Neutral Citation Number: [2007] IEHC 86

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2006 No 1139 J.R.]

BETWEEN

USK AND DISTRICT RESIDENTS ASSOCIATION LIMITED

APPLICANT

AND
AN BÓRD PLEANALA
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
GREENSTAR RECYCLING HOLDINGS LIMITED AND
KILDARE COUNTY COUNCIL

NOTICE PARTIES

Judgment of Mr. Justice Kelly delivered on the 14th day of March 2007

Introduction
1. The main issue dealt with in this judgment is the discretion of the court to remit a matter to an inferior tribunal for reconsideration by it, subsequent to the court granting *certiorari* to quash that tribunal's decision.

2. The question falls for consideration in circumstances which I will now outline.

Facts
3. On 24th July 2006, An Bórd Pleanala (the Board) decided to grant planning permission to Green Star Recycling Holdings Limited (Greenstar) for the development and operation of a landfill capable of accepting 200,000 tons of non-hazardous waste per annum. The development is planned for Usk, Kilcullen, Co. Kildare. The permission has a duration of ten years.

4. On 22nd September 2006, the applicant commenced proceedings seeking leave to apply for judicial review of the Board's decision. That application was transferred into the Commercial List and was the subject of judicial case management. During the course of that process the solicitors for the Board, by letter of 23rd January 2007, informed the applicant's solicitors that the Board had decided to concede both the application for leave to seek judicial review and the substantive application itself.

5. Two reasons were given for this decision on the part of the Board. The first was "the absence of satisfactory records leading to the decision to grant permission as it ultimately issued". The second was "the fact that, for a period of time, the files in this matter were not available to the public". The Board described these as "unusual circumstances".

6. The letter then went on to explain in some detail how those circumstances arose. That explanation was subsequently put before the court in two affidavits. One was sworn by Brian Swift who is a member of the Board. The other was sworn by John O'Connor the Chairman of the Board.

Mr. Swift's affidavit
7. In his affidavit Mr. Swift recounts the fact that following an oral hearing, the Board's Inspector made a report and recommendation dated 19th July 2005. The Inspector recommended a refusal of the permission citing four reasons for such refusal. Mr. Swift received the Inspector's report and recommendations on 21st July 2005.

8. Mr. Swift presented the file to the Board on 15th August 2005, and the Board determined to, and did, seek further information from Greenstar. A response to that was received on 9th January 2006. The response was circulated to interested parties.

9. On 9th June 2006, the Inspector provided an assessment of both Greenstar's response to the notice seeking further information and third party and other observations thereon. At that time she provided the Board with amendments to the text of her original report of 19th July 2005. This second report from the Inspector contained three reasons for the refusal of the permission, one of the original reasons having been overtaken by the information provided to her. The Inspector also furnished extracts of her original report indicating in manuscript the amendments which had been made to it. She handed those documents directly to Mr. Swift on 9th June 2006, without any covering memorandum or other document.

10. The matter came before the Board again on 20th June 2006. At that stage, the Board had before it both reports of the Inspector. The Board decided to grant conditional permission despite the recommendations of the Inspector. At that meeting it was agreed that the Inspector would be requested to draft the conditions in accordance with the Board's determination. Mr. Swift communicated that request to the Inspector. However he omitted to request the drafting of a condition in relation to three matters agreed upon by the Board relating to road conditions and a community gain/liaison committee.

11. The Inspector prepared conditions in relation to Mr. Swift's request. The conditions as drafted by the Inspector were sent to Mr. Swift together with a memorandum of 22nd June 2006, indicating that the Inspectors report had been amended. On that day he arranged for those conditions together with the Board direction he had prepared to be sent to the processing section of the Board in order to draw up the formal order. He is unable to recall whether the conditions drafted by the Inspector were discussed at a further formal Board meeting.

12. Mr. Swift went on annual holidays on the evening of 22nd June, and returned on 24th July. On his return, the Chairman of the Board indicated to him that he was not satisfied that the direction which Mr. Swift had drafted fully reflected all the Board's considerations in overturning the Inspector's recommendation to refuse permission. He asked Mr. Swift to amend it. The purpose of the amendments was primarily to ensure that the reasons for departing from the Inspector's recommendation reflected those settled upon by the Board at its meeting on 20th June. Some amendments were also made to the conditions. The Board direction and order in their final form were produced and signed by Mr. Swift on 24th July 2006. The amended final direction was dated as having been signed by him on 22nd June, but this was an oversight. He confirmed that he signed the final version of the direction on 24th July, but omitted to amend the date of signing.

