The High Court

Commercial

[2009 No. 8128 P]

Between

Donatex Limited and Bernard McNamara

plaintiffs

and

Dublin Docklands Development Authority

defendant

Judgment of Mr Justice Charleton delivered on the 31st day of July 2012

1. This is the fourth preliminary ruling on this case. It will therefore be as concise as possible.

2. The defendant is a statutory authority for the development of the docklands of Dublin. As such it has certain defined powers under the Dublin Docklands Development Authority Act 1997. As a creature of legislation, any exceeding of its powers renders its actions legally questionable. If, for instance and as the plaintiffs claim, it did not have power to enter into a complex commercial agreement, then that agreement may be subject to the same infirmity as a contract made with a person of unsound mind or an infant. Powers in legislation are conferred on a statutory body for use within the scope of the purposes explicit within the legislation or which arise through necessary implication. Where a statutory body is given discretion as to the exercise of powers, it cannot bargain away that discretion or fetter what is supposed to be the outcome of the genuine balancing of interests in favour of its own advantage; *North Wall Quay Property Holding Company Ltd & Anor v Dublin Docklands Development Authority* [2008] IEHC 305. That is one of the points made by the plaintiffs in this case. But it is not all: pursuant to permission granted by Clarke J in these proceedings in March 2012, the plaintiffs were also entitled to plead that the defendant never could have entered into the agreement to buy the land that is at the heart of this dispute because it was beyond the statutory powers of the defendant; see this case at [2012] IEHC 168. The defendant now counters that this plea is a matter of public law and that the case is subject to Order 84 of the Rules of the Superior Courts and has been brought outside the time limit of six months for the commencement of certiorari and that an extension of time is not merited. To be clear, these proceedings were commenced in September 2009 and the first mention of this issue occurred in affidavits 14 months later in November 2010.

3. This case concerns the old Irish Glass Bottle site, comprising about 25 acres, and which is situated at the western end of Sandymount strand to the south of the Poolbeg peninsula on Dublin's docklands. The board of the defendant consisted of various disparate interests and included a well-known banker. The memoranda of the defendant opened to the court indicated that on 12 October 2006, the consortium of which it was part together with the plaintiffs in the purchase of the site, considered expending €220 million to secure it. For whatever reason, by 24 October of the same year, the sum which the consortium was prepared to pay for this brown field site had risen to €430 million. In the end, following a tender process which concluded in January 2007, the sum of €411 million was paid for this land. On 25 October 2006 heads of agreement had been entered into between the defendant and the first named plaintiff to effect the purchase of the site through the purchase of shares in a company called South Wharf plc. A shareholders agreement was necessary with a company called Becbay Limited along with a subscription agreement, which completed the necessary documentation between the parties mentioned and another party, a corporate entity called Mempal Limited. By 29 January 2007, the consortium had acquired the property. The details of this are not important at this juncture, save that the second named plaintiff, Bernard McNamara, is the guarantor of the share of the first named plaintiff Donatex Limited.

4. None of the parties in this litigation are now content to have bought this site at this price. The plaintiffs make the case that they would never have dealt with the defendant had they been aware that it was not entitled to fetter its discretion on a number of important matters in respect of which it is claimed the defendant made representations. Of these, the most important are the alleged ability of the defendant to bring a spur line of the LUAS tram system from Point Village into the site; the defendant's ability to deliver a form of planning permission that arises under section 25 of the Dublin Docklands Development Authority Act 1997; and the delivery by the defendant of a certain density of housing which at the extreme state of the market in 2006 would have delivered a profit to the consortium even at a cost of land at €16.44 million per acre.

5. This judgment has nothing to do with either misrepresentation or breach of contract. The plaintiffs claim that the most recent amendments to their statement of claim are all concerned with the defendant representing to the plaintiffs that they had full statutory authority to enter into a transaction which the plaintiffs now seek to characterise as the defendant perpetuating its existence for generations to come through the profits which would have been made had property prices not collapsed by 70% or more in Dublin since 2007. The core nature of the claim of the plaintiffs on the amended portions of the statement of claim is that the transaction would never have taken place had the defendant remained within its statutory remit. Therefore, in the amended portions of the statement of claim, the plaintiffs claim "[a] declaration that the DDDA did not have sufficient *vires* and legal capacity to enter into the agreements and arrangements as set out" and they seek damages arising from such claim of invalidity; damages for breach of duty and breach of statutory duty; damages for negligence; and damages for misfeasance in public office.

