

**THE HIGH COURT
COMMERCIAL**

**[2007 No. 1236 J.R.]
[2007 No. 132 COM]**

BETWEEN

PHILIP O'CONNOR

APPLICANT

**AND
AN BORD PLEANÁLA**

RESPONDENT

**AND
KILLARNEY TOWN COUNCIL AND SEAN O'BRIEN**

NOTICE PARTIES

Judgment delivered by Ms. Justice Finlay Geoghegan on the 24th day of January 2008.

1. On 11th July, 2007, the first named notice party granted planning permission to the applicant for a proposed development in Killarney, County Kerry. The second named notice party had made a submission or observation to the first named notice party in respect of the planning application on 20th April, 2007.
2. On 2nd August, 2007, the second named notice party lodged an appeal with the respondent against the said decision granting planning permission to the applicant. The documents lodged included a letter dated 31st July, 2007, addressed to the secretary of the respondent, signed by the second named notice party (which I will refer to as "the Letter of Appeal") and an acknowledgement from the first named notice party dated 23rd April, 2007. The Letter of Appeal does not contain the address of the second named notice party. At paragraph 1.0 of that document, the second named respondent stated inter alia:

"Please find enclosed Killarney Town Council's acknowledgement of receipt of my observation in respect of the subject planning application and a cheque for the sum of €210 representing the third party appeal fee."
3. The enclosed acknowledgment from the first named notice party having recited the particulars of the planning application, states:

"A submission/observation in writing has been received from Sean O'Brien, Knockcullen House, New Road, Killarney, on 20/04/2007 in relation to the above planning application."
4. The respondent has treated the appeal as valid and has indicated in a letter dated 13th September, 2007, to the applicant's solicitor that it considers that the appeal lodged by the second named notice party meets all the criteria of s. 127 of the Planning and Development Act, 2000.
5. The applicant disputes this. He contends that the appeal of the second named notice party does not comply with s. 127(1)(b) of the Act of 2000 insofar as the appeal does not state the address of the appellant. He contends that the appeal is invalid pursuant to s. 127(2)(a) of the Act of 2000.
6. On 24th September, 2007, the applicant issued a motion seeking leave to apply by way of judicial review for an order of *certiorari* of the decision of the respondent to treat the appeal as valid and seeking a declaration that the second named notice party's appeal is invalid. On 22nd October, 2007, an order was made admitting the proceedings to the Commercial List pursuant to O. 63A, r. 4 of the Rules of the Superior Courts, 1986. On the same day, an order was made fixing the date for hearing of the application for leave to apply for judicial review and directing that, in the event that leave is granted, the Court should immediately thereafter proceed to consider the applicant's substantive judicial review application. At the end of the hearing before me, I indicated that I was satisfied that the applicant had met the statutory criteria in s. 50A of the Act of 2000 (as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act, 2006) for the granting of leave to seek the reliefs at paragraphs (d) 1, 2, 6 and 7 on the grounds set out at paragraph (e) of the statement of grounds dated 24th September, 2007. I permitted counsel for the parties to make any further submissions they then wished and, their having done so, reserved my decision on the substantive application for judicial review. This judgment is on the substantive application for the reliefs set out above.

Issues

7. The issues in this application relate to the nature of the obligation imposed by s. 127(1)(b) of the Act of 2000, the consequences of non-compliance with that obligation and whether the notice party, in his appeal against the permission granted to the applicant, complied with that obligation.

8. Section 127 of the Act of 2000, insofar as relevant, provides:

"(1) An appeal or referral shall –

- (a) be made in writing,
- (b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,
- (c) state the subject matter of the appeal or referral,
- (d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,
- (e) in the case of an appeal under section 37 by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,
- (f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with section 144, and

(g) be made within the period specified for making the appeal or referral.

(2) (a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid.

(b) The requirement of subsection (1)(d) shall apply whether or not the appellant or person making the referral requests, or proposes to request, in accordance with section 134, an oral hearing of the appeal or referral."

9. The applicant submits, correctly in my view, that the requirement in s. 127(1)(b) that the appeal state the address of the applicant is truly mandatory and not merely directory in accordance with the test set out by Henchy J. in the Supreme Court in *The State (Elm Developments Limited) v. An Bord Pleanála* [1981] I.L.R.M. 108, at p. 110:

"Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intentment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."

10. I am satisfied that, having regard to the words used by the Oireachtas in s. 127 and the purpose of the requirement in s. 127(1)(b), the Court should treat the requirement to state the address of the applicant as truly mandatory. It follows from this conclusion that neither the Court nor the respondent may excuse non-compliance with the requirement in s. 127(1)(b) that the appeal state the address of the appellant on a *de minimis* basis. I agree with the similar view expressed by Kelly J. in *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763, at p. 766.

