

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY CITY HOTEL (DERRY)
LIMITED FOR JUDICIAL REVIEW**

WEATHERUP J

The application

[1] This is an application for Judicial Review of a decision of the Department of Social Development relating to the development of lands owned by the Department at Foyle Street, Londonderry. The applicant is a wholly owned subsidiary of Monument Property Services Limited, which in turn is a wholly owned subsidiary of Harcourt Developments Limited. The applicant was incorporated for the purposes of developing, building and operating a hotel development at the Foyle Street site. The applicant and the Department entered into a development agreement for the site in 1996 but the development has not taken place. The applicant now proposes an alternative form of development but the Department has rejected the applicant's proposals and it is that rejection that is the subject of this application for Judicial Review.

The background

[2] The Department issued a development brief for the Foyle Street site in 1994. Several interested developers submitted their proposals to the Department. The applicant entered into a development agreement with the Department on 20 December 1996 for a hotel development on the site to be completed by May 1998, and ultimately title to the site was to be transferred by the Department to the applicant.

[3] In January 1997 the applicant took possession of the site and commenced the works. There were differences between the applicant and the Department in relation to the works and the Department served notices on the applicant under the contract to determine the agreement and repossess

the site. In February 1999 the Department commenced proceedings against the applicant in the High Court for possession of the site and further to an arbitration clause the proceedings were stayed and the dispute referred to the Lands Tribunal. There followed two hearings in the Lands Tribunal and by the final order of the Lands Tribunal dated 6 September 2002 the applicant was granted an extension of time for completion of the works to 13 April 2004.

[4] The applicant summed up the position on 6 September 2002 in the following manner. The Department had been found to be in breach of the development agreement by preventing the applicant from continuing work on the site; an extension of time was granted to 13 April 2004 for completion of the development; market conditions for a hotel development had changed significantly; the applicant had spent £300,000 in developing the Foyle Street site; grant assistance for the hotel project was no longer available and it was extremely unlikely that any further grant or assistance would be made available; the adverse market changes were as a result of delay in the development due to the legal proceedings initiated by the Department which were unsuccessful. The applicant came to the conclusion that the original development plan was no longer viable. The result was that from that date until the commencement of these Judicial Review proceedings in November 2003 the applicant attempted to agree an alternative form of development with the Department.

[5] In summary the exchanges between the applicant and the Department during that period included the following. At a meeting on 17 September 2002 between the applicant and the Department the applicant sought the Department's agreement in principle to alternative development in the form of commercial office development with some retail at ground level or a small hotel together with commercial development and some retail at ground level. By letter dated 20 November 2002 the Department emphasised the existing agreement of 20 December 1996 which had been extended to 13 April 2004; that in considering the renegotiation of the 1996 agreement the Department would be obliged to have regard to its procedures and the interests of third parties; that the Department was prepared to recognise a truly exceptional case bearing in mind the public interest; that there was a paucity of detail in the applicant's proposals and that it would keep under review its assessment of the requirements of the public interest with regard to the development of the site.

[6] Alternative development proposals were then prepared by the applicant and furnished to the Department. Meetings occurred between the applicant and the Department on 7 February 2003 and 1 April 2003. The Department's "Note for File" of the meeting of 1 April 2003 sets out what are described as the "essential ingredients" of a package of proposals "which might persuade the Department to consider if an alternative development

should/could be permitted.” The essential ingredients were noted as follows–

“(i) A proposal to develop the site in a manner which is, from the perspective of the public interest in having regard to current policies clearly preferable to the development authorised by the agreement dated 20 December 1996.

(ii) A proposal which complies fully with all of the Department’s normal requirements, together with such addition or enhanced requirements as are deemed appropriate in all the circumstances.

(iii) A proposal which contains all guarantees and assurances which the Department considers reasonable and appropriate in all the circumstances.

