Neutral Citation No. [2006] NIQB 9 | *Ref:* **GIRC5487**

Judgment: approved by the Court for handing down | *Delivered:* **10/02/2006**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF APPLICATIONS BY:

(1) AM DEVELOPMENTS UK LIMITED
(2) BELFAST CITY COUNCIL AND BELFAST CHAMBER OF TRADE AND COMMERCE
(3) BOW STREET MALL LIMITED AND LISBURN CHAMBER OF COMMERCE
(4) CENTRAL CRAIGAVON LIMITED

FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE RT HON LORD ROOKER, MINISTER WITH RESPONSIBILITY FOR THE DEPARTMENT OF THE ENVIROMENT

GIRVAN J

[1] By a summons dated 25 January 2005 a number of applicants sought discovery of certain documents which, it is alleged, are discoverable in the judicial review proceedings brought separately by individual applicants. The documents sought against the respondent minister by various of the applicants are listed in paragraphs 1 to 9 of the First Schedule to the summons. Of the nine matters listed in that Schedule it remains only necessary to rule on two categories of documents, namely to, those in paragraphs 4 and 8.

[2] Belfast City Council and Belfast Chamber of Trade and Commerce seek:

> "Any material considered by other ministers in the application of Article 31 in similar circumstances, for instance, Victoria Square, Belfast."

[3] The words "for instance" show the potential width of the request. In supporting the application for discovery of this documentation Mr Scoffield contended that the minister did not undertake any proper empirical or professional assessment of the social and economic benefit of the development, considerable assessment of this kind being undertaken by the then minister considering the application for Victoria Square development, including the instruction of independent consultants to advise him. The applicant sought discovery of that documentation to show comparatively the difference of approach between Minister Dodds and Lord Rooker in approaching the exercise of their duty of inquiry where major application of this sort was concerned. It was argued that the respondent had wrongly dismissed the request.

[4] The governing principles in relation to discovery in judicial review cases in this jurisdiction are set out in Re McGuigan's Application [1994] NI 43, Re Rooney's Application [1995] NI 398 and Re Belfast Telegraph Newspapers Application [2001] NICA 20. The power to make discovery derives from Order 24 rule 3. Under rule 9 the court is to refuse to make an order if satisfied that discovery is not necessary either for disposing fairly of the matter or for saving costs the onus being on the party from whom discovery is sought. In judicial review proceedings discovery is restricted both in respect of the occasions on which it will be ordered and the extent to which discovery is to be made. It is essential to examine carefully the issues which arise in any particular application for judicial review to ascertain whether discovery is necessary for the resolution of some issue arising in the application. Unless there is some prima facie case for suggesting that the evidence relied on by the deciding authority is in some respect incorrect or inadequate it is improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence. The court will consider that discovery is not necessary for disposing fairly of the case where the applicant is unable to positively identify material which suggests that the respondent has acted improperly in making the impugned decisions.

[5] The documentation referred to in paragraph 4 is not necessary for fairly disposing of the case. The application is brought merely to enable a comparative exercise to be carried out comparing and contrasting the different approaches taken by ministers in an article 31 situation. This does not of itself advance the applicant's case nor would it establish that the minister in this case acted in breach of his legal obligations. The argument whether the minister properly directed his mind to the proper issues that

arise under article 31 does not require the claimed discovery. Accordingly, I refuse the application.

[6] In paragraph 8 of the summons Bow Street Mall seeks discovery of the draft PPS 5 document that formed part of the minister's consideration at the time of his improper decision. The formulation of the request pre-supposes that the minister had taken PPS 5 into account. By letter dated 18 January 2006 Mr KJ Brown writing on behalf of the Departmental Solicitor stated:

> "You suggested a document described by you as `*the draft PPS 5 document*' formed part of the minister's consideration at the time of his impugned decision. I am clearly instructed that this suggestion is incorrect. No such document was considered by the minister in making the impugned decision. Accordingly, your complaint that the minister took into account *an unpublished document* is without foundation."