Mr. O'Connor's affidavit

13. Mr. O'Connor confirms that at the meeting on 20th June 2006, it was decided to grant permission subject to conditions. There was a discussion of the substance of the conditions which were to be attached to the permission. It was agreed that the Inspector who had dealt with the case would be requested to prepare a draft of the conditions to be incorporated into the decision order. The Inspector provided a draft of the conditions under cover of a memorandum to Mr. Swift on 22nd June. The Chairman believes that the conditions drafted by the Inspector were further discussed by the Board members on 22nd June. No record of such a meeting can be found. Because Mr. Swift was on holidays, Mr. Hunt, the Deputy Chairman of the Board, furnished the file and draft order that had been drawn up to the Chairman. He read the draft order, but did not consider that the reasons and considerations and conditions as set out in the draft adequately conveyed the Board's decision. He was of the view that they needed to be expanded in certain respects. He decided not to sign the draft order but rather waited until Mr. Swift returned from leave so that he could discuss the matter with him. That discussion took place on Mr. Swift's return and he was in agreement that the direction giving the Board's reasons and considerations should be expanded and three conditions should be added. That was reflected in the revised Board direction and order as signed by Mr. Swift on 24th July 2006.

The Board's concessions
14. The Board concedes that there are a number of unusual circumstances in the case. The absence of satisfactory records leading to the decision to grant permission is such that it cannot establish that the conditions drafted by the Inspector were the subject of a formal Board meeting. It is on that basis that it concedes victory to the applicant.

15. The Board also accepts and indeed apologises for the fact that its file was not available to the public for a period of time. Whilst accepting that fact, counsel contends that it, of itself, would not be enough to vitiate the decision of the Board.

16. The sole basis upon which the Board is conceding the applicant's claim is because of its failure to record adequately or at all its decision approving the conditions attached to the decision of 24th July 2006, thereby disabling it from establishing that the decision in question was made in accordance with law.

17. I have set out the factual position as deposed to in the affidavits of Messrs Swift and O'Connor in some detail. I have done so for two reasons.

> First, it is necessary for me to make certain findings before I can grant *certiorari*.
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> Secondly, the applicants have sworn three additional affidavits subsequent to the two from which I have just quoted. The first, sworn by the applicant's solicitor, runs to some seventy two paragraphs and conducts a detailed analysis of the Board's solicitor's letter of 23rd January 2007, and the material contained on the Board's file. The affidavit seeks to raise certain questions concerning what went on in the Board subsequent to the Inspector's first report. There is also an affidavit sworn by Mark Rave who is a planning consultant. He, having considered all of the evidence, concludes that the Board dealt with the appeal in an unusual and entirely unsatisfactory manner. Finally, there is a short affidavit from Mr. Patrick F. Higgins who is a member of the applicant company. He says that the members of the applicant are very concerned at the facts disclosed and believe that they have not been fairly treated in the planning process from 3rd August 2005, to date. The 3rd August 2005, is chosen because it was at that point that it was decided that the Inspector should draft a request for information which subsequently became a s. 10 request.

18. At the end of his lengthy affidavit the applicant's solicitor says that in the light of all that is recounted in it his clients:

> "… have no faith in the objectivity or impartiality of the Board in respect of the within development. The manner in which this appeal has been dealt with has been peculiar throughout. The Board at all times has seemed determined to overcome all adversity in respect of the within permission and has tied itself up in knots in attempting to explain its decision making process in deciding to grant this permission.
>
> As against this, my clients have been put to enormous expense in the course of this appeal, particularly in engaging experts, solicitors and counsel to attend an oral hearing and then to respond to an *ultra vires* section 10 request."

19. He asks the court to refuse to remit the case to the Board and simply to grant *certiorari*.

Certiorari
20. In circumstances where the Board concedes the relief sought by the applicant, there is no doubt but that an order of *certiorari* ought to be granted. That much is accepted by all parties before the court.

21. I will grant *certiorari* solely on the ground conceded by the Board. Whilst the applicant raises other questions which might arguably provide additional grounds for granting *certiorari*, it is not in anybody's interest that the public time of the court or the expensive time of the litigants and their advisers be expended on such an exercise. Judicial restraint dictates that the court should confine itself to facts and findings necessary to support the order of *certiorari*. It should not go beyond them.

Findings
22. I grant *certiorari* to quash the decision in suit. I do so on the following findings which I make on the basis of the affidavit evidence placed before me by the Board.

23. The Board agreed not to follow the recommendation of its Inspector but rather to grant conditional permission for the development. It also agreed the terms of the conditions to be attached to the permission.

