THE HIGH COURT

PLANNING AND ENVIRONMENT

[2024] IEHC 546

Record No. H SP 2023/ 329

IN THE MATTER OF SECTION 50(1) OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

AND ON THE APPLICATION OF AN BORD PLEANÁLA

AND IN THE MATTER OF SUBSTITUTE CONSENT APPLICATION BEARING AN BORD PLEANÁLA CASE REFERENCE SU05E.SU0138 AND IN THE MATTER OF THE DECISION OF AN BORD PLEANÁLA DATED 14 APRIL 2023 ON THAT SUBSTITUTE CONSENT APPLICATION

AN BORD PLEANÁLA

Applicant

-And-

PATTON BROS. QUARRY LIMITED

Respondent

JUDGMENT of Ms. Justice Emily Farrell delivered (ex tempore) on the 11th September 2024

1. These proceedings come before the High Court under section 50(1) of the Planning and Development Act 2000, as amended: the Board seeks the directions of the court as to how it should resolve the situation which has occurred by the Board making an admitted error when the application made by the Respondent under section 177E of the 2000 Act came before it.

2. This is the first application which has come before the High Court under section 50(1). As appears from that subsection 50(1), there must be a live issue before the Board in order that it may refer a question of law to the High Court. For the reasons set out herein, I am satisfied that there is a live application before the Board.

3. At the outset, counsel for the Board stated clearly that no criticism is made of the Respondent or its lawyers, and it has been accepted that no acts on the part of the Respondent caused it to institute these proceedings. In fact, the Respondent only became aware of the Board's Order dated 14th April 2023 when served with the proceedings in December 2023.

4. The following aspects of the chronology are relevant to the matter before the Court:

5. The Respondent applied for leave to apply for substitute consent in respect of the Quarry owned and previously operated by it on 31st March 2016. That application was made under Section 177D of the 2000 Act, as amended, and was granted on 23rd February 2017, under that section.

6. On 15th August 2017, the Respondent made the said application for substitute consent (bearing ABP Case Reference SU05E.SU0138) to the Board, pursuant to section 177E of the 2000 Act. Time had been extended for the making of that application.

7. The Board appointed an Inspector to prepare a Report in relation to the substitute consent application. The Inspector's report, dated 20th August 2020, recommended that substitute consent be granted subject to conditions.

8. On 30th July 2021, the Board requested information in relation to any "*exceptional circumstances*" which would justify the grant of substitute consent, consequent on relevant amendments of the 2000 Act.

9. On 9th June 2022 the Board met and requested the Inspector to prepare an Addendum to her Report. The Inspector prepared an Addendum to the Report on 23rd November 2022, in which she stated that she was satisfied that the Respondent had provided a robust response to the request for information regarding exceptional circumstances. The recommendations in this Report stated:

"*having regard to the foregoing and the Inspector's report SU 05E.SU 0138 dated 20 August 2020, I am satisfied that the applicant has demonstrated that exceptional circumstances exist, in accordance with section 177D(1)(b) of the Planning and Development Act 2000, as amended.*"

10. The Board met again to consider the application under section 177E on 26th January 2023, and but the submission by the Respondent was on the Board file at that meeting.

11. On 2nd March 2023, the Board requested that the Inspector prepare a further Addendum report taking account of the developer's submission. The updated Inspector's Addendum Report is dated 10th March 2023. The recommendation in this report is in virtually identical terms to the recommendation in the previous Addendum and also refers to section 177D(1)(b) of the 2000 Act.

12. The Board met to consider the Respondent's application on 31st March 2023. The Minutes of that meeting, which were signed by the chairperson of the meeting, are before the court and it is stated therein that the decision of the Board was to "*Grant leave to apply for SU C*".

13. The Board Direction, dated 4th April 2023 referred to section 177D(1) of the 2000 Act as amended. The Direction states that the Board was satisfied as to the existence of exceptional circumstances. The Board Direction concludes by stating that it "*considered that it would be appropriate to consider an application for the regularisation of the Development by means of an application for substitute consent.*"

14. The Board Order with reference 05E.SU.0138 was signed on 14th of April 2023. This refers to an application for substitute consent made by the Respondent in accordance with section 177E of the Planning and Development Act 2000 as amended, however the decision is stated in the following terms:

> "*GRANT leave to apply for substitute consent under section 177D1 of the Planning and Development Act 2000, as amended, based on the reasons and considerations set out below.*"

15. Those reasons stated that the Board had regard to section 177D(1),and stated that an EIA had not been carried out, that a Natura Impact Assessment was not required and that exceptional circumstances existed. It concluded by saying that it "*considered that it would be appropriate to consider an application for the regularisation of the Development by means of an application for substitute consent*."

16. In his grounding affidavit, Pierce Dillon, senior executive officer of an Bord Pleanála, states that he was not present at the meeting of the Board on 31st March 2023 and that the Board's error was not a typographical or clerical error.

17. The averment of John Patton that it appears to be a typographical error casts no light on what occurred before the Board, nor would he be in a position to provide any such evidence.