6. Central to the issue on the amended portions of the statement of claim are the powers conferred on the defendant by section 18 of the Act of 1997. Under section 18(2), ancillary powers, or perhaps dependent powers, or perhaps independent powers, are granted to the defendant. The construction of the act of 1997 is not a difficult task and would perhaps occupy a day or two of argument before the High Court. The amended sections of the statement of claim add little, therefore, to a claim which has already been in the commercial list for three years. The defendant claims that the pleas made and the remedies sought in the amended portion of the statement of claim amount to a public law contest made out of time.

7. Since the decision in *O'Donnell & Anor v Corporation of Dún Laoghaire* [1991] ILRM 301, it has not been in doubt that proceedings,

where a public law remedy is sought outside the scope of judicial review, may nevertheless be included within a plenary summons and statement of claim. Public law remedies, however, are subject to the strictures of Order 84 of the Rules of the Superior Courts which, as of the commencement of these proceedings, provided that such an application must be brought promptly, specifying six months as opposed to the normal six year limitation period for an action in either contract or tort, subject to an extension of time in appropriate circumstances.

8. In *O'Reilly v Mackman* [1983] 2 AC 237, a directly opposing view had been taken by the House of Lords leading to the necessity for multiple proceedings in that jurisdiction and requiring the analysis of the issues in each case, which in some cases, may lead to a deprivation of remedy because of the choice of an incorrect form of procedure. The authorities in that jurisdiction are a very useful guide on the question as to what is a public law dispute, subject to the strictures of Order 84, and what is a private law dispute, such as one in contract or tort. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 the issue was the provision of contraceptive advice to the children of the plaintiff who were aged under 16 years. Even though it was clear that although the core issue was the provision of that service to children, an exception was nevertheless to be grafted into the law because of the overwhelmingly private concern of the plaintiff. Essential to the decisions in England and Wales is the concern of those courts to protect themselves against abuse of process. At page 178 of the report, Lord Scarman emphasised this point:

> If there be in the present case an abuse of the process of the court, the House cannot overlook it, even if the parties are prepared to do so, and even though the writ in this case was issued before the decision of the House in O'Reilly's case [1983] 2 A.C. 237.
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> Mrs. Gillick's action is essentially to protect what she alleges to be her rights as a parent under private law. Although she is proceeding against two public authorities and invokes the criminal law and public policy in support of her case, she claims as a parent whose right of custody and guardianship in respect of her children under the age of 16 is (she says) threatened by the guidance given by the department to area health authorities, doctors, and others concerned in the provision by the department of a family health service. This is a very different case from O'Reilly [1983] 2 A.C. 237 where it could not be contended that there was any infringement or threat of infringement of any right derived from private law. For the appellants in O'Reilly's case were convicted prisoners faced with forfeiture of remission, and they were held to have not a right to remission of their prison sentences but merely "a legitimate expectation" which could, if the necessary facts were established, entitle them "to a remedy in public law." They had, therefore, no private right in the matter, and could rely only on the "public law" doctrine of legitimate expectation.
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> It is unnecessary to embark upon an analysis of the newly fledged distinction in English law between public and private law, for I do not see Mrs. Gillick's claim as falling under the embargo imposed by O'Reilly's case [1983] 2 A.C. 237. If I should be wrong in this view, I would nevertheless think that the private law content of her claim was so great as to make her case an exception to the general rule. Lord Diplock, at p. 285F, recognised that the general rule which he was laying down admitted of exceptions including cases:
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> > "where the invalidity of [the public authority's] decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons."

Both these exceptions can be said to apply in the present case. Like Lord Diplock, I think that procedural problems in the field of public law must be left to be decided on a case to case basis. Mrs. Gillick was, in my opinion, fully entitled to proceed by ordinary action, even though she could also have proceeded by way of judicial review.

