

APPROVED

[2024] IEHC 5



**THE HIGH COURT
JUDICIAL REVIEW**

2022 299 JR

BETWEEN

JOHN GARDINER

APPLICANT

AND

MAYO COUNTY COUNCIL

RESPONDENT

**BP MITCHELL HAULAGE & PLANT HIRE LTD
TRADING AS KILLALA ROCK**

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 January 2024

INTRODUCTION

1. The applicant in these judicial review proceedings seeks to challenge a grant of planning permission. The planning permission authorises the carrying out of certain quarrying activities. This judgment is delivered in respect of an application by the beneficiary of the planning permission, i.e. the quarry

NO REDACTION REQUIRED

operator, to have the proceedings dismissed. The quarry operator submits that the proceedings entail an impermissible collateral challenge to an *earlier* decision in respect of which the statutory time-limit has expired. More specifically, it is submitted that it is not open to an objector to use the occasion of the “*grant*” of planning permission to launch a collateral attack upon the underlying “*decision*” to grant planning permission.

LEGISLATIVE FRAMEWORK

2. The Planning and Development Act 2000 (“*PDA 2000*”) prescribes a two-stage decision-making process in respect of an application for conventional planning permission. The first instance decision is made by the local planning authority. Thereafter, there is a right of appeal to An Bord Pleanála. In the event of an appeal, An Bord Pleanála’s decision operates to annul the first instance decision of the planning authority.
3. The planning legislation draws a distinction between a “*decision*” to grant planning permission and the subsequent “*grant*” of planning permission. This distinction reflects the fact that the planning authority’s decision is amenable to appeal. The “*decision*” does not authorise the carrying out of development. Rather, it is necessary to await the making of a “*grant*” of planning permission.
4. The right to carry out the permitted development only crystallises once the possibility of an appeal has expired. It is only then that the planning authority’s “*decision*” is given legal effect by the issuing of a “*grant*” of planning permission. More specifically, the planning authority may only make a “*grant*” in circumstances where (i) the four-week period prescribed for an appeal has expired without an appeal having been made, or (ii) an appeal has

been withdrawn prior to An Bord Pleanála making a determination on that appeal. In either contingency, the planning authority is then required to make a “*grant*” of planning permission.

5. It should be explained that the function of the planning authority in making a grant of planning permission is purely mechanical and perfunctory. The planning authority is confined to implementing its earlier decision by faithfully transposing the terms and conditions of that decision into a formal grant of planning permission. The planning authority cannot change any aspect of the decision: the planning authority could not, for example, add or delete conditions.
6. In the event that an appeal has been made to An Bord Pleanála, and not withdrawn, no grant of planning permission will ever issue pursuant to the planning authority’s decision. This is because the decision of An Bord Pleanála operates to annul the decision of the planning authority as from the time when it was given: see Section 37 of the PDA 2000. If An Bord Pleanála decides to grant planning permission, then the grant will be issued by An Bord Pleanála itself. The planning authority has no role in this regard. (Of course, if An Bord Pleanála decides to *refuse* planning permission, then no grant will be made).
7. The PDA 2000 prescribes a special judicial review procedure for legal challenges to decisions and acts of a planning authority. Insofar as relevant, Section 50(2) of the PDA 2000 reads as follows:
 - “(2) A person shall not question the validity of any decision made or other act done by—
 - (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,

[...]

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the ‘Order’).”

8. Section 50(6) of the PDA 2000 prescribes an eight-week time-limit for such judicial review proceedings:

“(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.”

9. Provision is made for the High Court to grant an extension of time in certain circumstances. No application for an extension of time has been made in the present proceedings.