[7] The case is made that the minister in reaching his decision failed to have regard to the draft document. If, as a matter of law, the draft document was a relevant consideration to be taken into account before the decision was made then, by the Department's own admission, the decision maker failed to have proper regard to that consideration. Discovery of the document itself will not advance the applicant's case on that issue. Mr Horner QC referred to a document which appeared to have been a set of answers suggested by departmental advisors that the minister should give to possible questions arising from the decision which might be posed at a press conference. Question 7 onwards read:

> "Q7 – Will this decision be consistent with the revised retail planning policy currently being drafted by the Department of Regional Development.
> **A7 - Revised retail planning policy for Northern Ireland has yet to be published but will be issued in due course in the form of a public consultation draft.**
> Q8 – Are you aware of the content of draft PPS 5?
> **A8 – I am aware of the broad content of the current draft PPS 5 in that it is in line with draft BMAP. Papers addressing the detail are with my office at present.**
> Q9 – This decision is out of step with draft PPS 5. Why are you ignoring PPS 5?
> **A9 – PPS 5 is a draft which has yet to be published. But I recognise that it would be a**

factor to be taken into consideration in coming to a decision on planning applications. That said in the case of this development as Spruce field, I am clear that the other factors would outweigh PPS 5.
Q10 – Have you deliberately delayed the publication of draft PPS 5 to try to make this decision about Sprucefield easier to present.
A10 – PPS 5 has taken sometime to produce because of the complexity of some of the issue involved. John Speller discussed those issues with officials on a number of occasions which was not in a position to complete his consideration of the draft PPS before the general election was called. It would not have been appropriate to take any public action on PPS 5 in the run up to the election. I have now taken over responsibility for PPS 5. This was only finally determined last week and so I have not yet had the opportunity carry out the detailed examination of the papers which will be necessary before I can clear them for publication. "

The suggested answer to Q9, if it had been given as an answer at a press conference, might have led to the reasonable inference that the minister knew about PPS 5, that it was a relevant factor to be taken into consideration; that he had taken it into account; but that he was clear that PPS 5 was on the facts of the relevant planning application outweighed by the factors in favour of the grant of permission. At the *actual* press conference the Minister was asked "Why did you announce this before we had seen the PPS 5 proposals on retail planning?" The answer given was:

"Well PPS proposals on retail planning had not gone through the system. The honest truth is, I'm trying to give you the honest truth anyway, its arrived on my desk although I am not essentially the minister who would deal with that for reasons of responsibilities amongst the ministers and interest amongst the ministers. It's not sufficient in my view but I've to do a lot of work on it because it was literally only last week Thursday I think it was that it was agreed that it would come from one minister over to me so I physically got it on my desk upstairs this morning of what I know about it. The fact of the matter is the wider considerations of what was involved in this planning application I don't

think would have been outweighed by what's in the draft PPG 5 (sic) which"(sic).

The question was posed whether in the form that it was at the moment was the proposal compatible with what the minister had been asked to do. His answer was:

"Well, it doesn't matter 'cos I haven't first of all it hasn't been gone through. The fact of the matter is whatever is in PPG 5 (sic) or whatever ends up in PPG 5 (sic) would not be compatible (sic) and, secondly, the wider overall considerations I don't think would be negative (sic) by what's in PPG 5 (sic) either in draft or in its final form."

What precisely this incoherently worded answer actually means will require to be carefully analysed in the course of the substantive application. The answers may inferentially suggest:

(a) that the minister had PPS 5 (incorrectly called by the minister PPG 5) in the sense of it being on his desk but that he had not considered it or considered it in detail;

(b) whatever it said, the wider considerations raised by the application would have outweighed whatever was in the draft document (which was only a draft anyway).