11. It also follows from this conclusion that the Court has no discretion to excuse non-compliance with the requirement to state the address in s. 127(1)(b) of the Act of 2000 on the basis of an alleged absence of prejudice to the applicant or any other person. The position is similar to that stated by the Supreme Court in the judgment of Finlay C.J. in *Electricity Supply Board v. Gormley* [1985] I.R. 129, at pp. 156, 157:

"I am satisfied on the principles laid down in *Crodaun Homes Ltd. v. Kildare County Council* [1983] I.L.R.M. 1, and on the true interpretation of s. 26 sub-s. 1, of the Act of 1963, that a challenge to the validity of a planning permission granted by a planning authority, which is based on non-compliance with the permission regulations, does not depend upon the person making such challenge being able to demonstrate that the non-compliance directly affected him or her. Such a challenge can properly be made by any person who is affected by the permission granted and, if made and if non-compliance is established, the permission is invalid not by reason of prejudice or disadvantage to the person challenging it but by reason of a want of power and jurisdiction in the planning authority to exercise their right of granting or refusing permission pursuant to s. 26 of the Act of 1963."

12. On the facts herein, unless the appeal submitted by the second named notice party complies with the requirements of s. 127(1) it is invalid in accordance with s. 127(2)(a) of the Act of 2000 and the respondent has no jurisdiction to consider and determine the appeal.

13. The respondent's letter of 13th September, 2007, informed the applicant that "the Board is satisfied that the appeal meets all the criteria of section 127 of the 2000 Act". In these proceedings, the submission made on its behalf is that there was compliance with the requirements of s. 127(1)(b) by the second named notice party enclosing with and expressly referring, in paragraph 1.0 of the Letter of Appeal, to the first named notice party's "acknowledgement of receipt of my observation in respect to the subject planning application ...", and the fact that such acknowledgment records the receipt of the submission/observation from "Sean O'Brien, Knockcullen House, New Road, Killarney".

14. The applicant submits that the enclosure of the acknowledgement cannot constitute compliance with the requirement that the appeal state the address of the second named notice party. He does so essentially for two reasons. Firstly, he contends that there is no evidence that the address of Knockcullen House, New Road, Killarney was the address of the applicant at the date of lodging the appeal. Secondly, he contends that, having regard in particular to the provisions of s. 127(1)(e), the acknowledgment from Killarney Town Council is a separate document to "the appeal" referred to in s. 127 of the Act of 2000 and hence a statement of the name and address of the appellant in the acknowledgment does not satisfy the requirements of s.127(1)(b) that "the appeal state . . .".

15. The first issue is whether the recital in the acknowledgment of 23rd April, 2007, of the name of the second named notice party followed by an address may be properly regarded as a statement of his name and address at the time of the appeal. In the Letter of Appeal the second named notice party expressly refers to the receipt of "my observation". Having regard to the terms of the acknowledgment of 23rd April, 2007, which are set out above, it appears to me that a reasonable and common sense interpretation of the document is that it is an acknowledgment of a submission/observation from Sean O'Brien, i.e. the second named notice party of Knockcullen House, New Road, Killarney, i.e. his address. I am therefore satisfied that the acknowledgment does state the name and address of the second named notice party.

16. In reaching this latter conclusion I have considered the submission made on behalf of the applicant, relying upon article 29 of the Planning and Development Regulations, 2001 (S.I. No. 600 of 2001) (as substituted by article 8 of the Planning and Development Regulations, 2006 (S.I. No. 685 of 2006)). Article 29(1)(b) requires any submission or observation to a local authority in respect of a planning application to state, inter alia, the name and address of the person making the submission and also to indicate the address to which any correspondence relating to the application should be sent. It was contended on behalf of the applicant that, having regard to these provisions, there is uncertainty as to whether the address recorded by Killarney Town Council in its acknowledgment herein was the address of the second named notice party or an address notified for the purposes of correspondence. Having regard to the terms of the acknowledgment, it does not appear to me that there is any such uncertainty. It is an acknowledgment of receipt of a submission/observation from the person whose name and address is stated.

17. There is no evidence to suggest that the second named notice party might have changed address since making the submission/observation to the first named notice party or that there is any uncertainty as to his address. The relatively short time between the making of the submission/observation to the first named respondent (20th April, 2007) and the lodging of the appeal (1st August, 2007) and the express reference to the receipt of "my observation" appear to permit the acknowledgment to be considered as a statement of the address of the second named notice party at the time of making the appeal.

18. The second issue is whether the reference in the Letter of Appeal to the acknowledgement of "my observation", coupled with the statement of the name and address of the applicant in the enclosed acknowledgement from the first named notice party, constitutes compliance with the requirement of s. 127(1)(b) of the Act of 2000 that "the appeal" state the name and address of the appellant. That requirement must be construed in the context of the entirety of s. 127 of the Act of 2000 and the statutory scheme established by the remaining provisions of the Act of 2000. The detailed provisions of the Act of 2000, in relation to the procedure which must be followed in applying for or objecting to planning permission or any appeal relating thereto, establishes a relatively detailed code which must be complied with but which, nevertheless, is a code which is addressed to and envisaged to be acted on by members of the public without the assistance of lawyers. There are no regulations relating to the form of an appeal. The only requirements as to its form or content are those set out in s. 127. There is no definition of what constitutes "the appeal" for the purposes of s. 127(1).