(iv) An unequivocal undertaking by the company that it will withdraw its application to the Lands Tribunal for an order for costs against the Department – or alternatively, if appropriate, will waive any such order already made (none to date).

(v) An unequivocal undertaking that the company will not initiate any further litigation against the Department of any kind whatsoever arising out of or relating to the agreement dated 20 December 1996.

(vi) A civil undertaking by the company to execute a written agreement with the Department containing all necessary provisions to reflect the Department’s requirements (supra).

(vii) Agreement to pay current market value for the site.”

[7] By letter dated 15 May 2003 to Harcourt Developments Limited the Department rejected the applicant’s proposal. The nature of the Department’s approach to the proposal appears from the letter –

“As you are aware, the Department has been giving consideration to whether it should,

exceptionally, and in the public interest, make an arrangement whereby the City Hotel (Derry) Limited or your company would be permitted (subject to all other relevant legal requirements, authorisations and approvals) to carry out a development on the relevant site at Foyle Street, Londonderry ("the site") other than that permitted by the City Hotel's agreement dated 20 December 1996 with the Department's predecessor."

The reason for refusal was stated to be that the proposal did not contain the essential ingredients the Department required and in particular the proposal manifestly failed to unequivocally offer a realistic and acceptable financial premium for the site.

[8] The applicant wrote to the Minister. The applicant's solicitors forwarded draft Judicial Review proceedings to the Department's solicitors. By notice dated 17 June 2003 the Department required the applicant to proceed diligently with the contract works on the site within 30 days or in default the agreement and the applicant's licence would determine. On 13 June 2003 the applicant issued a notice of reference to the Lands Tribunal claiming damages against the Department for breach of contract. Each party defended their position in correspondence.

[9] The requirement that the applicant pay the current market value of the site was a key problem. The applicant was prepared to offer the sum that would have been payable under the development agreement of £353,000. The Department indicated that the Valuation and Lands Agency had advised that the site had a current market value in the region of £1.75M - £2M for a mixed development use. By letter dated 3 October 2003 the Department's solicitor stated that –

"At this advanced stage your client has still failed to include in its proposal to the Department anything remotely approaching a realistic offer in this respect. If your client wishes to supplement the terms of its current 'proposal' to include a substantial and realistic financial premium for the site, please indicate accordingly."

By letter dated 20 October 2003 the applicant's solicitors referred to the premium for the site and the valuation provided and stated that "...our client is willing to pay the consideration as set out in the December agreement of 1996."

The applicant's ground of challenge

[10] Leave was granted to the applicant on the single ground that –

“The Department has misdirected itself by failing to acknowledge the applicant's position as different to that in which the Department's normal principles for the disposal of land apply. In particular, the Department expressed itself to be willing to consider the applicant as an exceptional case, but thereafter continued to take steps to enforce the agreement of 20 December 1996 and to obtain possession of the site.”

Public Law

[11] The respondent raises two preliminary grounds, and in respect of each ground it is contended the applicant's claim should be dismissed. First it is contended that this dispute between the applicant and the Department is a private law issue relating to the contractual arrangements between the applicant and the Department and is not a public law matter giving rise to Judicial Review. Secondly it is contended that the applicant is in breach of its obligation to make full and frank disclosure in that it has omitted reference to its alleged current financial difficulties.

[12] Whether an issue is one of public law has given rise to some debate in this jurisdiction. In the context of employment in the Civil Service Carswell J reviewed the authorities in *Re Phillips Application* [1995] NI 322 and at 344 concluded that “It is a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law.....”

Kerr J addressed the point in relation to decisions of the Army Board on the proposed discharge of soldiers in *Re McBride's Application* [1999] NI 299 at 310 where he stated –

“It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as

a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity.”

On the appeal to the Court of Appeal in a further decision of the Army Board in Re McBride's Application (No 2) [2003] NI 319 at 336 Carswell LCJ agreed with and adopted the above approach of Kerr J.

