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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATIONS BY SHERIDAN MILLENNIUM LIMITED FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT FOR SOCIAL DEVLOPMENT

AND

IN THE MATTER OF A DECISION BY LAGANSIDE CORPORTATION

JUDGMENT

GILLEN J

[1] This is an application for discovery by the applicant of a due diligence assessment of a development at Victoria Square by the firm of BDO Stoy Hayward (BDO) on behalf of the Department for Social Development (DSD). The present matter is set in the context of an application for an Order of Certiorari to quash decisions of the DSD made on 12 December 2006 to terminate the applicant's appointment as a preferred developer for the Queen's Quay development and of Laganside Corporation (the Corporation) made on 6 November 2006 that it cannot make a recommendation as to whether or not the DSD should enter into a development agreement with the applicant. A third application is for a declaration that the said decisions were unlawful, ultra vires and of no force or effect.

Background

[2] I have already set out the background to this case in an unreported judgment I have handed down of the same title, GILC5800, on 18 April 2007

when I granted leave to the applicant to present the judicial review application. I therefore borrow the background information that I set out in that case at paragraphs 2-10:-

> "[2] The Corporation was established under the Laganside Development (Northern Ireland) Order 1989 ("the Order"). Under Article 10 of the Order, the object of the Corporation shall be to secure the regeneration of the designated area. The object is to be achieved in particular by the following means:-
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> (a) By bringing land and buildings into effective use.
>
> (b) By encouraging public and private investment and the development of existing and new industry and commerce . . . .
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> [3] Under Article 10(3)(a) of the Order the Corporation, for the purpose of achieving the object, may acquire, hold, manage, reclaim and dispose of land and other property. Under Article 13(a) the Corporation may enter into an agreement with any person to develop any land in the designated area, whether or not the Corporation has any estate in that land. By virtue of Article 11, the Department of the Environment may give directions of a general or specific nature to the Corporation as to the manner in which it is to discharge its functions under the Order and the Corporation shall act in accordance with any such direction.
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> [4] In January 2005 the Corporation issued a brief for the development of Queen's Quay, Belfast. The brief provided that selection of a preferred developer would be based on a number of set criteria including the financial bid. After a submission and presentation dated 1st June 2005 the Corporation wrote to the applicant informing it of its appointment as preferred developer for the Queen's Quay.
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> [5] On confirmation of its appointment as preferred developer, it is the applicant's case that it then engaged in a series of meetings with the Corporation and the DSD. The DSD owned parts of the development site and was responsible for

commissioning the removal of the Queen's Quay fly over. The applicant's case was that considerable delays had been caused by the Corporation's inability to agree with the Road Service the precise limits of the sites and to make appropriate progress on the design and limitation of parts of the scheme.

[6] At the end of November 2005 the Corporation issued terms of reference for a due diligence exercise. Following a tendering process BDO Stoy Hayward was appointed (BDO) and sent a detailed information request to the applicant. After a thorough investigation, it is the applicant's case that an initial report was submitted to the Corporation from BDO in early May 2006. A clear dispute arose between the applicant and the proposed respondents about the ensuing developments. It is the applicant's case that the Corporation was kept informed at all times of the time table for submission of its accounts under the due diligence process supported by BDO. During the summer of 2006 the Corporation requested the Government's Central Procurement Division (CPD) to employ a firm of accountants to review the BDO reports and the accounts filed by the applicant. Deloitte and Touché was appointed to carry out the reviews.

[7] It is common case that up to this stage no contract was formed with the applicant and indeed the whole matter was subject to contract. The preferred developer status appears to have conferred on the applicant only a preference in terms of negotiating a possible contract with the Corporation and/or the DSD.

[8] It is the applicant's case that on 12th December 2006 the Corporation wrote to the applicant advising that the DSD had reached a decision. Having considered the findings of the due diligence report, the Corporation Board had concluded that it could not properly form an opinion on the deliverability of the project and so could not make a recommendation as to whether or not the DSD should proceed to enter into a development agreement with the applicant. The DSD in turn in December 2006 informed the Corporation that, having considered the advice of its

Board and taking account of the information provided in the due diligence reports, it had concluded that the applicant had been allowed ample opportunity to provide the necessary information which it had failed to do. Accordingly it was terminating the applicant's appointment as preferred developer.

