[2020] IEHC 651

THE HIGH COURT

[Record No. 2013/941 JR]

BETWEEN

LISCANNOR STONE LIMITED

APPLICANT

AND

CLARE COUNTY COUNCIL

AND

AN BORD PLEANÁLA

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan, delivered on the 4th day of December, 2020

Issues

1. Leave was afforded to the applicant on the 16th of December, 2013, to maintain the within judicial review proceedings wherein the applicant seeks the relief of:

   (a) an order of certiorari of the first named respondent's ('the Council') decision of the 22nd of August, 2012;

   (b) certiorari of the second named respondent's ('ABP') decision of the 18th of October, 2013;

   (c) an order quashing the decision of the Council of the 5th of November, 2013; and,

   (d) a declaration that the provisions of s.261A(4)(a) of the Planning and Development Act 2000 as amended ('the Act') are unconstitutional.

2. In the statement of grounds the basis of the applicant's claim is essentially that the quarry on the instant land commenced before the 1st of October, 1964, and thereafter the applicant has operated the activity on a small scale which is proportionate to the established user as of the 1st of October, 1964, without changing or intensifying in any way the development. On this basis it is argued by the applicant that an application for substitute consent ('SC') is not required.

3. The applicant suggests that the Council decision that registration requirements were not fulfilled was wrong in fact and in law, and apparently on this basis the decision of the Council was sought to be reviewed by the applicant (in the letter of the 4th of September, 2012, the applicant merely appealed the notice issued by the Council to ABP without specifying the grounds).

4. The basis of the complaint against ABP is effectively that within the inquiry pursuant to s.261A(2) an assessment should have, but was not made, to the effect that the quarry activities commenced before the 1st of October, 1964, without change in the manner or rate of extraction and was therefore lawful and should not have been required by ABP to apply for SC.

5. It is argued that as a matter of law the planning status of the land determines whether or not an Environmental Impact Assessment ('EIA') or Appropriate Assessment ('AA') is required. It is argued that the determination of ABP was unreasoned, irrational, *ultra vires*, and of no legal effect, with the reasons afforded being wholly inadequate, and the determination is said to be contrary to fair procedure.

6. It is acknowledged that ABP determined that registration had been complied with, and therefore set aside the Council's direction under s.261A(4) to the effect that the Council intended to issue an enforcement notice. It is said that the note within ABP's decision has no basis in law and essentially it is unclear as a matter of law and fact whether the applicant should apply for SC in respect of the whole site or merely the three identified portions.

7. The complaint in respect of the Council's direction of the 5th of November, 2013, (to apply for SC pursuant to ABP's direction) is that it is also unclear because of lack of clarity as to whether or not the applicant is to apply for SC in respect of the whole of the site or the three identified portions thereof.

8. In respect of the State respondents at para. 21 of the statement of grounds it is stated that if the determination reached (presumably by ABP) is in accordance with the provisions of s.261A then the section itself is contrary to the Constitution as the applicant has established constitutional property rights and is entitled to continue developing its lands, which rights have not been taken into account. It is then stated that the determinations of both the Council and ABP are contrary to such rights. It is argued that the uncertain application of s.261A(10) is contrary to the Constitution and retrospectively penalising the applicant is contrary to Article 14 of the Constitution and natural and constitutional justice.

9. There is a grounding affidavit of Mick Johnson in support of the reliefs claimed of the 12th of December, 2013, which aside from mentioning exhibits does not add to the factual or legal basis for the reliefs being sought.

10. Written submissions were tendered by the applicant which are directed to identifying the legal errors alleged as against ABP. The submissions do not elucidate the claim against the Council. Insofar as the claim against the State is concerned the written submissions do not advance the position either but rather state that the applicant is not in a position to particularise this claim until such time as it is known whether or not ABP's decision is, or is not lawful.

11. In oral submissions of the applicant the claim against the State is not advanced further but rather the applicant states that the applicant reserves its entitlement to pursue this aspect of the matter in due course when the decision has been made in respect of ABP's decision. In oral submissions it is argued that the Council did not make an assessment under s.261A(3) of the Act and focussed solely on sub.2 thereof.

