THE HIGH COURT

[2024] IEHC 468

[Record No. 2013-907JR]

BETWEEN

MICHAEL KELLY

APPLICANT

AND

AN BORD PLEANÁLA

AND

ROSCOMMON COUNTY COUNCIL

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Miriam O'Regan delivered on 25 July 2024.

Issues

1. Although the within proceedings are brought against three parties in total the matter which came before the Court is confined to the claim of the applicant as against the first named defendant, An Bord Pleanála ("ABP"). An order of *certiorari* of the decision of ABP of 9 October 2013 is sought. Initially, in both the statement of grounds and the written submissions on behalf of the applicant, the claim was based on more extensive issues than were ultimately pursued before this Court. In this regard, the applicant acknowledged that

insofar as other headings of claim were concerned same have, since the institution of the proceedings, been dealt with adversely to the applicant's position in various judgments. The applicant acknowledged he is not raising a *Worldport* argument to enable this Court to find otherwise than in such judgments contained.

2. The applicant identified that there were two remaining issues in these proceedings, surviving past jurisprudence, one of which would be a matter for the State respondents, who did not partake in the matter before the Court and therefore the applicant's remaining reasons for seeking to set aside ABP's decision of 9 October 2013 might be summarised as: -

(a) planning permission had been granted *"in respect of"* the instant quarry albeit that the relevant planning permission relied on was permission for the construction of a stone bagging shed and associated site works together with subsequent permission for waste-water treatment facilities where the latter permission was sought in compliance with condition 15 in the former permission requiring the applicant to obtain such planning permission; and

(b) no or no adequate reasons were given as to why ABP did not follow the Inspector's recommendation or indeed s.261A Guidelines of January, 2012 ("the Guidelines").

Background

3. Section 261 of the Planning and Development Act 2000 as amended came into force on 28 April 2004 under statutory instrument number 152 of 2004. The provision required all quarry owners to register their quarries with the local authority and further enabled the local authority to impose conditions on the operation of the quarry.

4. The applicant applied for such registration on 19 April 2005 identifying that the quarry was in operation prior to 1 October 1964. The local authority subsequently imposed conditions on the operation of the quarry bearing date 24 April 2007.

5. In 2011 following the decision of the European Court of Justice in *Commission v Ireland (Case-215/06)* where the State was found to be in breach of the EIA Directive, s.261A of the 2000 Act came into force. The local authority was obliged to review quarries in its functional area afresh and make a determination as to whether development was carried out on or after 1 February 1990, which development would have required the EIA or EIA screening but none such was carried out. Should such a finding be made the local authority was then obliged to determine whether the quarry commenced operation before 1 October 1964, or, *"permission was granted in respect of the quarry"* and also to determine whether or not the requirements in relation to registration under s.261 were fulfilled. Assuming that registration requirements were fulfilled, the section provides *inter alia* if there was permission granted in respect of the quarry or same had commenced operation before 1 October 1964 the operator would be directed to apply to ABP for substitute consent. On the other hand, if the quarry commenced operation after 1 October 1964 and no permission was granted in respect of the quarry, an enforcement notice would be served requiring cessation of the unauthorised quarry.

6. The applicant argues that the planning permission afforded to the applicant in 2006 in respect of the bagging shed and the planning permission afforded to the applicant in 2007 in respect of a sewage treatment plant comprises relevant planning permission within the meaning and application of s.261A(3). Accordingly, the Applicant should have been directed to apply to ABP for substitute consent. ABP was wrong to determine that no permission was

granted in respect of the quarry (as a consequence of which an enforcement notice requiring cessation of the unauthorised quarry is imminent).

7. In oral submissions the applicant confirmed that *"in respect of"* is the central issue under consideration. In support of the applicant's position that planning permission for the bagging shed and the water treatment facility sufficed to come within the ambit of s.261A(3) the applicant relies on the Guidelines and the decision of the Court of Appeal (Woulfe J) in *Diamrem Limited v Cliffs of Moher Visitor's Centre Limited* [2023] IECA 235.

8. On the other hand, ABP submits that it was correct in its determination that the shed, ancillary to the quarry activities, was not a permission embraced by s.261A(3)(a) as it was concerned only with such a shed rather than the quarry itself. ABP relies on the balance of the jurisprudence hereinafter identified (other than *Diamrem*) together with the wording of s.261(6)(a)(ii) for the purposes of informing the meaning of *"in respect of"* in the context of s.261A.

9. S.261(6)(a)ii) provides that the planning authority may *"in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963 reinstate, modify or add to conditions imposed on the operation of the quarry"* and the owner and operator of the quarry shall be notified in writing.