[9] It is the applicant's case in short that this decision was predetermined i.e. that the applicants were not permitted to be the preferred developer in Queen's Quay arising out of a flawed process which was lacking in openness, fairness and transparency. Mr Horner QC, on behalf of the applicant argued that the respondents, in coming to this predetermined decision, allowed themselves to be improperly influenced by untrue and irrelevant false allegations made both in Parliament and in newspaper articles allegedly connecting the applicant with Sinn Fein and Provisional IRA together with claims that the applicant was involved in laundering money generated from criminal activity. These articles are now the subject of legal proceedings. In essence therefore it is the applicant's case that the process has been subverted and designed to achieve the exclusion of the applicant as the preferred developer. Neither BDO nor the applicants had allegedly been asked for appropriate information and the main board of the Corporation had not been involved in the decision making process. It is argued that there is manifest unfairness in excluding the applicant from a proper opportunity to deal with any of the concerns of the corporation or the DSD before a decision had been taken.

[10] The proposed respondents case, as appears from correspondence with the applicant's solicitors, is that the Corporation provided ample opportunity for the applicant to provide due diligence including consideration of appropriate accounts and that as a result of the failure to comply with these requests, the status as preferred developer was reviewed. It was the Corporation's conclusion that in light of the BDO and Deloitte Touche due diligence reports, it was constrained on 6th November 2006 to advise DSD that in reaching its decision as to entering into a

> project for the Queen's Quay project it could not properly form an opinion on the deliverability of the project and so could not make a recommendation as to whether or not the Department should proceed to enter into a development agreement with the applicants."

The current hearing

[3] Discovery has already been made by the respondent to the applicant on a number of issues in this case. The remaining area of dispute centres around the pre-conditions and recommendations in BDO's report on another separate development at Victoria Square.

The applicant's case

[4] It is the applicant's case that the DSD has made the benchmark for due diligence, the rigour applied to the Victoria Square scheme. Mr Horner QC, who appeared on behalf of the applicant, relies on the affidavit made by John McGrath the Deputy Secretary in the DSD on 11 May 2007 where he averred at paragraph 6:-

> "In directing Laganside on the nature of the due diligence required, the benchmark was set by the rigour applied to the Victoria Square scheme. The Victoria Square scheme was assessed in line with HM Treasury guidance which states that the risk attached to major projects should be identified and managed as far as possible. Any dilution of this approach could expose the Department to criticism that it was less vigorous than it should have been. If the Queen's Quay scheme had gone wrong at some point in the future, questions would have been asked about why the due diligence test was less than that for Victoria Square. The Department's own procedures and those that it imposes on partners such as developers are subject to scrutiny by Parliament and bodies such as the Northern Ireland Office. It is simply not appropriate in a project of this nature to proceed without rigorous checks being put in place. This situation is very different from a straightforward commercial arrangements where a level of risk may be acceptable both in the profitability of the venture and also in the partners one chooses to do with business with".

[5] At paragraph 16 Mr McGrath, dealing with the circumstances in which BDO had recommended imposing conditions on the Sheridan Group as perquisite to entering into a development agreement , further averred:-

> ". . . Furthermore, BDO had proceeded to recommend that the Department should impose a number of conditions on the Sheridan Group as prerequisites to entering into a development agreement in order to mitigate the risks to the Department arising from the unsatisfactory assurance. Given the nature of the development competition, this was not a reasonable position in which to place the Department as, in our view, the Department had no proper role to play, within the context of the competition, in what would amount to regulating the internal affairs of the Sheridan Group in order to meet our requirements. This was akin to introducing further criteria, thus unfairly advantaging Sheridan Millennium Ltd over the other bidders and could expose us to challenge on the grounds that we had entered into a separate process with Sheridan Millennium Ltd."

[6] The Victoria Square diligence had been carried out by BDO. Accordingly, Mr Horner argued that the Victoria Square scheme due diligence assessment was highly relevant by way of comparison with the Queen's Quay scheme in order to ascertain if the same rigour and prerequisite conditions had been used in both. If there was a difference in approach in the Queen's Quay development from the benchmark standard of Victoria Square then it was relevant to the applicant's case that his client had been treated less favourably than otherwise should have been the case. In substance he argued that the second named respondent had put forward a comparator to Queen's Quay but was refusing to disclose the very document which would reveal the basis for assessing whether or not the comparator had been treated differently from the applicant.