PROCEDURAL HISTORY

10. The notice party made an application for planning permission to Mayo County Council on 1 July 2021 (Reg. Ref. P21/708). The development was described, *inter alia*, as the continued use and operation of a limestone quarry. Mayo County Council made a decision to grant planning permission on 11 January 2023.
11. The applicant in these judicial review proceedings resides adjacent to the quarry. The applicant had made an objection to the planning authority in relation to the planning application. Thereafter, the applicant attempted to make an appeal against the planning authority’s decision to grant planning permission. The appeal was, however, rejected as invalid by An Bord Pleanála on technical grounds: the appeal had not been accompanied by the requisite

proof that the applicant had made an objection to the planning authority at first instance.

12. In circumstances where there was no valid appeal in being, Mayo County Council made a grant of planning permission on 14 February 2023.
13. The applicant instituted these judicial review proceedings on 8 April 2023. This date is within eight weeks of the date of “*grant*” of planning permission, but more than eight weeks after the date of the “*decision*” to grant.
14. The notice party, i.e. the quarry operator, has issued a motion seeking to have the judicial review proceedings dismissed. More specifically, it is said that the applicant is out of time to challenge the “*decision*” to grant planning permission. The applicant seeks to resist the motion on the basis that the proceedings are properly directed to the “*grant*” of planning permission and have been taken within eight weeks of the date of grant.

DISCUSSION

15. The area of disagreement between the parties is narrow. Both sides accept that, for the purposes of Section 50(2) and Section 50(6), the making of a grant of planning permission by a planning authority constitutes an “*act*” done by a planning authority in the performance or purported performance of a function under the PDA 2000. Both sides also accept that the act of making a grant of planning permission is justiciable. The disagreement centres on whether the grounds of challenge advanced in the present case implicate the validity of the earlier decision to grant planning permission.
16. The difficulty with the applicant’s case is not so much that he is out of time to challenge the grant of planning permission, but rather that his grounds entail an

impermissible collateral challenge to the decision to grant. Crucially, the time-limit for challenging the decision to grant had expired prior to the institution of these proceedings.

17. What is meant by the concept of a collateral challenge has been discussed in detail by the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] IESC 1, [2018] 2 I.R. 250. The essence of the concept is that a party who has the benefit of an administrative decision, which has not been challenged within the prescribed time-limit, should not be exposed to the risk of having the validity of that decision challenged in later proceedings which seek to quash a subsequent decision on the basis that the earlier decision was invalid. Put otherwise, a litigant cannot use proceedings directed to a *subsequent* act or decision as a vehicle to challenge, indirectly, an earlier decision which is itself immune from legal challenge by virtue of a statutory time-limit having expired.
18. In any given case, it is a question of statutory interpretation as to whether a challenge to a subsequent decision in a staged decision-making process involves an impermissible collateral challenge to an earlier decision in the same process. The proper approach to be adopted is explained as follows in *Sweetman* (at paragraph 42 of the reported judgment):

“[...] the proper approach for the court to take is to consider whether, taking the scheme as a whole and having regard to its express terms and any additional matters which can properly be implied, it can be said that it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage. In such a case it is appropriate to require anyone who wishes to challenge that initial decision to do so within any relevant statutory time limit or time provided for in rules of court. Any failure to do so within such time limit, including any extended time limit which the court may, in accordance with its jurisdiction, permit, will render the initial decision incapable of challenge and will further preclude any

challenge to any subsequent decision made in the process which is based on a contention that the initial decision was not lawfully made.”

19. Applying those principles to the facts of the present case, the proceedings fall foul of the preclusion on collateral challenges. It is obvious from the structure of Section 34 of the PDA 2000 that all matters of substance are to be determined at the stage of the “*decision*” to grant planning permission. The section is directed towards the decision-making process: it prescribes the criteria to which regard must be had in deciding whether to grant or refuse planning permission. The subsequent step of making the “*grant*” of planning permission is purely mechanical and perfunctory. As discussed earlier, the purpose of the distinction between the “*decision*” to grant and the “*grant*” is to reflect the fact that the planning authority’s decision is amenable to appeal. Once the appeal period has expired without an appeal having been made, the planning authority does not enjoy any discretion: it cannot refuse to make the grant, nor can it change any aspect of the underlying decision to grant. Rather, the planning authority is required to faithfully transpose the terms and conditions of the decision previously made into a formal grant of planning permission.
20. It follows that the grounds upon which the act of making the grant of planning permission can legitimately be challenged are very narrow. It will be necessary to identify some legal defect in the faithful transposition of the underlying decision to grant planning permission. One example might be where a planning authority purported to attach an *additional* condition to the planning permission, over and above those notified as part of the decision to