12. In addition to the foregoing the applicant argues that it cannot be required to attack the Council decision if ABP's decision is quashed. It is suggested that:

    1. the Council's decision is not in accordance with the decision of *JJ Flood* (hereinafter referenced);

    2. it could not be the case that if the review decision is quashed this would result in a resurrection of the Council decision as it would be unfair to the applicant who would then be worse off than the applicant is with the ABP decision; and,

    3. further because of the passage of time there should be no remittal in the event that the ABP decision is quashed.

13. No jurisprudence has been identified to support the suggestion that the Council decision should be quashed on any one or more of the foregoing headings.

Background

14. It is not disputed that quarry activity occurred on the subject site in advance of the 1st of October, 1964. Nor is it disputed that a grant of planning permission was afforded to the applicant in 1975 in respect of a portion of the quarry under review.

15. On the 25th of April, 2005, the applicant applied to the Council to register the quarry pursuant to s.261 of the Act. The details given by the applicant in answer to the query as to the method of extraction was "*manual, hand tools, excavator*". In October, 2005 there had been an inspection of the property by the Council (and again on the 5th of September, 2008) which indicated a relatively low level of activity.

16. Between May, 2006 and September, 2012 there was an exchange of communication between the Council and the applicant. The Council sought further information in May, 2006 and in August, 2006. Engineering consultants on behalf of the applicant sought further time which application for further time was refused on the 25th of August, 2006. In March, 2007 the Council wrote to the applicant concerning the unauthorised quarry which was followed in April, 2008 with a warning letter pursuant to s.152 of the Act. In June, 2008 the engineering consultants indicated by letter an intention to seek retention planning permission which was followed in July, 2008 by a further letter from the applicant indicating an intention to seek planning permission.

17. On the 22nd of August, 2012, the Council issued its decision under s.261A of the Act.

18. Following the ABP decision the Council issued a second decision of the 5th of November, 2013 directing the applicant to apply for SC within twelve weeks.

19. On the 3rd of May, 2012, the Council carried out a quarry assessment when it was noted that there was machinery inconsistent with prior inspections which had indicated a relatively low level of activity. The relevant machinery was set out in the Senior Executive Chemist Report of the 25th of May, 2012, of the Council. In that report it was noted that the methods of extraction being deployed did not correspond with the information

supplied in the 1975 planning application. It was noted that significant excavation undertaken, particularly in recent years 2005/2010 in the area of the site designated as SPA.

20. The report also found that the extent of the quarry on site exceeds the area covered by maps submitted under the 1975 planning permission and exceeds the area which might be considered to have pre-1964 authorisation and requires an AA to ensure impacts on bird life in the Special Protection Area ('SPA') is avoided and mitigated.

21. By its decision of the 27th of August, 2012, the Council determined that there was development after the EU Directives trigger dates which required *inter alia*, an EIA and an AA but such assessments were not carried out. The Council further decided that the requirements as to registration under s.261 of the Act were not fulfilled. Notice was given of an intention of the Council to issue an enforcement notice in relation to the quarry (the s.261A(4) Notice).

22. The decision was appealed by letter of the 4th of September, 2012, to ABP.

23. An Inspector's report was undertaken by ABP dated September, 2013 which incorporated a site inspection on the 25th of June, 2013. The report noted at para. 9.2.4 that there was an area of land forming the old original quarry area that predated the Act of approximately .34 hectares. It was noted that there was no evidence to suggest this site area had been subject to extractions since October, 1964. This is the area of the cliff edge (Cliffs of Moher).

24. At para. 9.3.1 the report notes that in 1975 while making the planning application the applicant's quarry appeared to occupy an area of approximately .7 hectares and by 1995 had appeared to have doubled to 1.55 hectares. The applicant had strayed from within the boundaries of the planning permission area, however, this area was said to be not more than .4 hectares (this is one of the pockets identified in ABP's subsequent decision concerning the direction to apply for SC).