[7] Mr Horner further argued that Mr McGrath had stated that the Victoria Square due diligence exercise was to be assessed in line with HM Treasury guidance. It was his submission that such guidance had not been followed in the case of the applicant as evidenced by Sally Longworth, an expert from Grant Thornton UK LLP, retained on behalf of the applicant. In a letter of 8 November 2007, Ms M S Longworth declared:-

> "DSD have claimed that they applied their "standard approach" to due diligence in respect of the Queen's Quay development. Neither Mr Epstein . . . nor I are aware of DSD's standard approach to due diligence.

> As such we are unable to say whether the BDO or the Deloitte Terms of Engagement for the Queen's Quay project are consistent with the standard approach of Laganside or the DSD. At paragraph 6 of his affidavit, John McGrath, Deputy Secretary of the DSD states that in relation to the nature of the due diligence required, "the benchmark was set by the rigour applied to the Victoria Square scheme". I therefore consider it essential that I have access to the relevant information in relation to the due diligence exercise for the Victoria Square scheme to view the approach of DSD there and compare it to the approach adopted in respect of the Queen's Quay development.
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> . . . However without knowledge of the normal due diligence process or examples of other due diligence assignments undertaken for DSD/Laganside . . . I (*am*) unable to comment as to whether the due diligence undertaken in respect of the Queen's Quay development was in line with DSD/Laganside normal practice in respect of (*a number of areas*).
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> Sight of the Victoria Square due diligence exercise, including the terms of reference, due diligence reports (with or without recommendations), recommendations to the board and knowledge of who performed them were involved in procuring the due diligence exercise would enable us to resolve the issue."

[8] Finally it is the applicant's case that BDO was required to remove prerequisite conditions from its due diligence report in an effort to persuade BDO to change its conclusions. Mr Horner submitted that if BDO had recommended prerequisite conditions in respect of the successful developer at Victoria Square and those prerequisite conditions had remained and the Department proceeded with the development agreement, then that would be very strong evidence of the Department, contrary to what it has maintained, applying different standards to different developments.

The second named respondent's case

[9] Mr McMillen, who appeared on behalf of the second named respondent, argued that the applicant was misconceived in the submission that the Victoria Square scheme was the "template" for the Queen's Quay scheme. He emphasised that Mr McGrath only referred to due diligence being carried

out at Queen's Quay with the same vigour as that carried out at Victoria Square. The two schemes were entirely different enterprises and whilst there may well be equal vigour in pursuit of the due diligence assessments, a court could never assess whether that diligence was equal or not and in any event since each project would require different due diligence exercises depending on the circumstances, there was no relevance in disclosing the Victoria Square scheme due diligence exercise.

[10] It was Mr McMillen's submission that the applicants misunderstood the nature of due diligence. He drew my attention to a definition of due diligence found in the affidavit of Stephen Murray the Director of Financial Development for the DSD in an affidavit made on 20 August 2007 as follows:-

> "3. Obviously the purpose of due diligence is to provide the commissioner with the information to make an informed judgment as to the balance of financial and corporate governance risks associated with entering into any contractual relationship. The term "due diligence" is a generic term that covers a multitude of exercises that arise from a multitude of relationships. The precise nature of the due diligence exercise will depend on the requirements of the commissioner. These exercises may be grouped in rough categories, for example, public procurement of supplies, public procurement of services, public investment, private investment, company purchases, etc."

Accordingly Mr McMillen submitted that this is not an area where the court is equipped or required to carry out a detailed comparative exercise. Any documents obtained from the Victoria Square assessment would only give a partial picture of the exercise required in the project and any decisions taken would not be clear without examining the project in detail. To accede to this application would be to initiate a creeping process of ever more requests for further information on the Victoria Square scheme.

Legal principles

[11] Order 53 does not contain any particular rules relating to discovery. Order 53 Rule 8 serves to identify that an application for discovery (as an interlocutory application) should be addressed to the judge in chambers.

[12] The provisions of Order 24 apply to discovery in judicial review proceedings (Order 24, Rule 3). Order 24 Rule 9 provides:-

> "Discovery to be ordered only if necessary.

> 9. On the hearing of an application for an order under rule 3, 7 or 8, the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

Accordingly the court may dismiss an application for discovery if "it is not necessary" and shall refuse to make an order if "it is not necessary either for disposing fairly of the cause or matter or for saving costs".