10. In the Guidelines of January 2012 at para. 3.3, it is provided that where the authority makes a determination that an EIA/screening for an EIA was required but not carried out, the authority must also decide whether the quarry at some stage obtained planning permission or whether it commenced operation prior to 1 October 1964 and registration requirements have

been fulfilled. It is stated that the quarry just has to have commenced prior to 1964 – it does not have to be operating under a pre-1964 authorisation and similarly, it is stated,

> *"in relation to the permission question, the requirement is just that a planning permission was granted at some stage, the requirement is not for the permission to be current, or for the development to be in accordance with the permission."*

The applicant's argument is to the effect that the planning permission for the shed is effectively an example of the nature of the planning permission required, according to the Guidelines, to come within the ambit of s.261A(3).

11. In the Inspector's report of 10 July 2013, the planning permissions of 2006 and 2007 aforesaid were referenced and it was noted that the permissions did not grant permission for the quarry but are relevant as they are within the site area. The total site area of the quarry in the registration of the quarry is expressed to be 7.8 hectares and the extraction area of the quarry is said to be .73 hectares. In the Inspector's determination under s.261A(4)(a) it is noted that permission was granted to the applicant in respect of the shed. The Inspector went on to quote from s.3.3 of the Guidelines and concluded that, as permission had been granted on this quarry site and registration requirements had been fulfilled, the criteria under s.261A(4)(a) had been exceeded and the planning authority's decision should be set aside.

12. In its decision of 9 October 2013, ABP confirmed the local authority's decision in respect of s.261A(4)(a) but did not accept the Inspector's recommendation aforesaid and went on to state: -

> *"The Board acknowledged that permission had been granted for a shed ancillary to quarry activities on the site (planning register reference number PD06/865) following registration of the quarry by Roscommon County Council under s.261 of the Planning*

and Development Act, 2000, as amended, but did not consider that this permission would satisfy the objectives of s.261A(3)(a) whereby it is a requirement that a planning permission had been granted in respect of the quarry."

Jurisprudence

13. In *Diamrem Limited v Cliffs of Moher Visitor's Centre Limited & Anor.* [2023] IECA 235, Woulfe J gave judgment on behalf of the Court of Appeal on 4 October 2023. The judgment related to costs arising from the principal judgment delivered on 5 November 2021 when the Court dismissed the appellant's appeal against the decision of the High Court to refuse to make an order under s.160 of the 2000 Act in respect of the relocation of a public carpark. The appellant argued that the s.160 proceedings fell within the terms of s.4(1) of the Environment (Miscellaneous Provisions) Act 2011 and accordingly s.3 of that Act applied which in turn provides that each party shall bear its own costs. Section 4(1)(b) of the Act provides that s.3 applies in civil proceedings: - *"In respect of the contravention of or the failure to comply with such…provision."*

The Court went on to identify that there may be more than one purpose or reason for the institution of s.160 proceedings. At para. 55 the court noted that the reliefs sought appear to suggest that the proceedings were instituted for the purpose of ensuring compliance with conditions attached to the 2002 permission but went on to acknowledge at para. 57 that it may well be that the appellant's underlying motivation for instituting the proceedings was to force the closure of the carpark in order to facilitate the appellant's commercial park and ride facility. However, the Court did not intend to take into account the underlying motivation. At para. 58 the Court stated ". . . it seems to me that the proceedings clearly fall within s.4(1)(b) in any event". At para. 59 it is stated: - *"In my experience the words 'in respect of" are invariably given a very wide meaning"*. The Court quoted from a prior Court of Appeal

decision of *Donnelly v Vivier* [2022] IECA 104 where Ni Raifeartaigh J observed that the phrase *"in respect of a contract"* has a very wide meaning. Ni Raifeartaigh J in turn quoted from a prior 2007 UK decision where it was held that *"in respect of a contract"* did not require the claim to arise under the contract – it requires only that the claim relates to or is connected with the contract. Woulfe J also made reference to a 1941 Australian decision which held *"the words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer".* At para. 60 aforesaid Woulfe J applied that very wide meaning to the phrase in s.4(1)(b) of the 2011 Act as it was impossible to argue against the proceedings being related to or connected with non-compliance with the 2002 permission.