25. At para. 9.4.1 the area for consideration for a proposed EIA which comprised three parcels totalling 1.14 hectares was identified. As this would amount to a sub-threshold EIA it was recommended to set aside the direction of the Council to the effect that an EIA was required. However, it was suggested that the requirement for an AA would be directed. Finally, it was recommended that the Board set aside the Council decision that registration requirements were not met and enforcement proceedings would issue.

26. On the 11th of October, 2013, ABP issued its direction in which it indicated that it was deciding generally in accordance with the Inspector's recommendation, however, confirmed the Council's determination to the effect that an EIA and an AA was required, but set aside that registration requirements were not met. Included in the reasons section was a consideration to the effect that notwithstanding the small size of the quarry, development was carried out after the trigger date. The Board was satisfied that the quarry had the benefit of planning permission and indicated that in deciding not to accept

the Inspector's recommendation as to an EIA the Board has regard to the super sensitivity of the site, its location which is of national importance, and notwithstanding its small size, the EIA was necessary. ABP identified the area the subject matter of an application for SC and further indicated that the remedial Environmental Impact Statement and remedial Natura Impact Statement should consider the overall area of the holding and all quarry activity therein.

Submissions

27. Notwithstanding that in the statement of grounds the applicant complains that it is unknown what area of lands were the subject matter of the direction for SC, during the course of oral submissions it was indicated that it was clear what area of land was the subject matter of the SC but ABP did not have authority to include the note as to the consideration of the overall area of the holding and quarry activity in the decision as the combination and cumulative effects go without saying.

28. Within the main complaint of the applicant (identified at para. 4 hereof) is that ABP failed to take into consideration the pre-1964 user as mandated under s.261A(3) of the Act. In this regard ABP submits that by taking into account that the quarry had the benefit of planning permission it was unnecessary to engage with pre-1964 user. This decision is said to be in ease of the applicant.

29. In paras. 15 and 16 of the statement of grounds it is suggested that ABP's decision is unreasoned, irrational, *ultra vires* and of no legal effect because:

    (1) no consideration of established user was afforded;

    (2) there is no basis for the note requesting consideration of all of the site in the remedial document;

    (3) it is unclear if an EIA is required for all of the site or limited to the three parcels; and,

    (4) the decision is without reason.

30. It is hard to conceive how a statement which goes without saying could vitiate an otherwise lawful decision.

31. Having regard to the detail contained in the decision of ABP, the applicant has not made out that its decision was irrational under the O'Keeffe test. The decision is reasoned in respect of the divergence from the Inspector's recommendation, and otherwise as the Inspector was generally followed the Inspector's report must also be read in the context of the provision of reasons.

32. The applicant in oral submissions acknowledged that the relevant three parcels of land to be the subject matter of the SC application are clear.

Principal Argument

33. The main focus of the applicant's complaint identified in oral submissions was targeted at the failure of ABP to consider established user under the assessment made in sub.2. The applicant argued that as the applicant's quarry has stayed within its pre-1964 envelope and was entitled to an application of the EU jurisprudence, to the effect that a lawful quarry staying within its pre-1964 user is entitled to the benefit of immunity from going through the SC process, in the like manner as either a quarry which had secured planning permission in advance of the Directive trigger dates, or where there was a planning application pending at the time of those trigger dates, such quarries would be exempt from the requirement for an EIA. The applicant argues that this assessment should take place at sub.2 stage when it is argued by the applicant this quarry should have been screened out. The essence of the applicant's argument is that it enjoys the same status relative to sub.2 as a quarry with full planning permission.

34. The applicant suggests that insofar as the decision in *JJ Flood & Sons (manufacturing) Ltd. v. An Bord Pleanala* [2020] IEHC 195 is concerned:

    1. the application of EU jurisprudence in this manner is not *acte clair*; and,

    2. it was wrongly decided and should not be followed as it is essentially in defiance of the CJEU decision in *Stadt Papenburg v. Bundesrepublik Deutschland*, Case C-226/08 of the 14th of January, 2010, where reference is made to projects which were already authorised at the date of coming into force of the Directives and does not distinguish between planning permission and pre-1964 authorisation.

