Neutral Citation Number [2006] IEHC 82

THE HIGH COURT
DUBLIN

[2006 No. 702 P.]

SMART MOBILE LIMITED

PLAINTIFF

AND
COMMISSION FOR COMMUNICATIONS REGULATION

DEFENDANT

Judgment delivered by Mr. Justice P. Kelly on Monday, 13 March 2006

1. Mr. Justice Kelly: Whilst a reserved Judgment would probably give rise to more felicitous English and more accurate syntax and grammar, it would nonetheless carry with it a concomitant delay. As I have reached a clear conclusion as to what the outcome of this application ought to be, I don't propose to be guilty of any delay in the proceedings.

2. The application before the Court is brought by Notice of Motion which seeks:

> "An order pursuant to Order 63(a) Rule5 or Rule 6(ii) of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the Court directing that the plaintiff's claim that the decisions made by the defendant as specified at Paragraph 2of the general endorsement of claim were unreasonable, constitute an abuse of process and should instead be brought by a way of an application for *certiorari* of the decisions by way of Judicial Review pursuant to Order 84 of the Rules."

3. Now in order to understand how this application comes to be made, it is necessary to sketch out very briefly the factual background to the matter. These proceedings began by plenary summons on 14February 2006, and the first claim in the general endorsement of claim is in the following terms:

> "A declaration that there exists a concluded contract between the plaintiff and the defendant for the award and subsequent grant to the plaintiff of a 3G Mobile Telecommunications B-License pursuant to Section 5 of the Wireless Telegraphy Act 1926 and the Wireless Telegraphy Third Generation Regulations 2002 (as amended)."

4. The alternative claim, which is at Paragraph 2 of the endorsement of claim, seeks:

> "(a) A declaration that having selected the plaintiff as the successful tenderer for the 3G license, the defendant was and is obliged to give the plaintiff a reasonable period of time to comply with the terms and conditions additional to those set out in the defendant's tender document which the defendant has sought to impose on the plaintiff as the successful tenderer for the 3G license.
>
> (b) A declaration that the defendant's deadline for 30 January of this year for the plaintiff to comply and satisfy the said additional requirements specified by the defendant for the performance guarantees to be provided by the plaintiff the defendant is unreasonable.
>
> (c) A declaration that the said additional requirement specified by the defendant for the performance guaranteed requested from the plaintiff are unreasonable.
>
> (d) A declaration that the defendant is not entitled to treat its negotiations with the plaintiff for the award and subsequent grant to the plaintiff of the said license as being at an end until such time as the plaintiff has been afforded a reasonable period within which to satisfy the defendant’s additional requirements in relation to the said performance guarantee or to proffer appropriate alternative proposals."

5. There is then sought injunctive relief.

6. I should say that having instituted those proceedings by the issue of that plenary summons, on the same day an application to Ms. Justice Laffoy for injunctive relief which was granted on an interim basis and by agreement that injunction is to continue until trial.

7. The factual background which led to the institution of proceedings is this: The defendant, the Commission for Communication Regulation, inherited the functions which were formerly carried out by the Office of the Director of Telecommunications Regulation. The defendant was established pursuant to the Communications Regulation Act of 2002.

8. On 15 June of last year, the defendant invited expressions of interest in respect of the 3G Mobile Telecommunication Licenses and it issued a tender document in that regard on 22 July 2005. That document invited applicants to make voluntary binding commitments to furnish performance bonds to support the performance targets made in the applications for the license.

9. The plaintiff was one of the applicants. It submitted an application before the relevant deadline, being 9 September 2005, and there were two other applicants: Eircom Limited; and, Meteor Communications Limited.

10. It is common case that in its application for the license, the plaintiff gave a voluntary binding commitment to furnish a performance bond in the amount of €100 million in support of the performance targets to which it committed itself in the application.

11. On 16 November 2005, the defendant informed the plaintiff that, having evaluated the three bonds, the plaintiff had achieved the highest score. It was, therefore, the successful applicant for the 3G license and that license would be issued to it on fulfilment of specific conditions.

12. The conditions which are relevant insofar as this litigation is concerned are that the plaintiff was required, before the license would be issued to it, to produce a performance bond in the amount of €100 million in a form acceptable to the defendant on or before 16 December. Secondly, a condition was attached to the effect that a guarantee in the amount of €7.6 million equivalent to what is described as the spectrum access fees payable for the first five years of the license would be furnished on or before 1 December 2005.

13. By a letter of 22 November 2005, the plaintiff accepted the defendant's offer of the license and the conditions attached to it.

14. On 30 November of last year, the plaintiff requested an extension of the deadline for the payment of the 7.6 million guarantee. By

a letter of 1 December, the defendant extended the deadline for that to 15 December.