14. In *An Taisce v An Bord Pleanála & Ors.* [2021] 1 IR 119 the Supreme Court delivered its judgment on 1 July 2020. At para. 10 thereof McKechnie J identified that the 2010 amendments to the Planning and Development Act 2000 had as its significant objective the State's desire to render our domestic legislation fully compliant with EU requirements, as was clear from s.3 of the 2010 Act. The Court referenced *Commission v Ireland* aforesaid where the State was found to be in breach of the EIA Directive because of the widespread availability of retention permission in this jurisdiction even in respect of projects which required an EIA but which wasn't carried out. The Court went on to note that the overall objective of the EIA was to the effect that the best environmental policy is to prevent pollution or nuisance rather than counteracting same subsequently so that the effects on the environment can be taken into account at the earliest possible stage. The European Court of Justice was also concerned that retrospective regularisation had the same effect as if permission had been obtained. There was nothing in the 2000 Act which prevented a

developer from seeking retrospective consent and this was essential to the European Court's judgment.

15. At para. 79, McKechnie J referenced the fact that retention permission is not precluded by community law however retrospective rectification must remain the exception to the requirement of obtaining pre-development consent. At para. 81 McKechnie J noted that the continuing application of exceptionality was both recognised and endorsed in *Sweetman v An Bord Pleanála* [2018] IESC 1. McKechnie J therefore was satisfied that there was no doubt but that the existence of exceptionality remains an essential requirement of EU law and must therefore be respected in any national measure providing for retrospective regularisation. Insofar as the meaning of exceptional circumstances are concerned, McKechnie J at para. 91 was satisfied that *"it could have a number of different meanings, it could connote something remarkable, extraordinary or special, and that the underlying events must be rare or unusual. However, context is important."*

16. In *Heather Hill Management Company CLG & Anor. v An Bord Pleanála & Ors.* [2022] IESC 43, Murray J gave judgment on 10 November 2022 on behalf of the Supreme Court and referred to the 1999 Law Reform Commission Consultation Paper which observed contrast between judges who construe a statute in order to ascertain the intention of the legislature and those who construe a statute in strict accordance with its words and drafting. At p.107, Murray J referenced *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 where McKechnie J at para. 54 *et seq* indicated: -

> *"Context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that."*

In *Bookfinders Limited v Revenue Commissioners* [2020] IESC 60, O'Donnell J approved the quote above in respect of the *Dunnes Stores* matter and at para. 56 stated: -

> *"A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision."*

At para. 108 Murray J noted that McKechnie J envisaged a two-stage inquiry namely words in context and (if there remained ambiguity), purpose. Murray J approved the view of the Attorney General to the effect that the literal and purposeful of approaches to statutory interpretation are not hermetically sealed. At para. 109 Murray J stated: -

> *"A dogged adherence to the refrain that a literal interpretation of a statutory provision is departed from so as to consider broader questions of statutory purpose and context only where the construction yielded by that literal analysis is ambiguous or absurd"* seemed curious notwithstanding the decisions quoted.

The Court went on to find that: -

> *"What, in fact, the modern authorities now make clear is that with or without the intervention of that provision (s.5 of the Interpretation Act 2005) in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflective rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of the statute as a whole or the context in which, and purpose for which, it was enacted."*

17. In *Shillelagh Quarries Limited v An Bord Pleanála* [2019] IEHC 479, Barniville J in the High Court was dealing with an application to quash the decision of ABP of 18 May 2017 where it refused to grant leave under s.261A(24)(a) of the 2000 Act to apply for substitute consent. The issue related to the meaning of *"commenced operation prior to 1 October*

1964" where the applicant submitted once some quarrying was being carried out at the site the subject matter of the application before 1 October 1964 that was the end of the matter. However, the Board was satisfied that the subsequent user should be proportionate to the prior 1 October 1964 user and the Board also rejected the applicant's contention that the provision was a remedial provision which should be interpreted liberally. The applicant's position was grounded on what was said to be the inevitable consequence of giving the words used in sub. 24 their natural and ordinary meaning. ABP sought to interpret the provision in a manner which respects the decision of the CJEU in Case C215/06 and subsequent jurisprudence of the CJEU to the effect that an opportunity to apply for substitute consent does not afford a person the opportunity to circumvent the community rules and that it should remain the exception. Barniville J was satisfied that the Board's view was the correct interpretation and quoted from *Sweetman* aforesaid where Clarke CJ stated: -

> *"1.1 The former system of retention permission given for existing developments which had been carried out without an appropriate planning permission was found to be inconsistent with European law.*
>
> *7.6… Furthermore, the CJEU has held that the previous Irish system of retention permission which, as the court noted, could 'be issued even where no exceptional circumstances are proved' was inconsistent with European law.*
>
> *7.7 Thus, the validity of any scheme for retrospective consent, such as the substitute consent process at issue on this appeal, must, if it is to be compatible with European law, be such as it does not operate as a facilitation or encouragement to circumvention of Union rules and can only operate in exceptional circumstances."*