grant. In such a scenario, the grant could successfully be challenged by way of judicial review.

21. In the present case, all of the grounds pleaded in the statement of grounds are directed to the validity of the underlying decision to grant planning permission. Put otherwise, the grounds are all directed to the legality of that decision, rather than to any supposed error in the embodiment of that decision in the formal grant of planning permission.
22. To elaborate: it is pleaded that the quarry operator should have been refused planning permission, pursuant to Section 35 of the PDA 2000, on the grounds that the quarry operator has, allegedly, previously carried out unauthorised development. It is also pleaded that the planning authority failed to comply with fair procedures in its adjudication upon the planning application. More specifically, it is alleged that the planning authority should have invited submissions on the further information furnished by the quarry operator.
23. With respect, these are all grounds which go to the validity of the underlying decision to grant planning permission. It would not be possible for a court to rule in favour of the applicant without implicitly finding that the decision to grant is invalid.
24. It is no answer to all of this to say that it is the grant, and not the underlying decision to grant, which authorises the carrying out of the permitted development. The Oireachtas has prescribed that—for the purposes of a challenge to a decision to grant—the eight-week time-limit runs from the date of decision, not the later date upon which that decision takes legal effect, i.e. the date of grant. The wording of Section 50 of the PDA 2000 is clear and unambiguous in this regard. Indeed, the applicant has not contended otherwise.

The applicant accepts that each of the “*decision*” to grant planning permission and the “*act*” of making the grant sets a separate clock running for the purposes of Section 50(6) of the PDA 2000. The wording of the legislation does not preclude the bringing of a challenge to the grant of planning permission, but where such a challenge questions the validity of the earlier decision to grant, it must be brought within eight weeks of that decision.

25. The applicant’s reliance upon the judgment of the Supreme Court in *Mulcreavy v. Minister for the Environment* [2004] IESC 5, [2004] 1 I.R. 72 is misplaced. That judgment was concerned with the general time-limit on judicial review proceedings prescribed under the former version of Order 84 of the Rules of the Superior Courts, i.e. prior to its amendment by the Rules of the Superior Courts (Judicial Review) 2011. The general time-limit was expressed to run from the date when grounds for the application first arose. This formulation was sufficiently flexible to allow the Supreme Court to consider the *reasonableness* of the applicant delaying the institution of proceedings pending the possible annulment of the impugned decision by way of a parallel procedure. Here, by contrast, the relevant time-limit is expressed to run from a specific date, i.e. the date of the “*decision*” of the planning authority. This is notwithstanding that, for at least part of the eight-week time period, the decision will not yet be legally effective. Put shortly, the wording of Section 50(6) is such that the question of whether the decision is legally effective or not is irrelevant for the purposes of the time-limit. Time runs from the date of decision, not from the date of it being given legal effect by way of a formal grant of planning permission.

26. In summary, the ambition of these judicial review proceedings is to deprive the quarry operator of the benefit of the decision to grant planning permission notwithstanding that the eight-week time-limit had expired prior to the institution of the proceedings. A belated challenge of this type is precisely the mischief which the preclusion on collateral challenges is intended to guard against. Once the eight-week time-limit had expired in relation to the decision to grant, the quarry operator was entitled to assume, in the absence of a pending appeal to An Bord Pleanála or pending judicial review proceedings, that the decision could be relied upon. This is subject only to the possibility of a successful application for an extension of time within which to bring judicial review. No such application for an extension of time has been mooted in the present case.
27. In circumstances where the grounds of challenge to the grant of planning permission all involve questioning the validity of the underlying decision to grant, the judicial review proceedings are inadmissible by reason of delay.