[13] The traditional approach to discovery in judicial review must be viewed in light of the decision in the House of Lords in Tweed v Parade Commission for Northern Ireland (2006) UK HL 53.("Tweed")

[14] Following Tweed disclosure of documents will still remain ordinarily unnecessary in judicial review. It should not be routinely ordered as in civil litigation. Lord Brown of Eaton under-Heywood said at paragraph 56 of Tweed:-

> "In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the court should continue to guard against what appeared to be merely "fishing expeditions" for advantageous further grounds of challenge. It is not helpful, as is often both expensive and time consuming, to flood the court with needless paper".

[15] On the other hand Lord Bingham encapsulated what I discern to be the revised approach in judicial review at paragraph 4 as follows:-

> "Where a public authority relies on a document as significant to its decision it is ordinarily good practice to exhibit it to the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant seeking sight of the document to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is

> enough that the documents itself is the best evidence of what it says. There may however be reasons (arising, for example, from confidentiality, or the volume of the materials in question) why the document should or indeed not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

[16] The principal judgment in Tweed was delivered by Lord Carswell who referred to the requirement under the Northern Ireland Rules that the Court should refuse to make an order for disclosure if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. Having referred to the previous authorities he stated at paragraph 32:-

> "I do consider it, however, that it would now be desirable to substitute for the Rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with requirements to the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, which generally raise legal issues which do not call for disclosure of documents."

[17] Finally, the court recognised that problems of confidentiality may arise where documents are ordered to be disclosed and it was the role of the court to assist in resolving such difficulties. In the particular context of the Tweed case, Lord Carswell said at paragraph 41:-

> "I think that the judge considering disclosure should first receive and inspect the full text of all the documents . . . so that he may decide whether they would give sufficient extra assistance to the applicant's case on proportionality, (*being the issue in the case*), over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides that the contrary in the case of any of the documents, the documents will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration."

[18] **Applying the principles to this case –**

(1) I consider that the respondent in this case has relied upon the benchmark set by the rigour applied to the due diligence concept applied in the Victoria Square scheme. Mr McGrath has specifically relied upon it. Moreover, as he indicated, the Victoria Square scheme was assessed in line with HM Treasury guidance and thus will serve to highlight or disclose at least one appropriate method adopted by DSD in assessing the manner in which compliance with HM Treasury guidance should be effected. This could prove to be of assistance in ascertaining whether the method of compliance invoked in the Queen's Quay project was deliberately defective or not.

(2) The Department recognises that the Queen's Quay scheme may in certain events require scrutiny on issues such as value for money and if so the rigour of the due diligence test would be applied against the comparator of the Victoria Square scheme. Such scrutiny may be carried out according to Mr McGrath "by Parliament and bodies such as the Northern Ireland Office". I consider therefore that the rigorous checks which apparently were put in place in the Victoria Square scheme as a benchmark for other schemes bear scrutiny and are relevant in looking at the issues in this case concerning the Queen's Quay due diligence assessment.

(3) In my view the submission by Mr Horner that such a comparison is not only required by his expert Ms Longworth, but would be valuable to this court in assessing whether there is substance to the applicant's case that it was unfairly treated differently from other similar potential preferred developers, is well founded.

(4) In my view this is an instance of the type of case adumbrated by Lord Bingham in Tweed where a public authority has relied on a document as significant to its decision on the issue of due diligence in this case It therefore is ordinarily good practice to have exhibited such a document in its relevant parts or the relevant extracts should be disclosed to the applicant.

[19] I recognise that there may well be issues of commercial confidentiality for example with reference to those who may not be parties to these proceedings but are named in the Victoria Square scheme. I have no doubt that the admonitions by Lord Carswell in Tweed's case can be applied to this case with appropriate redaction carried out either by agreement between counsel or with the assistance of the court.

[20] I therefore accede to the application by Mr Horner, refined before this court, that disclosure be made of BDO's conclusions and summaries (including any prerequisite conditions) in the due diligence assessment carried out by it on behalf of the DSD with reference to the Victoria Square scheme after all appropriate redactions have been made to preserve commercial confidentiality.

[21] In conclusion I pause to observe that the court is acutely aware of the concern raised by Mr McMillen that the disclosure of BDO's conclusions and summaries set out in paragraph 19 above will provide a platform from which to launch further applications for more documents arising out of the Victoria Square scheme should the current documentation not serve the purpose for which it is intended. I recognise that this is a wholly separate scheme from Queen's Quay. Thus the assistance it may give to these proceedings has obvious limits. Accordingly any further application for documents arising from the scheme at Victoria Square will command the anxious scrutiny of the court to ensure the exercise is not becoming unhelpful, oppressive, time consuming or flooding the court with needless paper.