Neutral Citation no. [2007] NIQB 27 | *Ref:* **GILC5800**

Judgment: approved by the Court for handing down | *Delivered:* **18/4/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY SHERIDAN MILLENNIUM LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION BY THE DEPARMENT FOR SOCIAL DEVELOPMENT

AND

IN THE MATTER OF THE DECISION BY LAGANSIDE CORPORATION

_____

JUDGMENT

_____

GILLEN J

THE APPLICATION

[1] In this matter the applicant seeks an Order of certiorari to quash decisions of the Department of Social Development (DSD) made on 12th 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 6th 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] 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:-

(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 . . . .

[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.

[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.

[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 Heyward 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 Touche 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 being 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 and 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 ISSUES BEFORE THE COURT

The leave hearing

[11] It is well settled, and agreed by Mr Horner on behalf of the applicant and Mr Shaw QC on behalf of the proposed respondents, that in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision – see R v. Secretary of State for the Home Department ex parte Cheblank (1991) 1 WLR 890. That is the test that I propose to adopt in this case.

The issues to be determined at the leave stage

[12] Mr Shaw submitted that leave should be refused to the applicants on the grounds that they had failed to comply with the obligation to apply for judicial review promptly and in any event within 3 months from the date when the grounds for the application first arose. He recognised that the court may consider that there is reason for extending the period within which the application shall be made pursuant to Order 54 Rule 4, but it is for the applicant to establish that there is good reason to extend time (see R v Warwickshire County Council ex p Collymore (1995) ELR 217 at 228 FG).

[13] These proceedings had been issued on 7th March 2007. The impugned decision of the Corporation had been made on 6th November 2006 i.e. 4 months before the application, and the decision of the DSD on 12th November 2006, almost 3 months before the application was made. Mr Shaw made the following points:

(a) The applicant had failed to move promptly in this matter. No attempt had been made to explain the delay.

(b) The Corporation would be wound up in March 2007 and the duties and responsibilities passed over to the relevant Government department. Already substantial delay had been incurred in the resolution of this matter. The passage of time requires a review of the character at the subject sites with the property market constantly evolving. The process to arrange for a preferred developer may have to start again and the delay in resolution of this matter is exacerbating the problem. Moreover counsel asserted that there were increasing site assembling costs.

[14] Mr Horner submitted that the Corporation did not notify the applicants of its decision until 12th December 2006 and therefore both decisions were challenged within the three month period. He drew my attention to the onset of the Christmas period during the exchange of correspondence which may have been a factor in delay assembling the necessary information and statements to mount the appropriate judicial review application.

[15] In approaching the question of delay, I consider that the principles to be applied are found in R v Secretary of State for Trade and Industry, ex parte Greepace Limited (2000) ENV LR 221 where Kay J (as he then was) posed three criteria:

> "(1) Is there reasonable objective excuse for applying late?
>
> (2) What, if any, is the damage in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?
>
> (3) In any event does the public interest require that the application should be permitted to proceed?"

[16] Even if the applicant can make out a good reason for obtaining permission to extend time the court retains an overriding or residual discretion and may still refuse permission for example where the public interest does not require the application to proceed.

[17] I do not consider that the delay here is so inordinate as to be necessarily fatal to the applications at the leave stage. However I intend to adopt the phrase employed by Sedley LJ in R (Lichfield Securities Limited) v Litchfield District Council (2001) EWCA CIB 304 that "undue delay should be placed on the agenda at the substantive hearing." The proposed respondent will be permitted to recanvass the issue of promptness in light of an affidavit which should be made by the applicant dealing with the question of delay. In terms I

wish to have a fully reasoned argument put before the court at the substantive application. At this stage, however, I consider that the applicant has raised sufficient argument to persuade me that delay may not be fatal to his application. I am not persuaded that any real prejudice has accrued to the respondents by this delay and the issues in this case arguably attract a public interest dimension. I emphasise however that an application for permission to apply for a judicial review must not only be made promptly but even where an application is made within 3 months it may still be rejected where, for example, finality is important (see R v Bath Council ex parte Crombie (1995) COD 283). It is therefore important that the matter is fully addressed in some detail in a further affidavit from the applicant prior to the hearing of the substantive matter.