HENRY V. CAVAN COUNTY COUNCIL

28. For completeness, brief reference should be made to the judgment in *Henry v. Cavan County Council* [2001] IEHC 16, [2001] 4 I.R. 1. That judgment was delivered in the context of an earlier version of the planning legislation. More specifically, the proceedings were subject to Section 82(3A) of the Local Government (Planning & Development) Act 1963 (as amended by the Local Government (Planning & Development) Act 1992). Under that version of the legislation, the special judicial review procedure was confined, relevantly, to a

“decision of a planning authority on an application for a permission or approval”.

29. This is to be contrasted with the all-embracing nature of the current legislation. The special judicial review procedure now extends to *“any decision made or other act done by”* a planning authority in the performance or purported performance of a function under the planning legislation. See Section 50 of the Planning and Development Act 2000 (as amended by the Planning and Development (Strategic Infrastructure) Act 2006).
30. The principal argument advanced in *Henry v. Cavan County Council* had been that there was a *“continuum”* between the initial decision to grant planning permission and the formal grant, and that the critical date for the purposes of the time-limit was the date of the grant. The High Court rejected this argument and held that a distinction must be drawn between a decision of a planning authority to grant planning permission and the grant itself. On this analysis, the proceedings were out of time.
31. The judgment in *Henry v. Cavan County Council* is of no immediate relevance to the legal issue raised in the present proceedings for the following reasons. First, the scope of the two versions of the special judicial review procedure is very different. It would appear that a challenge to a *“grant”* of planning permission may not have been caught by the previous version. Secondly, and more fundamentally, the point argued—and determined—by the High Court is different from that in the present case. Here, both sides accepted that there is a distinction between the *“decision”* and the *“grant”* and that both are justiciable. The disagreement between the parties centred, instead, on whether the grounds of challenge advanced entail an impermissible collateral challenge to the

underlying decision to grant. This is a different legal issue from that addressed in *Henry v. Cavan County Council*. The judgment in that case does not address, in terms, the concept of a collateral challenge. This is not surprising: the judgment predates the modern case law on collateral challenges.

CONCLUSION AND PROPOSED FORM OF ORDER

32. These judicial review proceedings involve an impermissible collateral challenge to an earlier decision in respect of which the time-limit had already expired prior to the institution of the proceedings. More specifically, all of the grounds pleaded in the statement of grounds seek to question the validity of the underlying decision to grant planning permission. The applicant is out of time to challenge this decision and cannot sidestep the time-limit by purporting to challenge the subsequent grant of planning permission by reference to grounds which impugn the validity of the underlying decision to grant. Accordingly, the proceedings must be dismissed.
33. As to legal costs, the proceedings are subject to the special costs rules under Section 50B of the Planning and Development Act 2000 (as interpreted by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313). More specifically, the proceedings seek to challenge a decision made pursuant to Section 34 of the PDA 2000 which is a statutory provision which gives effect to, *inter alia*, the Environmental Impact Assessment Directive (Directive 2011/92/EU). The default position under the special costs rules is that an unsuccessful applicant is not required to pay the other side's costs. My *provisional* view is that no order as to costs should be made and that each party should instead bear its own

costs. If either party wishes to contend for a different form of costs order than that proposed, they will have an opportunity to do so when the matter is next listed.

34. The proceedings will be listed, for submissions on costs and final orders, on 25 January 2024 at 10.30 AM.

Appearances

John Kenny for the applicant instructed by Walter P. Toolan & Son (Ballinamore)
Oisín Collins SC and Gabriel Dennison for the notice party instructed by
O'Connell & Clarke Solicitors

Approved
Gemma S.M.S.