35. It is acknowledged by the applicant that this argument failed in *JJ Flood*, and the conclusion arrived at that pre-1964 quarries did not enjoy a like benefit with quarries which had planning permission prior to the trigger dates in the Directive so as to be effectively screened out of the future SC process.

36. Insofar as *JJ Flood* took into account Mr. Justice Meenan's prior decision in *Bulrush Horticulture Ltd. v. An Bord Pleanála ; Westland Horticulture Ltd. v. An Bord Pleanála* [2018] IEHC 808, it is suggested this was not an appropriate comparator as it related to peat and the relevant activity did not commence until 1983.

37. At p. 113 of *JJ Flood* the Court poses the question "*Does the fact that a quarry has stayed within its pre-1964 user automatically render it immune from the requirements of the EIA Directive and the Habitats Directive*?".

38. The Court's approach was to look at Irish law through EU spectacles. The Court expressed the view that the Directive applied to all developments within its scope, other than those specifically outside the scope of the Directive, and based this on the analysis of the scope of the directive in *Westland and Bulrush.*

39. The Court went on to quote from, and comment extensively on *Bulrush* and at para. 87 noted that the reasoning of Meenan J. was endorsed by Simons J. in F*riends of the Irish*

Environment Ltd. v. Minister for Communications & Ors. [2019] IEHC 646, which is followed at para. 88 by answering the question posed to the effect:

> *"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."*

40. It is evident from the foregoing that in fact in answering the question the analysis contained in *Bulrush* was the guiding feature, however, the only comment the applicant has made on *Bulrush* is to the effect that it is not relevant because it relates to peat which commenced in 1983.

41. Peat was an exempted development until regulated in 2011. The applicant suggests that a pre-1964 development is in the nature of a planning permission rather than an exempted development.

42. I cannot agree:

    (1) Both peat extraction for so long as it was exempt, and pre-1964 planning were effectively tolerated under the legislation without inquiry as opposed to a situation with a grant of planning permission which would involve a third party assessment in the context of a given process and a consideration of the development in accordance with proper planning and development.

    (2) The same cases emanating from the CJEU, including *Stadt Papenburg*, were considered by Mr. Justice Meenan.

    (3) In coming to his conclusion Meenan J. quoted from O'Neill J. in *M&F Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426 which is a judgment in a case concerning a quarry and clearly Meenan J. took the view that a quarry comparator was appropriate.

43. Given that the applicant has in the main condemned the *JJ Flood* decision and not the *Bulrush* decision which was the foundation of the *JJ Flood* decision, it is not appropriate for me under the heading of judicial comity to find otherwise given that I am not satisfied that there is any substantial reason for me to do so. There is no clear error in the judgment relative to the instant question posed, the judgment is of a recent vintage and did rely on existing and recent jurisprudence.

44. The applicant argues that the issue as to whether or not pre-1964 user might be excluded in a like manner as the formal grant of a planning permission is a matter for the European Courts to determine and reference thereto should be made.

45. This argument is not without merit if made by a party who was an applicant whose development remained within a pre-1964 envelope. However, in the instant matter the applicant has not demonstrated to this Court that it is such a party having regard to the history herein, for example:

(a) On the earlier maps used in the Inspector's assessment, portions of the quarry are identified as disused quarries.

(b) The applicant in fact made an application for planning permission in 1975 in respect of a portion of the quarry.

(c) In the County Council quarry assessment and Inspector's report preceding the Council decision of the 22nd of August, 2012, it was stated that quarrying was occurring beyond what might have been anticipated in 1964.

(d) In the inspection prior to the Council decision aforesaid material was identified on site which was inconsistent with the nature of quarrying said to be taking place in the applicant's registration documents under s.261 (in 2005) which amounts to an intensification of user.