[13] Kerr J returned to this point in Re Kirkpatrick's Application [2003] NIQB 49 in the context of fishing licences issued by the Lough Neagh Fishermens Cooperative Society Limited. In applying the test as to whether the matter “affects” or “impacts” on the public rather than merely engages its interest, Kerr J was satisfied that the licensing system for eel fishing in Lough Neagh was a matter of public law. He had regard to the intense public interest in the conservation of the natural resources of Lough Neagh and concern for the maintenance of fish stocks and the regulation of fishing activities and the historical accident that fishing rights were privately owned by the Society rather than controlled by a public agency accountable to Government.

[14] I adopt the approach of considering whether the issue “affects” or “impacts” on the public in the manner described by Kerr J. First of all it is necessary to identify the issue that is the subject matter of Judicial Review. The decision under challenge is not a decision made directly in connection with the contractual relationship between the applicant and the Department but rather is a decision made in connection with alternative proposals to the existing arrangements for the development and disposal of the lands. The issue concerns the terms on which public lands might be developed and disposed of, other than in accordance with an existing development agreement and further to established standards of public accountability. That being the issue it is necessary to consider if it affects or impacts on the public. The Foyle Street site is a prime city centre development site next to the historic centre of Northern Ireland's second city. The site is publicly owned and the public have a right to expect that the development and disposal of the site will be undertaken by the Department in the public interest. Development and disposal of this site in present circumstances is subject to statutory regulation and established procedures. It is also to be noted that the Department has expressed its own concerns about the threat of Judicial Review proceedings by other interested developers, and while that does not determine whether this is a public law matter it is an indication of the public law character attributed by others to connected issues. Consideration of the development and disposal of these public lands outside the existing contractual arrangements is a matter of public law.

Full and frank disclosure

[15] The respondent's second preliminary point concerns full and frank disclosure in relation to the applicant's financial position. The Department filed an affidavit exhibiting a winding-up petition lodged in the High Court on 16 February 2004 concerning the non-payment of a debt by the applicant in the sum of £161,274. The debt related to professional, architectural and interior design services provided under the standard form RIAI conditions of appointment of architects, which conditions contained an arbitration clause. The applicant disputed the debt and referred the dispute to arbitration. The applicant's solicitor filed an affidavit in these proceedings explaining that the applicant has operated as part of Harcourt Developments Limited in its discussions with the Department about the Foyle Street site, and has indicated to the Department that the applicant has been and will be funded by Harcourt Developments Limited in relation to any development at the Foyle Street site. The holding company has been involved in the discussions with the Department and some of the correspondence has been in the name of the holding company on behalf of the applicant. The Department has not made any challenge to the financial standing of the holding company or its financial support for the applicant.

[16] The financial viability of the applicant would clearly be a material consideration for the Department in assessing any development proposal from the applicant. The applicant's debt is disputed and will be the subject of arbitration and the financial stability of the overall corporate structure is not in dispute. In the light of the considerations outlined above on behalf of the applicant I do not accept that there has been any absence of good faith on the part of the applicant in the non disclosure of information about the dispute over architect's fees or that there has been material non disclosure.

The legislation

[17] Article 90 of the Planning (Northern Ireland) Order 1991 deals with the disposal of land held for planning purposes -

“(1) Where any land acquired or appropriated by the Department for planning purposes is for the time being held by the Department for those purposes, the Department may dispose of the land to such a person as may appear to it to be expedient in order to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out thereon, whether by itself or by any other person or to secure the erection, construction or carrying out thereon of any building or works

appearing to it be needed for the proper planning of the area in which the land is situated.”

[18] In the exercise of the statutory power the Department acts in accordance with “Government Accounting Northern Ireland”. Paragraph 32 deals with disposal of assets. Paragraph 32.1.1. provides –

“In disposing of assets departments should ensure that they get the best possible price so as to protect the taxpayers’ interests. As a general rule surplus assets should therefore be sold on the open market by means of public auction or tender or in the case of property assets by the most appropriate means recommended by the District Valuer in consultation with the selling agent.”