The reference to "whatever is in or may ultimately be in PPG 5" not being compatible is unclear it is unlikely to mean that the contents of PPS 5 are internally incompatible. It may mean that the granting of permission would not be compatible with PPS 5 or it may mean that PPS 5 proposals would not be compatible with the wider issues that needed to be addressed in relation to the subject application. Whatever might be the ultimate conclusion on what the minister said or meant the fact remains that it is said clearly on behalf of the minister that the minister did not take the PPS 5 document into consideration. The letter of 18 January must be assumed to have been given on the instructions of the minister and to have been given with his authority. If this understanding is incorrect then the minister would have a duty of candour to the court to correct the impression created by the letter. Inasmuch as the case made by the applicant is that the minister failed to take it into account as a relevant consideration, the ministerial concession confirms the factual basis of the proposition (whatever the legal effect of the point may be). Accordingly, discovery of the actual document is not called for.

[8] In the Second Schedule Belfast City Council and Chamber of Trade and Commerce and Central Craigavon Limited seek discovery as against the notice party Sprucefield Centre Limited ("SC") of various documents

comprising documents and correspondence relating to SC's contractual and financial relationship with John Lewis Plc at Sprucefield at the relevant time and relating to the proposal of John Lewis Plc to locate at Sprucefield.

[9] Mr Scoffield argued that if the minister took the identity of John Lewis Plc into account he could only do so if there was certainty that the proposed operator would in fact locate and operate from Sprucefield. There would have to be a guarantee to that effect. He argued that it is important for the court to know whether there was a contractual guarantee and to what extent if at all this may have been communicated to the minister. No case is being made out by the minister that there was such a guarantee and, in the absence of express knowledge of such a guarantee, no such guarantee could be inferred by the minister. Discovery of the documents sought by the Belfast City Council and Belfast Chamber of Trade is not necessary or appropriate. The case for the minister proceeds on the basis that the documents sought by the applicants in the application for discovery were not before the minister. Discovery of those documents is not necessary for the purposes of the challenge to the reasoning and the procedural process followed by the minister in arriving at the impugned decision.

[10] The argument mounted to support the application by Mr Larkin was that discovery was necessary to facilitate the prosecution of the EU law grounds. It was accepted that many of the grounds may not require discovery since it is argued the minister recognises that the identity of John Lewis Plc was a crucial factor. Mr Larkin argued that there is an obligation to member states to take appropriate measures to ensure fulfilment of obligations arising from the treaty and to facilitate the achievement of the community's tasks (see Koebler v Austria [2003] ECR 1-10239). He argues that there was, in effect, a tripartite arrangement between the state authority, SC and John Lewis Plc that was designed to facilitate the distortion of competition within the common market with the notice party in its arrangements agreeing to allow the opening of 29 additional units at Sprucefield as a means of subsidising John Lewis Plc's arrival at the centre and thereby applying dissimilar conditions to John Lewis plc, thereby placing it at a competitive advantage.

[11] In relation to the claim to see the documents it should be borne in mind that:

(a) This is a judicial review decision relating to a planning permission decision made by the minister and the questions of discovery must not lose sight of the limited nature of the legal challenge which analyses the reasoning process and decision of the minister, albeit that there may be relevant considerations arising under EU law.

(b) The documents of which discovery are sought were not seen by the minister and their actual contents in themselves could not therefore have been material in the minister's decision. That is distinct from the legal question whether the minister should have seen such documents or inquired into the issues raised by the proposal .

(c) In putting forward the case for the proposition that the granting of planning permission was unlawful State aid there is no need to have recourse to the documentation sought.

(d) The allegation of the unlawfulness of the minister in making his decision in breach of Article 81 (read with Article 10) must founded on the basis that the ministerial approach (i) was based on the information he actually had (which did not include the claimed documents) or (ii) arose from a failure to call for and examine the documents of which discovery is sought. Discovery is not required for either purpose.

(e) The nature and width of the claim for discovery smacks clearly of a fishing expedition.

[12] In these circumstances I do not accede to the application for discovery of the documents set out in the Second Schedule.