Neutral Citation Number [2005] IEHC 24

THE HIGH COURT
JUDICIAL REVIEW

2003 No. 695 J.R.

BETWEEN

THOMAS GREALISH

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
DUBLIN CITY COUNCIL

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on the 2nd day of February, 2005.

Factual background / planning history

1. This application for leave pursuant to s. 50 of the Planning and Development Act, 2000 (the Act of 2000) to seek certain reliefs by way of judicial review is made against the following background and planning history:

· For approximately 30 years there has been an advertising hoarding on the gable wall of the premises at 171 Drimnagh Road in the City of Dublin, a two-storey premises at the junction of Drimnagh Road and Balfe Road, which is now in commercial use. Prior to 1990 the hoarding accommodated static advertisements.

· In 1990 More O'Ferrall Ireland Limited applied to the predecessor of the notice party, as planning authority, for permission to "convert existing advertisement structure to a tri-vision sign …". On 21st May, 1990 the planning authority decided to refuse permission for two reasons stated in its order, which were as follows:

> "1. The proposed development would create a traffic hazard due to its distracting effect on drivers, especially as it is in the line of sight of drivers approaching from the west and as such would be contrary to the proper planning and development of the area.
>
> 2. The proposed development would be visually obtrusive in the streetscape of Drimnagh Road, seriously injurious to the visual amenities of this area and as such is contrary to the proper planning and development of the area.

That decision was appealed to the respondent which, on 26th November, 1990, granted permission subject to two conditions. The first condition stipulated that the tri-vision sign should be capable of displaying three messages only and the frequency of change of the messages should not exceed one change in any period of 20 seconds, so that the total "cycle time" for the display of all three messages should not be less than 60 seconds, and any message, when displayed, should be held on display for a period of not less than 20 seconds. The reason ascribed for the imposition of this condition was to minimise the visual impact of the proposed sign and its potential to distract, to an unacceptable degree, the attention of drivers. The second condition stipulated that the tri-vision sign should be removed from the site not later than 31st December, 1995 and the site should revert to its then current use for static advertising purposes, unless retention permission had been obtained. The reason ascribed for the imposition of this condition was as follows:

> "It is considered reasonable, having regard to the nature of the proposed sign and, in particular, its changing display feature, that the planning authority or [the respondent] on appeal should assess the impact of the sign and review the principle of this form of development after a reasonable period of time."

The reason ascribed by the respondent for granting the permission subject to the two conditions specified was stated as follows:

> "Having regard to the location of the site within a busy commercial district and its long-established use for advertising purposes, it is considered that, subject to compliance with the conditions set out in the Second Schedule hereto, the proposed development would not endanger public safety by reason of traffic hazard, would not be seriously injurious to the visual amenities of the area and would not be contrary to the proper planning and development of the area."

· In 1996 the applicant, who in the interim had acquired an interest in 171 Drimnagh Road, applied to the predecessor in title of the notice party, as planning authority, for "extension of existing planning permission for tri-vision rotating advertising sign on the gable wall". On 4th December, 1996 the application was refused for the reasons stated, which were as follows:

> "1. The proposed development would create a traffic hazard due to its distracting effect on drivers especially as it is in the line of sight of drivers approaching from the west and as such would be contrary to the proper planning and development of the area.
>
> 2. The tri-vision sign represents an even more strident intrusion on the streetscape than a static sign, detracts from the visual amenities of the area and would be contrary to the proper planning and development of the area."

There was an appeal against that decision to the respondent, which on 15th April, 1997 granted permission subject to two conditions. The first condition related to the frequency of the change of the advertisements, stipulating that the total "cycle time" be extended to 90 seconds coupled with a requirement that each advertisement should be displayed for not less than 30 seconds. The second condition dealt with the duration of the permission and provided that the permission was for a period of five years from the date of the order, whereupon the sign should be removed from the site,

unless before the end of that period permission for its retention should have been granted. The reason ascribed for that condition was stated to be as follows:

> "To enable the effect of the development on the amenities of the area to be reviewed, having regard to the circumstances then prevailing."

The reason ascribed for the grant of permission subject to the stipulated conditions was as follows:

> "Having regard to the location of the site within a busy commercial district and its long-established use for advertising purposes, it is considered that, subject to compliance with the conditions set out in the Second Schedule, the proposed development would not endanger public safety by reason of traffic hazard, would not seriously injure the visual amenities of the area and would not be contrary to the proper planning and development of the area.'