Paragraph 32.1.3 provides that particular care needs to be taken in the disposal of land and buildings to ensure that the full value is realised for the Exchequer and references are made to circulars containing detailed advice on the disposal of surplus land.

[19] The provisions for exceptions to the general rule set out above are of relevance to the present case. Paragraphs 32.1.12 to 32.1.14 concern the disposal of assets to bodies other than Government departments at less than full market value. It is provided that in exceptional circumstances where the Department considers that it would be justified in taking such action the Department requires the approval of the Department of Finance and Personnel and the transfer of an asset at less than full value should be accounted for as a gift to which specified procedures apply.

Exceptional cases

[20] The applicant claims to be entitled to consideration as an exceptional case, so that the existing development agreement should be replaced by an alternative development proposal agreed with the applicant. The applicant considers that this treatment is warranted because in the first place it alleges that the Department has been in delay in securing a determination in the arbitration. The High Court proceedings were stayed to arbitration in September 1999 and the hearing did not commence in the Lands Tribunal until May 2001. Secondly the applicant relies on the Department’s breach of contract and points to five major issues on which the Lands Tribunal made findings adverse to the Department, including a finding that the Department’s refusal to allow the company to continue working after February 1998 qualified as a delaying factor and as a repudiatory breach of contract.

[21] The Department has not accepted that it has been at fault in the respects alleged by the applicant but it has expressed a preparedness to treat the applicant as an exceptional case in all the circumstances that have arisen. That expression of preparedness is apparent from the correspondence from the Department and is reiterated in the affidavit of the Director of the North West Development Office of the Department who states –

“In effect the general rule is that the Department is obliged to seek to achieve both the ‘best use of the site’ and the ‘best price’ it can secure within the limits of any restrictions which it imposes in controlling the development of the site. While exceptions to this general rule are rare, I was prepared to consider treating the applicant exceptionally in this regard. However, in the event, the applicant’s ultimate offer of financial consideration for the site was considered to me to be woefully inadequate, with the result that the Department did not initiate the process of seeking DFP approval in accordance with the GANI provisions.”

[22] It is certainly the case that the Department purported to be prepared to treat the applicant as an exceptional case but the applicant contends that the Department was not genuine in its approach and was not prepared to treat the applicant as an exceptional case.

[23] The applicant relies on the Department’s continued enforcement of the agreement of 20 December 1996 and the attempts to obtain possession of the site as an indicator that the Department was not prepared to treat the applicant as an exceptional case. The existing legal relationship between the applicant and the Department is found in the agreement of 20 December 1996. The conclusion of the arbitration had the effect of extending the date for completion of the works to 13 April 2004. The applicant continued to be under an obligation under the agreement to proceed with the works and in default the remedies are provided for under the agreement and include termination of the applicant’s licence and of the agreement. Similarly the Department has obligations under the agreement. The differences between the applicant and the respondent as to their respective rights and obligations under the agreement will be determined by arbitration. The terms of that agreement continue to govern the legal relationship between the applicant and the Department, and subject to proceedings in Court or by arbitration that will remain the position until termination of the agreement or an alternative agreement is reached by the parties. Those discussions which have taken place between the applicant and the Department have been with a view to exploring the basis for an alternative agreement, but in the absence of

such an alternative agreement or the discharge of the original agreement the parties are bound by the agreement of 20 December 1996. In those circumstances the Department cannot be faulted for insisting on compliance with the original agreement pending the completion of a new agreement and that insistence does not indicate that the Department was not genuine in its expression of preparedness to contemplate an alternative agreement.

