THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 350
[Record No. 2019/253 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

PETER SWEETMAN

APPLICANT

AND

CORK COUNTY COUNCIL AND AN BORD PLEANÁLA

RESPONDENTS

AND

CLIONA O'HANLON

NOTICE PARTY

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 18th day of May, 2021.

1. Issues

1.1 By order of 29 April 2019 Noonan J. granted the applicant leave (on the basis of substantial grounds) to apply by way of application for judicial review for the relief of *certiorari* of a decision of the first named respondent of 7 March 2019, granting the notice party planning permission. Leave was also granted in respect of various other declaratory reliefs sought. The Court also afforded the applicant a stay on the consideration of the applicant's appeal of the Council's decision to An Bord Pleanála (ABP) brought by way of letter dated 5 April 2019. The matter comes before this Court on foot of the first named respondent's (the County Council) notice of motion of 22 July 2019 seeking to discharge the aforesaid stay.

1.2 At paragraph number four of the order of 29 April 2019 it was provided:

> "4. Liberty to the Respondent to apply on 48 hours notice to the Applicant to vary or discharge the said Order for a Stay."

2. Background

2.1 The notice party applied for planning permission on 19 September 2018 (dated 8 September 2018, received on 19 September 2018) in respect of a proposed development at Milleencoola, Bantry, Co. Cork.

2.2 On 12 November 2018 the first named respondent sought further information from the notice party, together with revised plans, to be provided within a period of six months. The letter stated that the developer was advised to contact the area planner prior to a formal response.

2.3 Initially an informal response was tendered to the first named respondent by the developer on 12 December 2018, and later on the 29 January 2019 a formal response from the notice party was tendered. A subsequent report on outdoor lighting bearing date 12 February 2019 (such report appears to contain a typographical error of the year 2018) was submitted on behalf of the notice party.

2.4 Following receipt of the formal response, and in advance of the lighting report, the revised application was published on 7 February 2019, and thereafter the within applicant had two weeks to tender submissions.

2.5 The applicant tendered submissions on 21 February 2019, and tendered further submissions on 28 February 2019 following the uploading of the outdoor lighting report on the County Council website (the submissions of 28 February 2019 were returned on the basis they were outside the time limit under cover letter of 4 March 2019).

2.6 Ultimately the County Council granted planning permission, subject to conditions, bearing date 7 March 2019. The applicant appealed the said decision to ABP by way of notice of appeal of 5 April 2019, and subsequently secured leave for the within judicial review application on 29 April 2019.

2.7 In the applicant's first submission of 21 February 2019 it is stated:

> *"There is no information as to when the newspaper notice was delivered to the Planning Authority.*
>
> *I would question the legality of the manner with which this application has proceeded.*
>
> *Any decision to grant must be in full compliance with the Planning Acts and Regulations."*

2.8 The second submission of the applicant is dated 28 February 2019 and notes that further information was received by the County Council on 13 February 2019. The letter goes on:

> *"I am very confused by this entry as my submission of the 21st was in respect of the Further Information that was received by the Council on 31st January which was re-advertised as significant further information on the 7th February.*
>
> *It is simply not permissible that 2 lots of further information could have been submitted and received in respect of the request for Further Information and the most recent further information, which was received 6 days after the date of the re-advertisement, was not the subject of public consultation as provided for under the Planning Acts.*
>
> *I have already questioned the legality of the manner in which this application has proceeded, and I must re-iterate that any decision that is not made in full compliance with the Planning Acts is not valid."*

2.9 The purpose of setting out the submissions as aforesaid is to demonstrate the minimal and generalised nature of same, save for the specific problem expressed in the rejected submission of 28 February 2019, to the effect that it was not permissible to receive two

responses to a singular request for particulars. The submissions are in stark contrast to the statement of grounds.