(e) The applicant's map accompanying its application for planning permission incorporated maps identifying portions of the quarry as "*disused*".

(f) A detailed affidavit on behalf of the Council of Ms. Helen Quirke is before the Court. At para. 7 the deponent identified a period of abandonment and non-user of the quarry and the basis for such a statement. This has not been countered by the applicant in any subsequent affidavit.

46. By reason of the foregoing there is insufficient documentation before the Court to suggest that the within quarry is within its pre-1964 envelope.

47. Insofar as the applicant argues that only unlawful quarries are in fact directed under s.261A to apply for SC the *Bulrush* decision aforesaid does not support this. Further in *JJ Flood* at para. 129 the Court indicated that the Board might have been overgenerous to the applicant quarry.

Council Decision

48. The suggestion by the applicant that the Council did not make an assessment under s.261A(3) is not a correct assessment by the applicant of the Council's decision by reason of the fact that under sub.3 it is necessary to determine if the relevant quarry has planning permission or is a pre-1964 development, and registration requirements under S.261 of the Act must have been fulfilled. In its decision the Council held that the registration requirements under s.261 were not fulfilled and as this was a necessary component on behalf of any quarry, and arises only under sub.3, there was in fact no necessity for the Council to consider either the planning permission status or the pre-1964 status under sub.3.

49. The Council has fully defended any attack or challenge to either of their decisions dated the 27th of August, 2012, or the 5th of November, 2013. It states that it cannot fathom how the August, 2012 decision would fall merely because ABP's decision might have been quashed. There are two distinct stages – one before the Council, and one before ABP.

50. In relation to remitting the matter and whether the ABP decision should be quashed the Council refers to *Tristor Limited v. Minister for the Environment & Ors*. [2010] IEHC 454, a judgment of the High Court of Mr. Justice Clarke and *P.C. v. Minister for Social Protection & Anor*. [2018] IESC 57, a Supreme Court judgment delivered by Mr. Justice MacMenamin.

51. In *Tristor*, a ministerial direction was quashed and the question arose as to remittal generally and to whom and when. Clarke J. quoted from Kelly J. in *Usk & District Residents Association Ltd. v. An Bord Pleanála* [2007] IEHC 86, where a decision of ABP was quashed, in reviewing the remittal requirements the Court was satisfied that undoing the consequences of an invalid act – no more no less, was what was required of the Court.

52. In the Supreme Court decision of *P.C.*, the Court quoted with approval from *Tristor* and from an article of Dr. David Kenny, "*Grounding constitutional remedies in reality: the case for as-applied constitutional challenges in Ireland*" (2014) 37(1) D.U.L.J. 53, to the effect that Article 15.4.2 of the Constitution permits if not requires a remedy precisely to fit the identified repugnancy and no more.

53. Reference is made to the decision of the Supreme Court in the *State (Abenglen Properties) v Corporation of Dublin* [1984] IR 381, wherein Chief Justice O'Higgins referred to the remedy of certiorari as a discretionary remedy with the discretion remaining unfettered where the applicant for the reliefs has no real interest in the proceedings and is not a person aggrieved by the decision. In the judgment of Walsh J. in that matter it is stated at p. 397:

> *"If I am correct in this then an order of certiorari quashing the decision made by the planning authority would be of no benefit to the prosecutors. While the Court could make such an order in the present case, the Court in its discretion could refuse to do so where it could not confer any benefit upon the prosecutors."*

54. Because in my view the Council, by referencing the lack of registration of the quarry, did have regard to s.261A(3) in its decision of the 20th of August, 2012, no basis at law has been identified by the applicant's to secure an order quashing the decision of the Council, and as the Council's decision incorporates notice of an intention to serve an enforcement notice, the applicant would, as is acknowledged by the applicant in oral submissions, be worse off than being left with the decision of ABP.