Barniville J at para. 123 expressed himself satisfied that: -

> *"The interpretation by the Board is one which better gives effect to the intention of the Oireachtas as that intention can be inferred not only from the subsection at issue itself but from the legislative framework and scheme in which s.261(A)(24) was inserted. … The relatively limited and highly conditional circumstances in which such opportunities are provided by the legislation (to apply for substitute consent,) as appears from the provisions at part XA … would in my view be entirely inconsistent with the interpretation advanced by the applicant which would allow the gateway provided to be opened… in circumstances where all that was necessary to be in existence before 01 October 1964 was a quarrying operation of some kind and not such an operation comparable or proportionate to the operation in place at the time of the application. Such an interpretation would run entirely contrary to the intention of the Oireachtas … my conclusion in this regard is also, of course, heavily influenced by the European dimension and context discussed by the Supreme Court in Sweetman & McTigue."*

Later Barniville J was satisfied that the interpretation of the words in the subsection at issue advanced by the applicant would not be compatible with EU law. At para. 134 the Court concluded that it would be very unsatisfactory if the words used in s.261A(24)(a) of the 2000 Act was given a different meaning to that given by Charleton J in An Taisce 2010 to identical words contained in s.261(7).

18. In *JJ Flood & Sons v An Bord Pleanála & Ors.* [2020] IEHC 195, Ni Raifeartaigh J at para. 88 came to the conclusion that the fact that a quarry has stayed within its pre-1964 user does not automatically render it immune from the requirements of the EIA Directive and the Habitats Directive simply by virtue of the fact that it has stayed within its pre-1964 user and went on to say that insofar as government Guidelines published in January 2012 suggest

otherwise, the Court considered them to be erroneous in that regard.

Decision

19. When one considers the provisions of 261(6)(a) and in particular sub. 2 thereof, it appears to me clear that when referencing *"a quarry in respect of which planning permission was granted"* same related to planning permission *"on the operation of that quarry".*

20. It has not been said, nor would it appear sustainable to suggest that, reference in s.261(6)(a)(ii) to *"a quarry in respect of which planning permission was granted"* relates to permission for the operation of the quarry whereas *"permission was granted in respect of the quarry"* as it appears in s.261A(3)(a)(i) relates to a different form of permission.

21. In *Diamrem* the Court was satisfied that the words *"in respect of"* are invariably given a very wide meaning. The Court applied such a wide meaning in the context of the matter before it. The Court, in reaching it's decision, was not concerned with a need to interpret the words having regard to European Law, in particular *Case-215/06*.

22. In the instant circumstances, a liberal interpretation of the provisions affording a gateway to substitute consent, has been rejected in *Shillelagh*. Furthermore, the Supreme Court has in the various decisions hereinbefore referenced indicated that context is "important"/"critical" and therefore clearly relevant.

23. Para 3.3 of the Guidelines do not suggest that planning permission for an activity other than a quarry will suffice for s.261A(3), however, ABP's Inspector's report of 10 July 2013 did support such a proposition.

24. In the light of all of the foregoing, I am satisfied that the planning permission contemplated under s.261A(3)(a)(i) requires that the qualifying permission must be in respect of the operation of the quarry and insofar as the Guidelines are said to say otherwise same is incorrect.

25. Insofar as reasons are concerned, the applicant argues that in the absence of identifying what ABP thought were the objectives of s.261A(3)(a), it remains unclear what ABP had in mind. On the other hand, the respondent argues that reasons are clear – in the Inspector's report, which was rejected, the Inspector was satisfied that because permission was granted for a shed incorporated in the seven hectares registered as a quarry, same was sufficient for the purposes of s.261A(3). However, An Bord Pleanála was not satisfied that the permission for the grant of the shed was sufficient to comply with s.261A(3)(a) requiring planning permission to be granted in respect of the quarry.

26. In my view, having regard to the Supreme Court dicta in *Connelly* and *Meadows*, an objective observer familiar with all the documentation referenced would be satisfied that ABP's reason for rejecting the Inspector's finding was clear and to the effect that the 2006 planning permission for the shed was not within the nature of the planning permission as contemplated by s.261A(3).

27. The application for *certiorari* of the decision of ABP is therefore refused.

28. As this judgment is being delivered electronically, with regards to the issue of costs, as ABP has been entirely successful, it is my provisional view that they should be entitled to their costs from the applicant, to be adjudicated in default of agreement. As the parties have

not had an opportunity to make submissions as to costs, I shall allow the applicant the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. Should the ABP wish to respond, written submissions of not more than 1,000 words should made within a further 14 days. In default of such submissions being filed, the proposed order will be made.