THE EXERCISE OF PUBLIC LAW FUNCTIONS

[18] This proved to be the key issue between the parties at this hearing. It was the contention of the proposed respondents that whilst they were both public bodies, the impugned decisions had been made in the course of the exercise of "private law" functions which are generally regarded as inappropriate for judicial review. In contrast the applicant asserted that the case amounted to an allegation of bad faith on the part of both proposed respondents in the exercise of public functions and therefore the remedy of judicial review could be properly invoked.

THE GOVERNING PRINCIPLES

[19] The principles on which I have based my conclusions at the leave stage in this case are as follows:

(1) A good overview of the approach to be adopted in such cases is found in 4th Edition of Fordham "Judicial Review handbook" at para 34.2 where the author states:

> "Principles of reviewability. The mass of case law can be seen to provide a host of working examples applying a series of interrelated principles regarding reviewability, with perhaps these main lessons:
>
> (1) treat no single factor as determinative; but
> (2) focus particularly on –
>
> (a) statutory or governmental underpinning and
> (b) the substance and effects of the function being discharged."

(2) In deciding whether a body is or is not amenable to judicial review, the prime focus is not so much on the status and nature of the body, as the particular function being exercised by it. The boundary between public law and private law is not capable of precise definition and thus the emphasis on function provides an important criterion. In R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy (1993) 2 AER 207 Neill LJ said at 220D:

> "In order to succeed in obtaining an order for judicial review it is necessary for (a claimant) to show not only that the body concerned is one whose decisions are susceptible to judicial review but also that the relevant decision was one which infringed or affected some public law right of the claimant."

The emphasis on the function of the body has found favour in a number of Northern Ireland cases. In Re Phillips Application (1995) NI 322 at page 332 Carswell LJ (as he then was) said:

> "The court went on to consider an alternative approach to the jurisdiction question, which is many ways I find more attractive than an attempt to classify the nature of the employment. It looked at the nature of the dispute to see if a sufficient public law element was involved, accepting the Crown's argument that it is necessary to find this to ground jurisdiction in judicial review, and that the mere fact that the person may not have a private law remedy does not mean that he has one in public law."

And at page 334:

> "For my own part I would regard it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus on the classification of the civil servant's employment or office."

Kerr J (as he then was) in Re McBride's application (1999) NI 299(McBride's case) said at page 310:

> "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 interests to qualify as a public law issue. It seems to be equally clear that a matter may be one of public law whilst having a specific impact on an individual in his personal capacity."

Similarly in an application by City Hotel (Derry) Limited for judicial review (2004) NI QB 38, Weatherup J, in the course of the review of a decision by a government department relating to the development of lands said at paragraph 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 a 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 establish standards of public accountability. That being the issue it is necessary to consider if it affects or impacts on the public."

(3) Accordingly a public body may well carry out a private function notwithstanding the fact that it is exercising a statutory power. Thus in R v Bolsover District Council ex p Pepper (2001) LGR 43 a local authority's function of selling land was held not to be reviewable, even though an exercise of statutory power, because there was no public law element introduced. A claimant challenged the refusal of the Council to sell certain land to him on the basis that he had a legitimate expectation either to be sold the land or at least to be allowed to make representations before any decision not to sell it was taken. In the course of giving his judgment at p46 Keene J said:

> "It seems to be quite clear that the mere fact that a local authority is exercising a statutory power when it decides to sell land is not by itself enough to render its decision a public law matter."

A little later he said this:

> "Normally a decision by a local authority to sell or not to sell land which it owns is to be seen as a private law matter unless a public law element is introduced into the decision making process by some additional factor. This is because the starting point is that the local authority, in so deciding, is simply acting as a land owner in such cases and is not performing any public function."

(4) A clear contrast to that is found in R (on the application of Molinaro) v Kensington and Chelsea Royal London Borough Council (2002) LGR 336 (Molinaro's case). Here a claimant challenged a decision of the local authority made pursuant to a lease to which both the claimant and the local authority were parties. The authority refused the claimant's application to change the purpose for which the demised premises could be used on grounds of planning policy. The claimant was using them for retail purposes and wished to change the purpose in order to open a restaurant. At paragraph 63 Elias J said:

> "Manifestly the Council was not simply acting as private body when it sought to give effect to its planning policy through the contract. Again, the decision not to permit a change of use, albeit one involving the exercise of discretion under a contract, was taken for the purpose of giving effect to its planning objectives. In my judgment, these factors themselves injected a sufficient public element in the decisions to justify them being subject to public law principles. . . . In my view, the fact that a local authority is exercising its statutory function ought to be sufficient to justify the decision in itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion."

