Neutral Citation: [2013] IEHC 584

THE HIGH COURT

JUDICIAL REVIEW

(2011) NO. 878 JR

BETWEEN

SEAN NEE

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

THE COUNTY COUNCIL OF GALWAY AND PETER MEAGHER

NOTICE PARTIES

Judgment of Ms. Justice O'Malley delivered the 29th October. 2013.

Introduction

1. This judgment deals with an issue arising from the judgment refusing the reliefs sought by the applicant delivered on the 12th November, 2012, concerning a factual error made by the court in setting out the reasons for the decision arrived at. The applicant says that the error is such as to require the court to revisit the decision.

2. To put the issue in context it is necessary to set out a brief summary of the history of the case.

3. In July 2009 the second notice party applied to the first notice party for planning permission in respect of the site in question. The applicant in these proceedings objected. Permission was refused on a number of grounds. The summary of "main reasons and considerations" for the decision stated that

> *"The proposed development has been assessed, within the restrictions imposed by the principles of proper planning and sustainable development and having regard to the policies and objectives of Galway County Council as set out in the 2009-2015 Development Plan. Based on this assessment it is considered that the proposed development would be contrary to the proper planning and sustainable development of the area and would be contrary to the objectives and policies as set out in the County Development Plan."*

4. Five specific reasons were given for the refusal. One was that the proposed development was located in a Class 4 rural landscape, where housing needs were restricted to essential residential needs of local households and family farm business. It was considered that the applicant, who wished to rebuild a cottage as a holiday home, had not "*fully demonstrated*" the necessary intrinsic links to build a house in the area.

5. Permission having been refused, the first notice party appealed to the respondent Board. The Board's inspector made a negative recommendation on specific grounds although considering that the proposal accorded with "*the principles of the policies*" of the Development Plan. The appeal was nonetheless successful, but the grant of permission by the Board was set aside in judicial review proceedings because the objector had not been notified of the appeal. No other issue was decided in those proceedings but it is necessary to note that it had been pleaded on behalf of the applicant that the Board was not entitled to grant permission in circumstances where, on the applicant's case, the planning authority had refused permission because the development would constitute a *material* contravention of the Development Plan. Section 37(2) of the Planning and Development Act, 2003 significantly affects the Board's power to grant permission on appeal from a refusal based on this ground.

6. The matter was remitted to the Board for reconsideration. This sequence of events is correctly set out at paragraph 13 of the judgment.

7. Again, the proposed development was the subject of a negative report, from a different inspector. It should be noted here that this inspector considered the question whether the refusal of permission by the Council had been on foot of a finding of a material contravention of the Plan. His view was that the Council "*clearly did not decide to refuse the proposal because it materiallv contravened the provisions of its Development Plan*." In this regard he noted the conclusion that the applicant had not *"fully demonstrated intrinsic links to build a house within this area*". He noted that the proposal did not contravene any specific objective of the Plan, and that while it might be said to contradict a number of policies in the Plan there were other policies which could be relied upon to support it. He also asserted that

> *"when due regard is had to the pattern of development in this area and to the extent of permissions that have been given by the planning authority in recent years (notably over the life-time of the last Plan as the current Plan is relatively recently adopted), it is reasonable to conclude that this could be another reason why the Board would not be restricted in its determination by Section 37(2)(b)."*

8. It was noted in the judgment that there was no evidence before the court in relation the pattern of development and permissions given.

9. The second notice party was again successful in obtaining permission from the Board, albeit with a number of conditions attached. The applicant then sought relief by way of judicial review with a view to quashing this decision.

10. At the hearing of the judicial review proceedings, several issues were canvassed, of which the power of the Board to grant permission having regard to s. 37(2) of the Planning and Development Act, 2003 was one. The subsection provides as follows:

> *S.37(2J(a):- subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates;*
>
> *(b) where a planning authority has decided to refuse permission on the grounds that the proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that-*
>
> > *(i) the development is of strategic or national importance;*
> >
> > *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated insofar as the proposed development is concerned; or,*
> >
> > *(iii) permission for the proposed development should be granted having regard to the regional planning guidelines for the area, guidelines under Section 28, policy directives under Section 29, the statutory obligations of any local authority in the area and any relevant policy of the government, the Minister or any minister of government; or*
> >
> > *(iv) permission for the proposed development should be granted having regard to the pattern of development and permissions granted in the area since the making of the development plan.*
>
> *(c) where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of Section 34(10) [which requires the Board to state its main reasons and considerations for a decision] indicate in its decision the main reasons and considerations for contravening materially the development plan.*

11. The issue that arose in this respect was whether the decision of the first notice party, referring as it did to contravention of the development Plan, meant that permission had been refused because of a material contravention. It is noted in the judgment that the Council did not make any submission in the proceedings and declined to address the court on the issue. The other parties submitted that the decision had to speak for itself. The question to be determined by the court was, not whether in the view of the court the contravention was material, but whether the Council had decided that it was so.