19. An analogous issue arose in *O'Reilly Brothers (Wicklow) Ltd v. An Bord Pleanála* [2006] I.E.H.C. 363. That application concerned the referral by Wicklow County Council to An Bord Pleanála of an issue as to whether the intensification of use of a quarry owned by the applicant was or was not development for the purposes of the Act of 2000. Section 127 of the Act of 2000 applied to the referral as it does to the appeal herein. The referral was made by letter from an administrative officer of Wicklow County Council to An Bord Pleanála. The relevant part of the letter stated: "I am enclosing the appropriate fee and a full copy of the unauthorised development file". The file of papers enclosed comprised random correspondence and documents. The issue in the proceedings was whether the referral was in compliance with s. 127(1)(d) of the Act of 2000 which required that the referral "... state in full, the grounds of ... the referral and the reasons, considerations and arguments on which they are based ...". Whilst An Bord Pleanála objected to the random nature of the file submitted by Wicklow County Council, it undertook the task of sifting through the documents and its inspector concluded that the reasons, considerations and arguments of the County Council could be discerned from the documents included in the file. One of the issues which arose was whether or not, even if that conclusion was correct, the requirements of s.127(1)(d) were complied with by the statement of the reasons considerations and arguments in the documents in the file sent with the letter of referral rather than in the letter of referral itself. The applicant, in that case, contended that the Council's referral must be contained within a single written document (the letter of referral) which states the grounds of the referral and the reasons, considerations and arguments on which they are based.

20. In his judgement, Quirke J. rejected that contention and stated at p. 6:

"S. 127 of the Act requires that referrals submitted to the Board shall be ... 'in writing' No provision of the Act requires that the grounds for a referral and the 'reasons, considerations and arguments' upon which they have been based must be contained within one document. The terms of Chapter III of the Act would seem to suggest the contrary.

...

What is contended on behalf of the applicant is that the 'reasons, considerations and arguments' upon which the ground was based are not to be found within the letter. Undeniably that is so. However, as I have earlier found, the referral need not be contained within one document. It may be contained within one document or within a series of documents and it may be submitted in a relatively informal manner by a member of the public. What is mandatory is that the grounds of the referral and the 'reasons, considerations and arguments' upon which they are based must be submitted in writing."

21. I would respectfully agree with Quirke J. that there is no requirement in s. 127 of the Act of 2000 or any other provision in the Act of 2000 or Regulations made thereunder which requires either a referral or an appeal to be contained in one document. In that decision, Quirke J. effectively found, that the documents on the file enclosed with its letter of referral by Wicklow County Council formed part of the referral for the purposes of s.127(1) , insofar as the written information in certain of the documents on the file satisfied the requirement of s. 127(1)(d) that the referral state *inter alia* the " grounds of referral and the reasons, considerations and arguments on which they are based

22. Whilst the decision of Quirke J. in *O'Reilly Brothers (Wicklow) Ltd. v. An Bord Pleanála* is not binding on me, it is, of course, of persuasive authority. It was not submitted that it was wrongly decided. It appears to me that there is no distinction in principle, for the purposes of compliance with s. 127(1)(d) and s. 127(1)(b) respectively of the Act of 2000, between the status of the documents in the file submitted by Wicklow County Council, with its letter of referral and the acknowledgement enclosed by the second notice party herein, and referred to in his Letter of Appeal.

23. It is relevant to note that the file of documents submitted by Wicklow County Council with its letter of referral would appear to be documents which come within s. 127(4)(a) of the Act of 2000 which provides that: "An appeal or referral shall be accompanied by such documents, particulars or other information relating to the appeal or referral as the appellant or person making the referral considers necessary or appropriate" . Quirke J does not appear to have considered that the above requirement that the referral "be accompanied by " the documents (in the file) precluded such documents forming part of the referral for the purposes of compliance with s.127(1)(d). It is however not clear whether any such submission was made to him.

24. Similarly, s. 127(1)(e) provides that the appeal "be accompanied by the acknowledgement ...". I have considered whether this provision distinguishes the position of the acknowledgement from the file enclosed by Wicklow co. Council and concluded that it does not. The use of the words "be accompanied by" in s. 127(1)(e) does not appear to me to necessarily indicate that the Oireachtas intended that an acknowledgement be excluded from constituting part of the appeal for the purposes of compliance with the other requirements of s. 127(1). Rather the intention is that it must be included with the other documents in writing (including those referred to in s.127(4)) which are lodged for the purpose of making the appeal in accordance with s. 127(5).

25. Accordingly, it appears to me to be consistent with the law as stated by Quirke J., in *O'Reilly Brothers (Wicklow) Ltd. v. An Bord Pleanála*, that I determine on the facts of this application, as I do that the enclosed acknowledgement dated 23rd April, 2007, from the first named notice party forms part of the appeal for the purposes of compliance with the requirement of s. 127(1)(b) of the Act of 2000. Hence the statement of the name and address of the second named notice party in the acknowledgement enclosed with and referred to in the Letter of Appeal is compliance with the requirement of s. 127(1)(b) of the Act of 2000 that the appeal state the name and address of the second named notice party.

26. Hence I have concluded that the appeal of the second named notice party complied with s. 127(1) of the Act of 2000 and dismiss the application for the reliefs sought herein.