18. The contention of the Board, that this is not a clerical or typographical error is borne out by the references to section 177D of the 2000 Act in the recommendations made in the Inspector's Addendum Reports, the order which it is stated was made in the Minutes of the meeting of 31st March 2023 and in the Board Direction and Order.

19. Undoubtedly, there was an error in the manner in which issues relating to the Respondent were considered by the Board at its meeting on 31st March 2023, and in the subsequent Board Direction and Order. It is clear from the evidence that what has occurred is that the Board has purported to grant an application which was not before it. Had the Board adverted to the mistake in the Recommendations of the Inspector in the two Addendum Reports, and determined the application under section 177K as it was required to do, one would expect that it would have

taken care to ensure that the decision made was a decision to grant (whether with or without conditions) or to refuse substitute consent.

20. There is no basis on which it could be said that the Board had decided either to grant or to refuse the application which had been made under section 177E. Clearly the contents of the minutes of the Board's meeting and Direction and Order do not disclose that any decision was made on the application for substitute consent made under Section 177E. The first Inspector's Report, made prior to the amendment of the 2000 Act, had recommended that substituted consent be granted subject to conditions. The latter Addendum Reports did not address the issue of conditions, nor did the Minutes of the Board Meeting nor the Board Direction and Order. Had the Board made a decision to grant substitute consent, it was necessary to decide whether conditions should be attached. The absence of reference to conditions reinforces my view that this is not a case where the error is typographical or clerical. The error was much more fundamental, and it is not one to which section 146A applies.

21. I note that in his second affidavit Mr. Dillon avers that a decision to grant the application made under Section 177E had not been made – it is evident that the Board has not decided to refuse that application either.

22. A purported decision of the Board to grant an application which was not before it (i.e. an application under section 177D) cannot have the effect of ousting its jurisdiction, and statutory duty, to determine the application before it which had been made under section 177E and fell to be determined under section 177K. That is the only application which was and is live before the Board.

23. This is not a case in which a decision must be withdrawn or quashed – the decision and Order of the Board dated 14th April 2023 is a nullity – it was a decision made without an application. The Board has not made a decision on the application before it. Quite clearly the Minutes of the Board meeting, and the Board Direction

and Order indicate that the decision made by the Board on 31st March 2023 was to grant leave to apply for substitute consent under section 177D.

24. *ND (Albania) & Ors v. IPAT* [2020] IEHC 451 relates to an entirely different situation – whereby the IPAT had made a decision on the appeal before it and the Applicants had asked it to reopen that appeal because the evidence had not been taken on oath. Humphreys J. held that, while Regulation 10 of the International Protection Act 2015 (Appeals) Regulations 2017 allowed for correction of errors in IPAT decisions, it did not empower the IPAT to set aside one of its decisions and hold a rehearing "*after a decision has been made*".

25. The position was different in *Krupecki v. Minister for Justice & Equality (No. 2)* [2018] IEHC 538, but it is also distinguishable from the instant case. In *Krupecki* Humphreys J. held that some decision-making processes may be completely water-tight so that the decision-maker is *functus officio* when the decision is made, others including certain decisions of the Minister for Justice are not. In that case, he stated that there was no impediment preventing the applicant from asking the Minister to provide the reasons for his decision.

26. The concept of a decision-maker being *functus officio* was also considered by the Court of Appeal in *Noel Recruitment (Ireland) v. PIAB* [2016] IECA 129. Insofar as that case is of relevance to the issues before the Court, it supports the proposition that the Board did not have jurisdiction to make a second decision on the application under section 177D, a decision having already been made and communicated. It is consistent with my decision that that purported decision in this case is a nullity.

27. In order for a decision-maker to be *functus officio*, it must have exercised its authority i.e. determined the application before it. If that is done invalidly, it is still a determination and the remedy of judicial review is open to an aggrieved party.

28. On 31st March 2023, the Board purported to make a decision granting leave to apply for substitute consent. As in *Mone v. An Bord Pleanála* [2010] IEHC 395, the purported decision can have no force as no such application was before it. Therefore, the making of that decision, which is a nullity, could not render the Board *functus officio* in respect of the Respondent's application under section 177E, which has yet to be determined and must be granted or refused in accordance with section 177K.

29. In this case the Board is clearly not *functus officio* – its duty has not ceased – no decision has been made on the application under section 177E, nor has it purported to make any such a decision. That application must be determined in accordance with law and without further unnecessary delay.

30. The decision I have reached is specific to the unusual and possibly unique facts of this case. *ND (Albania) & Ors v. IPAT*, *Krupecki* and *Noel Recruitment (Ireland) v. PIAB* to which I have referred, are distinguishable – I do not disagree with those judgments. In essence there is a decision without an application which is a nullity, and an application which has not been decided.

31. I intend to make a direction that the decision on the application under section 177E is made under section 177K within a specified timeframe. Before doing so, I shall hear the parties in particular as to whether the Board may require a further Addendum as to the Inspector's Report. Whilst the error which led to the Board's decision of 31st March 2023 first appeared in the recommendation of the Inspector, the Board is obviously entitled to consider the entirety of the Reports and Recommendations and is not required to follow those recommendations.

Emily Farrell