9. No issue as to abuse of process, however, arises in this case. The plaintiffs may be right or wrong, but their sincerity in attempting to distance themselves from a very unwise bargain is, nonetheless, real. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1992 1 AC 624, the plaintiff Doctor Roy sought the recovery of fees from his family practice committee, which was regulated by statute. It was in dispute with him, apparently, over whether he had seen enough public patients. A brief reference to the speeches of Lord Bridge and Lord Lowry provides illumination on the tension apparent in the analysis of a private remedy within a sphere of public, or statutory, regulation. At pages 628-629, Lord Bridge stated that it was appropriate that any issue which depended exclusively on the existence of a purely public law right should be determined in judicial review proceedings solely. Where, however, a litigant asserted his entitlement to a claim in private law which necessarily involved the analysis of a public law issue, a litigant was not to be prevented from seeking to establish his right outside of judicial review proceedings. Lord Lowry referred to the exceptions already grafted onto the law by Lord Diplock at page 650. At page 654 he referred to a number of tests used to determine whether the dispute was public or private. These included whether a statutory scheme gave rise to contractual rights; whether private law rights dominated the proceedings in question; whether the disputed issues of fact were private in nature; whether the order sought was barred from the traditional scope of judicial review, that is to say damages which are now available under the Rules of the Superior Courts since 1984; whether any individual rights asserted should be subject to public law time limits; that an analysis should be made into the existence of any abuse of process; and whether genuine claims in private law should be circumscribed by unnecessary procedural barriers. The House decided in favour of Dr Roy; after all, what could be more natural or more outside the sphere of public law than that a doctor should seek to be paid his money?

10. Other examples are to be found in the case law. In *Browne v Dundalk Urban District Council* [1993] 2 IR 512, at issue was not so much the hire of a room but the political decision taken to ensure that the hire of a room to a particular grouping of Republican-type people would not take place.

11. It is not appropriate on this motion for this Court to refer to any correspondence that was opened in support of the claim of the plaintiffs or any which was opened to apparently completely undermine those claims. Nor is it appropriate to give any analysis of the powers of statutory bodies or whether the ability of authorities is circumscribed by legislation in entering into financial transactions that are claimed to be outside what in company law would be called their objects clauses; see *Crédit Suisse v Allerdale Borough Council* [1997] QB 306. As between public law and private law, there can be little room for doubt. If a statutory body set up to promote swimming were to buy four acres to be set out in hurling pitches, which was beyond the scope of its legislative powers, then the farmer, from whom those fields were bought, would have a private law remedy in the event that the sale was not completed. If, on the other hand, an officious bystander with knowledge of the transaction were to feel aggrieved about the promotion of our ancient game by a body supposedly devoted to swimming and sought to overturn the transaction on the basis that the authority could only spend money on water sports, then the only remedy would be to through the public law challenge of judicial review.

12. The amendment allowed to the statement of claim raised the suggestion of a public law challenge. This Court is conscious of the confusion that can arise between remedies claimed in private and in public law. That confusion is shown to be genuine in this case.

The delay here, in comparison to cases where a late challenge was disallowed such as in *De Róiste v The Minister for Defence* [2001] 1 IR 190, is small. As Denham J stated in that case, at 208, the court should look to the nature or order of actions which are the subject of the application; the conduct of the applicant; the conduct of the respondent; the effect of the order under review on the parties subsequent to when the order had been made; the impact of such an order on any third parties; and the importance of public remedies being disposed of swiftly. The analysis of Fennelly J at 216 condemns ancient proceedings as inappropriate to public law remedies. Accepting all of these principles, it is clear that there has been a seesaw of applications and that fundamental to the claim of the plaintiffs is that it would never have entered into this deeply unwise transaction in the property market with the defendant as a business partner had a fair analysis of the powers of the Dublin Docklands Development Authority been laid out clearly. These are important remedies. No prejudice has been suffered. Nothing is to be gained by a portion, which was added to this litigation when it was realised to be important within 14 months of its commencement, being now surgically extracted.

13. I therefore refuse the application. I urge the parties to bring the matter to trial. Kelly J has requested that the matter be listed before him at 2pm today.