3. Matters to be Considered

3.1 In *Okunade v. Minister for Justice* [2012] IESC 49 the Supreme Court set out the matters to be considered in determining whether to grant a stay or interlocutory injunction in the context of judicial review proceedings as follows:

"(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should: -

(i) Give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;
(ii) Give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and
(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;
but also,
(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) The court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages;

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

3.2 In *McDonnell v. Brady* [2001] IESC 88 Keane C.J. stated at para. 45 in relation to where the onus of proof lay in an application to have a stay granted at leave stage discharged:

> "There is nothing in the wording of Order 87, Rule 20(7)(a), to suggest that, where an applicant for leave seeks an order of prohibition or *certiorari*, he is further entitled *ex debito justitiae*, to a direction that the proceedings should be stayed. There seems no reason in logic why the applicant, where the grant of the stay is subsequently challenged should not be under an onus to satisfy the court that it is an appropriate case in which to grant such a stay."

4. The Applicant's Case

4.1 In the statement of grounds, the applicant is seeking an order of *certiorari* in respect of the County Council's decision of 7 March 2019 affording planning permission to the notice party.

4.2 A declaration that the County Council failed to consider the application under the provisions of the Environmental Impact Assessment (EIA) and Habitat's Directive is also sought.

4.3 It is suggested that seeking further information and revised plans in a single request is contrary to the statutory provisions, and in breach of Articles 33 and 34 of the 2001 Planning and Development Regulations as amended (the 2001 Regulations).

4.4 The final substantial relief is a declaration that the County Council by notice of 7 February 2019 did not comply with Articles 33 and/or 34 of the 2001 Regulations.

4.5 It is said that by failing to conduct any, or any adequate EIA or Appropriate Assessment (AA), the application was invalid and contrary to European law.

4.6 Articles 18 and 19 of the 2001 Regulations were said to be breached on the basis that the connection to the water mains or sewers were outside the development and the townland was not identified in full, therefore, the subsequent public notice was invalid.

4.7 The applicant also complains:

(a) by issuing without prejudice correspondence and advisory opinion to the developer, the County Council acted *ultra vires* and contrary to the Planning and Development Scheme;

(b) the County Council accepted information from the developer on 12 and 19 February 2019 in response to the request for further particulars, whereas only a singular response should have been accepted;

(c) the public notice was published on 7 February 2019, however, submissions in respect of public lighting were received by the County Council on 13 February and submissions in relation to water mains were received on 19 February. However, no further public notice was published;

(d) it is asserted that the County Council failed to have regard to relevant documents namely the submissions of 28 February 2019 of the applicant and thereby acted contrary to fair procedures and natural and/or constitutional justice.

4.8 The applicant has sworn two affidavits respectively dated 21 November 2019 and 2 February 2020.

4.9 The applicant argues that the inappropriateness of the County Council's decision, and the manner of consideration, cannot be aired before ABP. It is asserted that there was secret and non-public communications between the parties which were not uploaded on the

website of Cork County Council. It is argued that the applicant has been deprived of an entitlement to participate (para. 20 of the first affidavit). He also raises several other matters which are not within the statement of grounds, for example, bias, and therefore this judgment will not be addressing such additional issues.

4.10 In his second affidavit the applicant states that ABP cannot deal with the issues raised as they are obliged to accept the validity of the application and are obliged to assume the actions of the County Council were lawful.

4.11 In submissions on behalf of the applicant it is argued that by failing to adequately, or at all, deal with an EIA or an AA, the planning application was invalid. It is argued that this amounts to an issue on jurisdiction so an appeal to ABP will not be adequate to deal with the applicant's complaints. It is further argued that because ABP will have the submissions in relation to public lighting and water mains/sewers, and will not have the applicant's submissions, they will be contaminated by these errors, and this is a further reason why an appeal to ABP is an inadequate remedy.

4.12 It is said that under s.50(2) of the Planning and Development Act 2000 (the 2000 Act) the only means of addressing the issues raised by the applicant would be by way of judicial review. In this regard s.50(2) provides that a person shall not question the validity of any decision made, or other act done by inter alia, a planning authority otherwise than by way of an application for judicial review under O.84 of the Rules of the Superior Courts.

4.13 It is argued that there was no proper first instance determination and therefore it would be inappropriate to confine the applicant to an appeal to ABP.

4.14 The applicant relies on the judgment of *Harding v. Cork County Council* [2006] IEHC 295 where Clarke J. granted judicial review based on a breach of the public consultation process.