24. Subsequently the conditions in question were drafted.

25. There is no record of any decision of the Board approving of the conditions as so drafted. Some members of the Board have no recollection of the conditions as so drafted being considered at any subsequent meeting of the Board.

26. Because of these facts the Board is unable to withstand a judicial review of its decision and so concedes the applicant's entitlement to *certiorari*.

Grounds
27. The unfortunate state of the Board's records emerged during the course of judicial case management of this application. These facts were not, and indeed could not have been, known by the applicant at the time when it presented the relevant papers seeking judicial review. It is common case that the grounds relied upon by the applicant in its Statement of Grounds do not accommodate the

basis upon which *certiorari* is being granted. Consequently, it is necessary that the applicant be given leave to amend its grounds. No objection to this course is taken by any party but there was some dispute as to the precise wording of the amended grounds.

28. I am of the view that the amendment to the grounds should be sufficient to accommodate the order being made and the reasons for it. The draft proposed by the applicant goes further than that and would not be justified having regard to the limited basis upon which *certiorari* is being granted. Consequently I will permit an amendment of the grounds so as to read as follows.

> "The Board failed to record adequately or at all its decision approving the conditions attached to the decision of 24th July, 2006, and is not in a position to establish that the aforesaid decision was made in accordance with law."

Remission
29. The applicant submits that the Court should simply grant an order of *certiorari* and not remit the case for further consideration by the Board. Both the Board and Greenstar disagree. I will consider the parties respective arguments on the merits later in this judgment, but first it is necessary to treat of the power of the court to remit.

The Power to remit
30. Since the coming into force of the Rules of the Superior Courts of 1986, the Court is granted an express power to remit a decision in respect of which an order of *certiorari* has been made. This is contained in O. 84, r. 26(4) which states:-

> "Where the relief sought is *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."

31. No similar provision is to be found in earlier editions of the Rules of the Superior Courts. It was suggested in argument that the provision is declaratory of an inherent jurisdiction of the court. That argument gains support from observations contained in Collins and O'Reilly "*Civil Proceedings and the State*" (2nd edition) where the authors' state that the High Court has always had jurisdiction to command a tribunal to rehear a case where it has quashed its order. They cite in support of that proposition the decision in *Rex v. Northhumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338 and an article contained in the Irish Criminal Law Journal published in 1993 intituled "*Certiorari* followed by remittal". The proposition is supported by the observations of Finlay C.J. in *Sheehan v. District Judge Reilly* [1993] 2 I.R. where in considering the provisions of O. 84, r. 26(4) he said:-

> "It must first clearly be stated that this rule which, on the face of it, gives to the court a discretion as to whether or not to remit a matter in which an order has been quashed for further consideration, cannot, having regard to the limitation of the powers vested in the rule making authority pursuant to the Courts of Justice Acts be the grant of any new or different power that is not already vested in the court by virtue of statute or by virtue of inherent jurisdiction."

32. Interesting as this proposition may be, it is quite unnecessary for me to consider it since all I am doing in the instant case is deciding whether or not the discretion undoubtedly granted by the relevant rule ought to be exercised in the manner urged by Greenstar and the Board.

The exercise of the discretion
33. The discretion to remit proceedings is 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. For example in *Hoburn Homes Limited v. An Bórd Pleanala* [1993] ILRM 368, Denham J. made an order remitting the matter back to the planning board. She dealt with it in a single sentence in the judgment by observing that it was an appropriate case to do so. Similarly in *Aherne v. Kerry County Council* [1998] ILRM 392, Blayney J. remitted a matter back to the local authority in like manner. In *Hurley v. Motor Insurers Bureau of Ireland* [1993] ILRM 886, Carroll J. similarly referred a matter back to the council of the MIBI in the final sentence of her judgment.

34. The nearest one comes to any consideration of the topic is to be found in the Judgment of Murray J. in *Nevin v. Crowley* [2001] 1 I.R. 113. That was a case involving *certiorari* directed to a district judge concerning a criminal conviction. In the course of his judgment Murray J. said:-

> "This court, in *Sweeney v. Judge Brophy* [1993] 2 I.R. 202 at p. 211, held that the proper exercise of a court's discretion in such a case 'would require that the matter should not be remitted to the district court in circumstances where the applicant has endured enough and the prosecution cannot be acquitted of all the blame for some, at least, of what went wrong at the trial'. This is not to be considered an exhaustive list of relevant considerations concerning the exercise of discretion which could include such matters as the passage of time, any period of imprisonment already served, whether the offence was a serious one or a minor one."