At paragraphs 68 and 69 Elias J went on to say:

> "Moreover, there are a host of important cases where decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised. . . In R v. Lewisham London Borough Council ex parte Shell UK Limited (1988) 1 AER 938 and Wheeler v. Leicester County

> Council (1985) 1 AC 1054 . .decisions of the Councils involved not to contract with organisations to whom they were ideologically unsympathetic were held to be unlawful . . .
>
> (69) In my opinion the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the court should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress."

(5) An analysis of these principles therefore leads to the conclusion that it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision and unless the obligation involves breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable. However this should not mask the purity of the principle that a public body in exercising a statutory function cannot escape being subject to judicial review if it abuses the power vested in it. Public bodies are not free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal address. In R (on the application of Cookson and Clegg Limited) v. Ministry of Defence (2005) EWCA Civ. 811(Cookson's case) Buxton LJ said:

> "This analysis makes a distinction between statutory fault in not following statutory rules . . . on the one hand; and actions of what might be called a normal commercial nature in awarding the contract itself. I would, however, immediately agree that analysis does not and should not exclude public law entirely from the contract awarding process, even if there were no statutory breaches involved: for instance if there were bribery, corruption or the implementation of a policy unlawful in itself, either because it was ultra vires or for other reasons."

Similarly Mr Horner relied on Mercury Energy Ltd. v Electricity Corporation of New Zealand (1994)1WLR 521(the Mercury case), where Lord Templeman said at 529b:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of *fraud, corruption or bad faith* (my italics)."

CONCLUSIONS

[20] I have concluded that I must grant leave to the applicant in this case for following reasons:-

(1) Mr Horner alleges that the decisions in this case by the proposed public body respondents were vitiated by unlawful motive and bad faith. I consider that this constitutes an arguable case that a public law element has entered into the decision making process and permeates the nature of the function they were performing (see authorities cited at paragraph 19(2) and (4) of this judgment). Thus the impugned manner in which the function has been performed merits a substantive hearing.

(2) Mr Shaw submitted that whilst the manner of disposal of land by public authorities may be subject to scrutiny, this only operates up to the stage when the developer is chosen. Thereafter when the matter has entered into the due diligence stage, this represents a confidential process governed by private law and excludes the scrutiny of judicial review. In essence his case was that the advent of due diligence translates this function into a private law matter and is not subject to public law duties. The recourse of the applicant should therefore be to seek private law remedies. I am not sufficiently persuaded by that argument at this stage of the proceedings. I consider that it is an arguable case that if this part of the process is flawed by mala fide on the part of public bodies exercising their public functions, judicial review should not be excluded (see the Cookson and Mercury cases at paragraph 19(4) above). Further if the claimants sustain their case that it was never intended by the proposed respondents that due diligence would ever result in the applicant being the preferred developer and that the whole process was a sham driven by ulterior motives, then such is the nature of the exercise of the function and the nature of the allegation of abuse of power that it is arguable that the courts should hear the complaint. In essence Mr Horner's case is that public bodies such as the proposed respondents should not be free to abuse their power by invoking a principle that since the phase of due diligence had commenced, public bodies can act unfairly or abusively without public law scrutiny (see Molinaro's case at paragraph 19(3) above). Therefore apart altogether from the central narrative thread of substantial land development as the subject matter of this dispute, which in itself arguably affects the public at large, the issues which have now arisen and which are alleged to have infected and poisoned the decision making process are in my view matters of public law affecting the public interest within the terms so used in McBride's case.

[21] I make it clear in coming to this conclusion that this is simply the leave stage where the threshold is low. I am dealing with the facts purely as they have been presented by the applicants without the benefit of affidavits or factual assertions on behalf of the proposed respondents. My finding therefore

that the applicants have an arguable case is no indication whatsoever of my views as to the eventual outcome of this matter.