· At the beginning of 2003 the applicant applied to the notice party for permission for retention for five years of the existing 6.5m x 3.5m prismatic advertising structure on the gable facing Balfe Road of 171 Drimnagh Road. Once again, by order dated 12th March, 2003, the planning authority, the notice party, refused permission, the single reason ascribed for the refusal being in the following terms:

> "It is considered that the proposed sign which measures 6.5m x 3.5m on the gable wall of number 171 Drimnagh Road, fronting onto Balfe Road, is of excessive scale and does not satisfactorily integrate with the design and scale of the building. The proposed sign on the gable elevation would contribute to visual clutter and would seriously injure the visual amenities of the area and would therefore be contrary to the proper planning and development of the area."

· The applicant appealed to the respondent against that decision. An inspector of the respondent reported on the appeal on 21st July, 2003. In her report the inspector described the advertisement structure as being 6.5m x 3.5m in dimension and being located roughly 4m above ground level. She also described it as being illuminated by an overhead light, roughly 6m in length. She concluded that it was excessive in size and scale, being one of three such structures in close proximity. However, given the planning history of this site, she recommended that the structure be retained at a much reduced size. Accordingly, she recommended that permission be granted subject to two conditions: that the structure be reduced in size to a maximum of 3m in height and 4m in width, with the overhead light similarly reduced in width to 3.6m, in the interest of visual amenity; and that the permission be for five years from the date of the order, to enable the effect of the development on the amenities of the area to be reviewed, having regard to the circumstances then prevailing.

· On 7th August, 2003 the respondent decided to refuse the permission sought by the applicant and that decision was formalised in an order dated 8th August, 2003 which stated the "reasons and considerations" for the decision as follows:

> "It is considered that the prismatic sign, proposed to be retained, is of excessive scale and does not satisfactorily integrate with the design and scale of the building at 171 Drimnagh Road. The prismatic sign, proposed to be retained, on the gable elevation would contribute to visual clutter, would seriously injure the visual amenities of the area and would, therefore, be contrary to the proper planning and sustainable development of the area.
>
> In deciding not to accept the Inspector's recommendation to grant permission, the Board concurred with the decision of the planning authority and considered that the proposed reduction in scale, as recommended by the Inspector, would not overcome its concerns."

It is that decision (the 2003 decision) which is impugned in these proceedings.

· Between 1997 and 2003 a new Dublin City Development Plan had been adopted in 1999 which, in para. 14.42.0, outlined the policy and objectives of the planning authority in relation to advertising hoardings, including tri-vision and three-dimensional signs. Seven guidelines, which were to be subject to amendment, were set out in relation to such structures.

· In his grounding affidavit the applicant has averred that he and his brother inherited the property, which I understand to mean the premises 171 Drimnagh Road, from his father and that he purchased the freehold interest in the property in 1996, relying on the fact that the respondent had previously granted permission for the advertising structure in 1990 and the fact that the relevant circumstances since that date had not materially altered.

Reliefs sought / grounds

2. The reliefs being pursued by the applicant on this application are as follows:

> (i) An order of *certiorari* quashing the 2003 decision.
>
> (ii) A declaration that the applicant had a legitimate expectation that, in the absence of any change in the prevailing circumstances, the respondent would grant planning permission for the proposed developments in the terms as previously granted, and an order of *mandamus* requiring the respondent to grant such planning permission.
>
> (iii) A declaration that the respondent is in breach of the rules of natural and constitutional justice in its failure to give any or any adequate reasons for its decision and/or for not accepting the recommendation of its inspector in relation to the appeal, and/or for taking into account material that was irrelevant and/or extraneous to the appeal.

3. The grounds on which the applicant seeks the foregoing reliefs, which are premised on the proposition that there was no change in the prevailing circumstances between the dates of the decisions made by the respondent in 1990 and 1997, on the one hand, and the date of the 2003 decision, on the other hand, and that the latter decision is precisely contrary to the previous decisions, are as follows:

(a) that there were no grounds or evidence upon which the respondent was entitled to reach the decision it reached or, in the absence of evidence or grounds to distinguish the earlier decisions, on the basis of the principle of *res judicata*, it was estopped from relying on the reasons given for its refusal, so that its decision was unreasonable and irrational in law;

(b) that the applicant had a legitimate expectation that, in the absence of any change in the prevailing circumstances, the respondent would grant planning permission in the terms as previously granted; and

(c) that the applicant was obliged, but failed, to give adequate reasons for its decision insofar as it was –

(i) contrary to its previous decisions, and

(ii) a departure from the recommendation of the inspector.