35. These observations do not have much relevance in the context of civil proceedings such as I am dealing with here.

36. I think the best that can be said is 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.

Discretion in the present case
37. The Planning Authority refused permission for this development. Greenstar appealed that decision. An oral hearing took place over a number of days. The Board's Inspector recommended refusal of the permission. The Board disagreed. But there was an imperfection in the way in which it dealt with that disagreement thus giving rise to this application.

38. If the case is not remitted then Greenstar must start all over again. It must go back to the drawing board and present an application to the local planning authority. It was suggested that the development may be one which falls within the ambit of the new infra structure legislation and that the application might perhaps be made to the Board in the first instance. I have insufficient information to know whether this is in fact the case or not.

39. The applicant has no complaint with the way in which the matter was dealt with by the Board until a date subsequent to the Inspector's first report. In his affidavit Mr. Higgins alleges that the applicant has not been fairly treated in the planning process from

the 3rd August, 2005 onwards. That was the date upon which it was decided that the Inspector ought to draft a request for information which ultimately became a s. 10 request. All of the complaints which have been made by the applicant relate to matters which occurred subsequent to the Inspector's first report. In these circumstances, it seems to me that it would be unjust not to remit the case for further consideration by the Board subject to certain conditions and recommendations. To refuse to remit would be disproportionate to the rights and entitlements of Greenstar, having regard to the limited complaints made and the even more limited basis upon which *certiorari* is being granted.

40. Apart from the great expense and inconvenience which would be caused by sending the project back to the drawing board, it would also lead to an inevitable and disproportionate delay in having the matter finally decided. I am firmly of the view that this is an appropriate case in which the court ought to make an order remitting the matter to the Board. However in doing so, I propose to make a number of recommendations which ought to address the applicants' complaints, real or perceived.

41. The applicant contends that it has no faith in the impartiality or objectivity of the Board in respect of the development. At various stages in its affidavit evidence it has described the Board as having dealt with the matter in a peculiar, extraordinary, extremely odd or incredible way. I make no adjudication whatsoever on these allegations since they are not germane to what I have to decide. Even if there is a basis for this lack of faith in the Board, the plain fact is that it is the only body authorised to adjudicate on planning appeals. Consequently, even if I refused to remit the matter and the planning process had to be begin all over again, inevitably it will be the Board that will have to decide on the development. Consequently, any loss of faith that the applicant has is something about which nothing can be done since the Board is the sole body appointed by the legislature to make ultimate decisions on planning applications.

42. That said, however, I propose to make a number of recommendations which, without in any way accepting the validity of any of the complaints made by the applicant, will minimise the risk of further judicial review.

43. Time has passed since the oral hearing was conducted by the Inspector. All of the complaints of the applicant relate to matters which occurred subsequent thereto. Under article 76(3) of the 1994 Regulations the Board is invested with a discretion to reopen an oral hearing even after the report from it has been submitted to the Board. The article reads:-

> "Unless the Board considers it expedient to do so and so directs, an oral hearing shall not be reopened after the report thereon has been submitted to the Board."

44. It is not open to me to direct the reopening of the oral hearing. Indeed to do so would be quite an improper trespass by me upon the discretion vested in the Board. That said, I ought to record that counsel on behalf of the Board indicated that in his view this would be an entirely proper way for the Board to approach the matter. He furthermore assured me that the Board would, of course, be inclined to follow any legal advice proffered to it in this regard.

45. With a view to minimising the risk of further judicial review, it would be prudent and correct for the Board to exercise this discretion and to reopen the oral hearing. That would provide a forum for all of the parties to place up-to-date information before the Inspector and also to agitate any other questions considered appropriate.

46. Counsel informs me that the Board consists of ten members. Only five have had any involvement with this application. Again, I would think it prudent that henceforth the matter remitted to the Board ought to be dealt with and considered only by or from amongst the other five members of the Board. This suggestion is not to be taken as in any way an acceptance by me of the criticisms which have been made in the affidavits on the part of the applicant. There may or may not be substance in them. It is not necessary for me to adjudicate upon them. The suggestion that I make is to ensure that a risk of further judicial review is minimised.

Result

47. *Certiorari* is granted. The decision of the Board of 24th July 2006 granting planning permission is quashed.

48. There will be an order remitting the matter to the Board. I strongly recommend that the Board exercise the power given to it to reopen the oral hearing. That will enable up-to-date information to be placed before the Board's Inspector and for any other matter which is considered appropriate to be dealt with by the Inspector and, ultimately, the Board. I also recommend that further consideration of this matter by the Board be dealt with by members of it who have not had a previous involvement in the case.