4.15 It is noted that there was no publication at all in *Harding*, whereas in the instant matter the issue on publication relates to public lighting which according to the affidavit of Mr. Philip O'Sullivan, Town Planner and Executive Planner of the County Council of 22 July 2019, at para. 15, public lighting is usually dealt with by conditions and was not deemed by the local authority to be a significant document for the purposes of re-advertising of the public notice.

4.16 The applicant argued that as there was no appeal of the grant of leave to maintain judicial review, the first named respondent accepts that there are substantial grounds available to the applicant in respect of the relief claimed. It is also argued that in granting leave Noonan J. also determined that an appeal to ABP would be an inadequate remedy.

4.17 This however is not recorded in the order of Noonan J., and indeed runs counter to the provisions of the order where Noonan J. afforded the respondents liberty to apply on short notice "to vary or discharge the order for a stay".

4.18 The applicant argues that lifting the stay would be fatal to the applicant in that it will render the judicial review proceedings moot, whereas it is suggested that there is no prejudice to the respondents in permitting the stay to continue.

5. The Respondents' Position

5.1 There is before the Court an affidavit of Bernard O'Callaghan of 19 December 2019, detailing the employment that will be generated by virtue of the development, and also identifying that the development is entirely social housing. This affidavit was made on behalf of the purchasing company, and with the consent of the notice party Cliona O'Hanlon, current owner of the greenfield land.

5.2 An affidavit of the owner of 13 January 2020 is also before the Court and at para. 4 it is stated that the ongoing judicial review proceedings are jeopardising the sale and this amounts to prejudice to her.

5.3 There are two affidavits of Philip O'Sullivan aforesaid, respectively dated 22 July 2019 and 13 December 2019.

5.4 In his first affidavit Mr. O'Sullivan says at para. 11 that there was an EIA consideration within his two reports dated 12 November 2018 and 6 March 2019.

5.5 He dismisses the argument as to location as being without merit, and he identifies that in fact the within applicant did not make any submissions at the initial planning application stage, and his submissions actually made thereafter were brief, general and entirely devoid of detail.

5.6 All documents were uploaded onto the County Council website and were available for inspection and it is was clarified that in the request for further information a request for the letter from Irish Water of 3 January 2019 was not in fact made.

5.7 Given the totality of the matter it is stated that it cannot be argued that there was no proper first stage hearing, and it is stated that the applicant has not suggested how lighting might be considered fundamental.

5.8 Mr. O'Sullivan raises the fact that there is a public interest in the orderly operation of the planning system and this is a factor to be taken into account in the balancing exercise in identifying where the greatest risk of injustice would lie (Okunade).

5.9 In his second affidavit Mr. O'Sullivan states at para. 8 that prejudice by reason of the judicial review proceedings is being occasioned as it is causing a serious delay in the development. He confirms at para. 19 that all documents were uploaded on the website by 23 January 2019.

6. Decision

6.1 The necessity to specify precisely the reliefs and grounds as mandated in O.84, r.20 has been dealt with in several judgments of the court. It is noted that in *Rushe & Anor. v. An Bord Pleanála & Ors.* [2020] IEHC 122, Barniville J. was satisfied that in planning matters this obligation is all the more critical given the fact that under s.50A(5) of the 2000 Act

the only grounds that can be relied upon are those where leave has been afforded. Hence the exclusion of consideration of additional matters such as bias herein.

6.2 In *McCallig v. An Bord Pleanála* [2013] IEHC 60, Herbert J. was dealing with a claim that the original planning application to the local authority was invalid by reason of an infirmity in the procedures adopted. Herbert J. held that the validity of the application for planning permission must be considered on appeal by ABP. A similar finding was also made by McGuinness J. in *Hynes v. An Bord Pleanála* [1998] IEHC 127.

6.3 Subsequently, Costello J. in *South-West Regional Shopping Centre Promotion Association Limited & Anor. v. An Bord Pleanála & Ors*. [2016] IEHC 84, confirmed that the validity of the application for planning permission must be considered on appeal before ABP.

6.4 In *North Westmeath Turbine Action Group CLG v. Westmeath County Council & Ors*. [2020] IEHC 505, Humphreys J. identified at para. 10, the general principle to the effect that one should allow the statutory process to proceed, and all steps can be challenged at the end of the process. In this regard he was applying the judgment of the Court of Appeal in *Spencer Place Development Company Ltd. v. Dublin City Council* [2020] IECA 268. At para.19 Humphreys J. identified that a jurisdictional objection does not automatically mean the process cannot continue. In his balancing exercise as to the prejudice that might be occasioned, Humphreys J. was satisfied that the loss of funding was a decisive factor.