55. In these events therefore, it appears to me it would be appropriate to exercise my discretion in favour of refusing an order of certiorari of the ABP decision even if the applicant was correct in suggesting that the decision of ABP should have found that the applicant was immunised from the effects of s.261A by reason of pre-1964 user and that this immunisation should have been identified at sub.2 stage.

Claim of Unconstitutionality

56. The applicant's claim against the State is as aforesaid to s.261A(4)(a) of the Act. As argued on behalf of the State this declaration is predicated on a claim that the applicant quarry operated legally but was forced through a process that was intended for unlawful developments only. The State further argues that the provision would only be relevant to the applicant and afford him *locus standi* if ABP's decision is to be quashed.

57. Within the statement of grounds the detail of the claim against the State is confined to para. 21. That paragraph suggests the entirety of s.261A is contrary to the Constitution. However, that is not within the reliefs claimed. It is argued that the applicant has established constitutional property rights and is entitled to continue developing his land accordingly.

58. In *McGrath Limestone Works Limited v. An Bord Pleanala & Ors*. [2014] IEHC 382, a judgment of Mr. Justice Charleton on the 30th of July, 2014, the Court quoted from Mr. Justice O'Neill in *M&F Quirke & Sons v. An Bord Pleanala* [2009] IEHC 426, to the effect that it is well settled that property rights as protected by the Constitution are not absolute. The power of the State to regulate the use of land has been recognised in a number of cases (para. 7.14).

59. At para. 7.16, O'Neill J. stated "*Inevitably, over the years, changes will have taken place in the lands quarried, in the surrounding area and in the science and technology. Any argument to the effect that because a quarry was being operated in a certain way over forty years ago, that it should continue in the same manner must be untenable*".

60. Charleton J. identified the statement of O'Neill J. as being high authority. Charleton J. was satisfied that s.261A was introduced to comply with EU Directives and jurisprudence, and therefore authorised under the Constitution.

61. As aforesaid the applicant has not made any submissions in respect of the constitutional action and as complained of on behalf of the State the plea against it is general in nature, unparticularised and no factual basis is put forward.

62. For the reasons above in my view the argument against the State must be struck out on the basis that any claim maintained in the within proceedings by the applicant against the State is not properly before the Court as it is not in accordance with O.84, r.20(3) of the Rules of the Superior Courts which rules were implemented in response to the Supreme Court's unanimous decision in *A.P. v DPP* [2011] IESC 2, finding that it was essential that the applicant for judicial review set out clearly and precisely each and every ground.

63. In turn O.84, r. 20(3) provides that it shall not be sufficient for an applicant to give as any of his grounds an assertion in general terms but rather should state precisely each such ground giving particulars where appropriate and the fact the matters relied upon in support of same.

64. No attempt was made to fulfil this rule in the claim against the State.

65. The only submissions written or oral referencing the State is to the effect that the applicant is effectively reserving its position. No application has been made to this or any other court to adjourn or allow the claim against the State to await a determination as against the Council and ABP.

Conclusion

66. In conclusion I am satisfied that the *JJ Flood* decision is valid and must be followed in the light of the foregoing analysis, the decision of ABP is rational and reasoned and arrived at within jurisdiction. Although at some point a reference to the CJEU might be contemplated by the courts the applicant has not demonstrated that it would be an appropriate applicant in respect of pre-1964 envelope activity.

67. Even if I am incorrect and the decision of ABP should be quashed, having regard to my view that the Council decision is valid so that only the ABP decision would then be quashed, no benefit would be occasioned to the applicant by quashing the decision. In these circumstances, it would be appropriate to exercise my discretion to refuse the relief of certiorari of the ABP decision.

68. The claim against the State is wholly general and is not made in accordance with the O.84, r.20(3) of the Rules of the Superior Courts or the decision of *A.P. v. DPP* of the Supreme Court, and in any event not only does the provision have the presumption of constitutionality but *McGrath* and *JJ Flood* have both considered the constitutionality of the section and concluded that as same is in accordance with and required by EU Directives and jurisprudence it is constitutional.

69. The reliefs claimed by the applicant are refused.