[24] Further the applicant contends that the Department was not treating the applicant as an exceptional case by its insistence on the payment by the applicant of current site value as a condition of an alternative agreement. The minute of the meeting of 1 April 2003 specifies one exceptional ingredient as payment of current market value for the site. The rejection of the applicant's proposal in the letter of 15 May 2003 refers to the absence of an offer from the applicant of "a realistic and acceptable financial premium". The Department's letter of 18 June 2003 requires "an acceptable financial premium" and states that the value of the site is believed to be between £1.7 and £2M. The Department's letter of 2 September 2003 states that one factor in rejection of the applicant's proposal is the absence of "a suitable premium" and the Valuation and Lands Agency valuation is enclosed. The Department's solicitor's letter of 3 October 2003 invites "a substantial and realistic financial premium for the site". The applicant's offer appears to have remained at some £353,000. The Director of the North West Development Office accepts that the valuation probably relates to the site being available for unrestricted development.

[25] While it is stated to be an essential ingredient that the applicant should pay the current market value of the site, consideration of the correspondence as a whole does not indicate that the Department was insisting on payment of the unrestricted development value of the site or indeed the restricted development value of the site. These exchanges are essentially commercial negotiations where the Department seeks and is obliged to seek the "best price" or must justify anything other than the best price. The "best price" will no doubt take account of all the other circumstances prevailing including the financial consequences arising under the contract and the arbitration for the Department and the applicant. The Department seeks a substantial and realistic financial premium for the site and has formed the opinion that the financial premium presently on offer is "woefully inadequate". That is a judgment that the Department is entitled to make and I am not satisfied that that judgment can be set aside on any Judicial Review ground, nor does the approach of the Department indicate any lack of genuineness in the expressed preparedness to consider the applicant as an exceptional case. Even if the Department were to require payment of the full market value of the site, that must remain a judgment for the Department to make in the circumstances. If there is to be no agreed alternative to the present agreement the parties will be left to pursue their rights and honour their obligations under that agreement.

[26] The applicant relied on other indicators that the Department was not treating the applicant as an exceptional case. The Department had not accepted any blame for the differences that had emerged between the parties, despite the adverse findings of the Lands Tribunal; it had never been stated that the applicant's case was exceptional, merely that the Department was prepared to consider exceptional cases; any preparedness to consider the applicant as an exceptional case was always conditional on essential ingredients being met; even if the financial demands were met the applicant's case would still only be "considered" for exceptional treatment; other developers who were interested in the site were being given equal consideration to that accorded to the applicant, despite the particular circumstances of the relationship between the applicant and the Department; regard was being had to the threat of Judicial Review by the other developers.

[27] The indicators relied on by the applicant reflect the wide circumstances that the Department has taken into account. I consider its actions to be measured by reference to such circumstances as the outstanding proceedings before the Lands Tribunal and the extant contract between the parties; the engagement in exchanges that have elements of commercial negotiations and litigation negotiations; the interest of other developers in the site and the prospect of their launching proceedings against the Department; the obligation to secure the best deal in the public interest; the concern to protect its position in public and private law. In referring to these matters I should emphasise that I make no judgment as to the steps being taken by the Department other than to consider their lawfulness in terms of this application for Judicial Review. I do not accept that the matters relied on by the applicant establish the ground for Judicial Review advanced in this case.

[28] In its broadest form the applicant's contention was that the Department's purported treatment of the applicant as an exceptional case was a "charade". In the applicant's eyes the Department is driving more than a hard bargain. I do not accept the applicant's contention that the Department has misdirected itself by failing to acknowledge the applicant's position as different to that in which the Department's normal principles for the disposal of land apply. I am satisfied that the Department has been prepared to treat the applicant as an exceptional case but the applicant has failed to meet the essential ingredients required by the Department. I am satisfied that in setting those essential ingredients the Department has not effectively prevented the applicant from being treated as an exceptional case.

[29] There are no Judicial Review grounds on which to interfere with the Department's decision not to accept the applicant's proposals for alternative development on the Foyle Street site. The application for Judicial Review is dismissed.