preoccupied with the present tense used in the Statute – as long as the conditions subsisted where the Local Authority made its application the Court had jurisdiction to decide whether or not to make a care order."

33. In another Child Care Order case in Great Britain (*D. (a minor) v. Berkshire County Council* (1987) A. C. 317), a baby was taken into care suffering from drug withdrawal symptoms from birth. On a literal reading of the phrase, "baby's heath is being impaired", the statutory test could never be met on the particular facts of the case. The Court construed the phrase as applying to the continuous period from birth and continuing at the time the Order was made and held that the Order was valid.

34. I am satisfied that the restrictive interpretation of the phrase, "which is subject to an appeal to the Board" advanced by the applicant in the instant case is contrary to the grammatical and therefore the literal meaning of s. 37(5)(a). But even if this were not so, it is contrary to the clear intention of the Legislature to remedy by means of s. 37(5)(a) the particular mischief which I have previously identified and this is an intention which this Court in construing that section is obliged to promote to the greatest possible extent within the limits of its interpretive role.

35. The Court will therefore dismiss this application.