The hearing

4. The court was informed that the practice of the respondent is not to file an affidavit in response to the grounding affidavit at leave stage, unless the latter contains misleading evidence or, for some other reason, correction is necessary. There being no such need, the normal practice has been adopted in this case.

5. The notice party has not participated in the proceedings at leave stage, the resolution of the issues between the applicant and the notice party relevant to the pendency of the proceedings having been agreed *inter se*.

6. The court has had the benefit of comprehensive written submissions on behalf of both the applicant and the respondent.

Substantial grounds

7. To accede to this application the court must be satisfied that there are substantial grounds for contending that the 2003 decision is invalid or ought to be quashed (s. 50 of the Act of 2000). I respectfully adopt the construction of the expression "substantial grounds" set out in the following passage from the judgment of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at p. 130:

> "What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result will be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the various arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial I do not have to say that the applicant is confined in his arguments at the next stage to those which I believe may have some merit."

Absence / inadequacy of reasons

8. In considering the grounds on which the applicant relies, I consider it logical to deal with the "reasons" grounds first.

9. The respondent is required by statute to state the "main reasons and considerations" on which its decision is based, and, where conditions are imposed in relation to the grant of any permission, the main reasons for the imposition of such conditions (s. 34(10)(a) of the Act of 2000). The respondent is also required, where its decision is different, in relation to the granting or refusal of permission, from the recommendation in the report of the inspector assigned to report on the appeal on its behalf, to indicate in the statement under para. (a) its "main reasons" for not accepting the recommendation (s. 34(10)(b)).

10. In *O'Donoghue v. An Bord Pleanála* [1991] I.L.RM. 750, having referred to the relevant statutory obligation requiring the respondent to give reasons in force at that time, and the decision of the Supreme Court in *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1989] I.L.R.M. 104 delivered by the Chief Justice in relation to the general obligation imposed on a quasi-judicial tribunal to give reasons for its decisions, Murphy J. considered the statutory duty of the respondent to give reasons in the following passage of his judgment at p. 757:

> "The significance of the observations of the Chief Justice in the Criminal Injuries Compensation Tribunal case is the explanation or amplification of the logic which lies behind that regulatory provision. It is clear that the reason furnished by the board (or any other tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations but on the other hand the need for providing the grounds of the decision as outlined by the Chief Justice could not be satisfied by recourse to an uninformative if technically correct formula. For example it could hardly be regarded as acceptable for the board to reverse the decision of a planning authority stating only that 'they consider the application to accord with the proper planning and development of the area of the authority'. It seems to me that in the nature of the problems as defined by the Chief Justice it would be necessary for the administrative tribunal to indicate in its decision that it had addressed its mind to the substantive issue which had led the planning authority to believe that the permission would have an adverse effect on the planning and development of the area."

11. In my view, standing alone, the ground advanced by the applicant as to the inadequacy of the reason expressed for departing from the inspector's recommendation, which it was contended was a mere tautology of the refusal and did not advance in any way the explanation for the refusal, is not sustainable. It is clear on the face of the record of the 2003 decision that the respondent considered two of the options open to it: to refuse permission in line with the decision of the planning authority; or, alternatively, to grant permission subject to conditions, as recommended by the inspector. It decided to refuse permission, but it explained why it opted for this course: it considered that the proposed reduction in scale, as recommended by the inspector, would not overcome its concerns, which it had outlined earlier – the scale and non-integration of the structure. That pithily tells the applicant and the world at large in terms which any intelligent person should be capable of understanding why the respondent departed from the recommendations of the inspector.

12. In support of his submission that it was incumbent on the respondent, in giving reasons for its decision, to explain why it departed from the approach it adopted in its 1990 decision and its 1997 decision, counsel for the applicant referred to the following passage

from Wade on *Administrative Law,8th Edition* at p. 517:

> "There is no closed list of circumstances in which fairness will require reasons to be given but the more important examples may be given here. First, decisions that appear aberrant without reasons have to be explained, so that it may be judged whether the aberration is real or apparent. Thus an award of abnormally low compensation to an unfairly dismissed prison officer by the Civil Service Appeal Board, which made it a rule not to give reasons, was quashed by the Court of Appeal, holding that natural justice demanded the giving of reasons both in deciding whether the dismissal was unfair and in assessing compensation, since other employees were entitled to appeal to industrial tribunals which were obliged by law to give reasons. Similarly, where the decision-maker departs from a previously adopted policy (even if not published) fairness will require that departure to be explained. Thus a health authority's refusal, without giving reasons, to follow the policy of the National Health Service Executive to introduce a new (and expensive drug) was quashed."