6.5 In *Dunnes Stores (Limerick) Limited & Anor. v. Limerick City Council & Ors*. [2019] IEHC 59, the procedural difficulty of the public notice not having been served was sufficient to allow judicial review to proceed in advance of the appeal. In that matter there was also a claim within the statement of grounds to the effect that there was *mala fides* which the respondent accepts could not be within the appeal remit of ABP, however points out that a claim of *mala fides* is not within the instant statement of grounds.

6.6 More recently in *Sweetman v. An Bord Pleanála & Ors*. [2021] IEHC 16, Hyland J. referred to and applied *McCallig* and *Hynes* aforesaid in finding that ABP must consider if it has jurisdiction by examining the validity of the application.

6.7 In *Kinsella v. Dundalk Town Council & Anor*. [2004] IEHC 373, Kelly J. found that it was for the planning authority to determine whether or not further information received was significant to trigger a requirement for further publication. The Court applied *State (Abenglen Properties) v. Corporation of Dublin* [1984] IR 381 which identified that the court is to take into account all circumstances including the grounds upon which *certiorari* is sought, the adequacy of the alternative remedy, and the conduct of the applicant. The Supreme Court noted that the 2000 Act envisaged a self-contained process and exceptional circumstances would be required for the court to intervene. Kelly J. in *Kinsella* was satisfied that the appeal was a preferable remedy and that there was no justification for court intervention.

6.8 In *Sweetman v. Clare County Council* [2018] IEHC 517, Binchy J. was dealing with leave, coupled with a stay on the appeal to ABP, granted in circumstances where the grounds were an assertion of no adequate AA or EIA. At para. 40 the Court acknowledged that an applicant was entitled to a lawful first instance determination. However, it was satisfied that even if the planning authority decision was flawed, ABP had jurisdiction to hear the appeal, and at that time the errors could be corrected (see para. 43 of the judgment). The Court noted at para. 46 that the procedure before ABP was a *de novo* process under s.37 of the 2000 Act.

6.9 In the case of *Petecel v. Minister for Social Protection & Ors*. [2020] IESC 25, O'Malley J. was satisfied that that matter came within the exception as the statutory appeal process could not provide the remedy sought which was, in the circumstances, a reference to the CJEU. The issue concerned an asserted incorrect classification under EU law of a disability allowance. O'Malley J. at para. 109 of her judgment acknowledged that the appeals officer would be bound to assume the validity of the national measure as to classification, and a subsequent application for judicial review before the High Court might well proceed on the basis of an assumption that the issue of classification did not arise from the decision.

6.10 In applying the foregoing to the instant facts for the purpose of an assessment as to where the greatest risk of injustice lies (*Okunade*), it appears to me:

(a) The appeal to ABP is capable of addressing all issues raised.

(b) The onus of proof lies with the applicant to establish that continuation of the stay is justified.

(c) The applicant argues that the judicial review proceedings would be rendered moot. However, I am satisfied that this would arise only because ABP would be in a position to deal with all issues raised (see (a) above), and therefore the potential mootness of the judicial review proceedings does not occasion appreciable prejudice to the applicant.

(d) The submissions made by the applicant to the first named respondent were general and nonspecific, and indeed only the first submission was within time.

(e) The case law identified above does not suggest that the applicant's case is particularly strong, however, the granting of leave supports the proposition that the applicant's case is reasonable, arguable and weighty.

(f) There is a public interest in the orderly implementation of the planning process.

(g) There is a heightened public interest in the provision of social housing.

(h) Appropriate weight must be given to the orderly implementation of measures which are *prima facie* valid.

6.11 In all of the circumstances therefore, I am not satisfied that the applicant has discharged the onus on him to establish the necessity of a stay on the appeal before ABP. The greatest risk of injustice would lie in granting a continuation of the stay.

6.12 Accordingly, I will grant an order discharging the stay afforded on 29 April 2019 in respect of progressing the appeal to ABP.