12. The judgment deals with this question in the following way:

> *37. The applicant makes a simple case on this issue. The legislation does not require the use of any particular formula of words by the planning authority. He argues, with force, that each of the contraventions must be considered to be material because otherwise permission would not have been refused.*
>
> *38. The Board and the second notice party make the case that the word material" is a term of art. They point to, for example, the difference between Ita change of use" and a material change of use".*
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> *39. They further argue that if the Council had considered the contraventions to be material it would have used the word. That it had its attention drawn to the question is clear from the fact that it had been pleaded in the original judicial review proceedings. The Council also had the opinions of Counsel for the parties, both of which referred to the argument, before it.*
>
> *40. It seems to me that the Act itself does maintain a distinction between material and non-material contraventions. The section relied on specifically provides that the Board may grant permission lleven if' the refusal is for a material contravention. That would make little sense if every refusal by a planning authority for contravention of a Plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the board in cases not coming within the excepted categories. I do not believe that to be the intent of the section.*
>
> *41. I concur with the view of the second inspector that the formulation adopted by the council was loose. I note his view that the proposal under consideration did not contravene any objective of the Development Plan, and the view of the first inspector that it accorded with the principles of the policies" of the Plan. I also take into account the fact that the Council did not make any representation in the appeal process.*
>
> *42. There is also no doubt but that the Council was aware, when approaching its decision in this case for the second time, that if it did not use the word llmaterial" the Board was likely to conclude that the identified contravention was not considered to be such. The word was not used and I have come to the conclusion that this must have been by deliberate choice on the part of the Council. The refusal of permission by the Council was not, therefore, by reason of a material contravention.*
>
> *43. It would be desirable, having regard to the potential impact of the section, if planning authorities expressed themselves more directly on this issue.*
>
> *44. It follows that I do not consider that s.37(2) has application in the present case."*

13. The error in this analysis lies in the fact that, of course, the Council did not make its decision a second time. The applicant having succeeded in the first judicial review, the matter was remitted to the Board for reconsideration. The obligation on the Council at that stage was to rectify its earlier failure to give proper notification of the appeal.

14. It is perhaps necessary to state clearly that this error was entirely my own, and not to be ascribed to any of the parties.

Submissions on the consequences of the error

15. The applicant submits that, in reaching its conclusions on the intent of the Council, the court was informed "solely and exclusively" by the misapprehension that the matter had been reconsidered by the Council, that the error was central to the

determination of the issue and that the court must therefore revisit its judgment. It is argued that the court has jurisdiction to do so in circumstances where no final order has been made and that to refrain from so doing would constitute a breach of the applicant's right to access to justice.

16. It is further contended that the issue is an important one in circumstances where planning authorities do not have a practice of using precise wording in their decisions.

17. Following on from this, Counsel for the applicant again makes the case that the refusal should be considered as having been on account of a material contravention.

18. The other parties take the view that the matter is primarily one for the court but have submitted that the determination on the point did not rest solely on the factual misapprehension and that the court was entitled to reach the conclusion that it did.

Jurisdiction to re-open a case after judgment
19. That there is, in some circumstances, a jurisdiction to re-open a hearing after judgment but before the making of a final order is not in dispute. It occurred in the case of *In Re Mcinerney Homes Ltd & the Companies Acts*, [2011] IESC 31 where it was brought to the attention of the court that material had come to light which could entirely change certain factual assumptions affecting the basis on which the judgment had been given. On appeal, the Supreme Court was unanimous in considering that the judge had been correct in taking the course of re-opening the matter where the new evidence "*substantially undermined the entire basis on which the ... judgement has proceeded*" (O'Donnell J. at paragraph 61). In that case the matter raised was "*fundamental*" (Fennelly J. at paragraph 23).

20. The judgments of the Supreme Court refer to the decision of the UK Supreme Court in *Paulin v Paulin* [2010] 1W.L.R. 1057, which had been relied upon by the judge of the High Court as permitting the course of action adopted by him, but did not find it necessary to consider the criteria set out therein. Essentially, those criteria require "exceptional circumstances" for the exercise of the jurisdiction.

21. More recently, in *Byrne v The judges of the Circuit Court*, (High Court, 5th September, 2013), Hogan J. amended a draft judgment where he considered that the error identified in it was "central to any fair evaluation of the...issue". There, the significance of certain evidence had been mistakenly ascribed to a different applicant's case.

Conclusion on the issue of error
22. It is accepted by all the parties that the task of the court was not to decide whether the contravention was material but rather to determine whether the Council considered it to be such.

23. While accepting that the court did indeed fall into the error described, I do not feel that the mistake bears the weight attributed to it by counsel for the applicant. It was not the "*sole and exclusive*" basis for finding that the Council had not refused permission on account of a material contravention. It was a buttressing or fortifying consideration in circumstances where, as a matter of statutory construction, the court had already rejected the contention of counsel that any contravention giving rise to a refusal must have been considered to be a material contravention. The court also set out the views of the two inspectors. It pointed to the fact that the Council was fully alive to the issue after the first judicial review but made no representations in the appeal process, to which it was a party.

24. In simple terms, what it comes down to is this: the Council did not say that it considered the development proposal to amount to a material contravention of the Plan. The Board exercised its jurisdiction on the basis that the Council had not found a material contravention. That being so, the onus was on the applicant to establish that the Board was wrong and that the Council did find the contravention to have been material in this case. Having lost on the statutory interpretation argument the applicant was not in a position to discharge that onus.

25. In the circumstances, I do not feel that discovery of the error alters my view on the issue, still less that it substantially undermines the basis for it. I do not therefore consider that re-opening the hearing would be an appropriate course of action.