13. When one puts the three decisions of the respondent side by side, a very stark departure from the conclusions reached in 1990 and 1997 is revealed in the 2003 decision. In 1990 and in 1997 the respondent concluded that the advertising structure would not seriously injure the visual amenities of the area and would not be contrary to proper planning and development of the area. In 2003 it concluded that the very same advertising structure would seriously injure the visual amenities of the area and would be contrary to proper planning and sustainable development of the area. Although it rationalised its conclusion in 2003 as to the impact of the structure on visual amenities on the basis that it would "contribute to visual clutter", and of its scale and non-integration, in my view, this does not explain the apparent aberration. It is not apparent that these factors did not exist in 1990 or in1997 and the evidence before the court suggests that they did. Against that background, and the fact that in 1990 and in 1997 the respondent expressly overruled the findings of the planning authority as to the obtrusiveness and detrimental impact of the structure on the visual amenities of the area, how can the validity of the 2003 decision be assessed in accordance with the applicable judicial review norms without knowing the reason for the *volte-face*?

14. While it was undoubtedly open to the respondent to come to a different conclusion in 2003 to that reached in 1990 and 1997, in the unusual circumstances of this case, in my view, the ground advanced by the applicant that the respondent should have given an explanation for departing from the stance it had adopted previously and set out the considerations which led to such departure and that the failure so to do is a breach of his rights, is a substantial ground.

***Res judicata* / estoppel**

15. The preponderance of judicial opinion is that a decision of a planning authority and of the respondent is capable of giving rise to a res judicata, but that not every decision will do so: see, for example, dictum of Hardiman J. in *Ashbourne Holdings Limited v. An Bord Pleanála* [2003] 2 I.R. 114 at p. 134. However, in my view, the ground advanced by the applicant in reliance on the doctrine of *res judicata* or on estoppel in this case is wholly unsustainable.

16. The 1997 decision related to a different period to that to which the 1990 decision related, it was subject to a different condition in relation to "cycle time", and, in fact, superseded it.

17. The 1997 decision permitted a development which would endure for a period of five years from 15th April, 1997. It expressly provided that the purpose of the limitation on duration was to enable the effect of the structure on the amenities of the area to be reviewed, thereby giving rise to the clear implication that the permission would not necessarily be extended at all, or extended on similar terms, at the expiration of the fixed period. Further, in 2003 the respondent was considering and adjudicated on a different issue to the issue it considered in 1997. It was considering whether permission should be granted for a period commencing in 2003, whereas in 1997 the issue was whether permission should be granted for a period commencing in 1997.

18. In my view, the submissions made by counsel for the respondent that the basic ingredients necessary to bring the doctrine of *res judicata* into play are missing, is correct. In particular, the 1997 decision was not a final decision permitting the development to endure for all time or for any period beyond 14th April, 2002 and it determined a different issue to the issue determined in the 2003 decision. Aside from the fundamental principle that the respondent could not fetter its statutory discretion, the previous decisions, on their terms, are incapable of giving rise to *res judicata* or an estoppel against the respondent.

Legitimate expectation

19. For similar reasons, the applicant's contention that he had a legitimate expectation that, in the absence of any change in the prevailing circumstances, he would be granted planning permission in similar terms to the previous decisions is unsustainable. Each of the earlier decisions permitted a development which was limited in time. Each made it clear that retention of the structure *in situ* after the prescribed period was contingent on a new permission being obtained. Neither contained any express or implied representation that a new permission would be forthcoming, even if there was no change in the prevailing circumstances. The stated purpose in each case for the limitation on the duration of the permitted development was to enable the situation to be reviewed after the prescribed period. In the case of each decision the respondent was careful to preclude the possibility of giving rise to an expectation that the permission would be extended. Such expectation could not reasonably have arisen having regard to the terms of each decision.

Unreasonableness / irrationality

20. Finally, I consider that the applicant should be granted leave to advance the ground alleging the unreasonableness and irrationality in law of the 2003 decision, which it should be open to the applicant to argue in tandem with its contention that there was a failure to give adequate reasons for the 2003 decision.

Order

21. Accordingly, there will be an order granting leave to apply for the following reliefs set out in the applicant's grounding statement dated 1st October, 2003: the reliefs sought in para. (d)(i) and in para. (d)(iii) on the following grounds set out in para. (e)(i) of the said statement only:

- the ground set out in paragraph 1,

- the ground set out in paragraph 2 excluding the allegation in the following terms: "and/or the Respondent was estopped from relying upon the said grounds or reasons given", and

- the grounds set out in paragraphs 4 and 5.