15. On 15 December, the plaintiff requested an extension of the deadline. By a letter of 16 December, the defendant informed the plaintiff that the deadline for a submission of the performance bond in the amount of 100 million and the guarantee of 7.6 million was extended to 5 o'clock on Monday30 January 2006 and that if guarantees were not provided by that date, no further extension of the deadlines would be possible and the plaintiff would not be awarded the license. That was set out with specificity in the relevant correspondence which I've read.

16. It is contended that on various dates between 16 December and 27 January, the defendant held meetings, conversations and otherwise corresponded with the plaintiff emphasising the importance of the deadline. And, indeed, that is borne out by the correspondence which I've read. So there could be no doubt but that the plaintiff was clearly on notice of the deadline which was specified.

17. Despite those requests, the contention is that the drafts of the actual performance bond which the plaintiff proposed to provide were first sent to the defendant on the afternoon of Friday 27 January 2006.

18. On receipt of the draft performance bonds and thereafter, particularly on Saturday the 28th and Sunday the 29th, the defendant furnished comments and indicated its concerns in relation to the draft performance bonds.

19. The defendant during that weekend, it is said, informed the plaintiff that for reasons which were set out over the course of the weekend, the draft performance bonds were not acceptable to it.

20. The defendant contends that neither the performance bonds nor the guarantee were furnished by the deadline and on 13 February 2006 it informed the plaintiff that the license would not be awarded to it because the plaintiff had failed to meet the conditions attached to the offer of the license.

21. Now for the purpose of these proceedings, the endorsement of claim, which I've already recited, falls into two parts. The first is for a declaration that there was a concluded contract between the plaintiff and the defendant. And the basis for that contention is, it is said, that the plaintiff will argue that it had in fact met the requirements of the defendant prior to 5 o'clock on 30 January and that the documents which were proffered by it on the preceding Friday and over the weekend constituted a compliance with the defendant's requirements and that, therefore, the offer which had been made and accepted ripened into an enforceable contract having regard to the plaintiff's compliance with the defendant's requirements. That is not accepted by the defendant and that is clearly going to be in contention in the proceedings.

22. The second part of the plaintiff's claim, which is that dealt with at Paragraph 2, is of an entirely different type. It is contended there that far from there being a private law arrangement as between the defendants, there is a public law element involved.

23. It is said that the defendant is a statutory regulator, that it has under public law concepts certain obligations imposed upon it and that it breached those obligations in particular an obligation to act reasonably in the imposition of the time limit and the way in which it then enforced it. And it is conceded on the part of the plaintiff that that is matter which falls to be dealt with exclusively by public law concepts.

24. Now what is contended by the defendant here is that the bringing of these proceedings in this form, having been instituted by plenary summons, constitutes an abuse of the process of the Court. This is so, it is said, because in truth and in reality the second leg of the plaintiff's claim is one which seeks, although not by name, certiorari to quash the decision made by the defendant. That being so, to bring proceedings seeking such relief by way of plenary summons is impermissible and constitutes an abuse of the process of the Court.

25. The plaintiff does not accept that it is in effect *certiorari* which it is seeking but in any event says that it is not an abuse of the process of the Court to bring proceedings in this form.

26. Although there has been a wealth of case law gone through in the written submissions, it has to be said that a number of things emerge therefrom. First, that unlike certain other regulators there is no obligation imposed by statute or by regulation which requires a person who seeks to contest the validity of a decision made by the defendant to do so by Judicial Review and by no other means. Such a provision is to be found for example in the planning legislation where decisions of the planning board may not be contested in any manner other than Judicial Review. There is no such requirement insofar as this defendant is concerned.

27. Secondly, there has been no decided case in this jurisdiction to the effect that a party who is not by statute required to bring an application to contest the validity of a decision of a statutory regulator by Judicial Review and Judicial Review alone is guilty of an abuse of process by seeking to contest the decision in any other way.

28. In that regard, what I have heard today is rather reminiscent of arguments that I had to deal with in the case of *Landers -V- Garda Síochána Complaints Board* which is reported at [1997] 3 IR. The relevant passage from my Judgment is as follows:

> "If the Director of Public Prosecutions is to succeed on this leg of his claim, he has, in my view, in effect to demonstrate to my satisfaction that the procedure adopted in this case amounted to an abuse of the process of the Court. He would be well on the way to so doing if he could show that the procedures as prescribed under Order 84 of the Rules of the Superior Courts are mandatory and exclude, in the cases coming within their purview, the adoption of any other procedure, e.g. the issue of a plenary summons seeking declaratory relief."

29. The same applies in this case.

30. I then went on to consider the earlier decision of Mr. Justice Costello, and I said:

> "This topic has already been considered by this Court in the case of *O'Donnell -v- Dun Laoghaire Corporation* [1991] ILRM 301. In the course of his judgment, Costello J. (as he then was) considered the relevant English statutory provisions and the case law which had developed in relation to them culminating in the decision of the *House of Lords in O'Reilly -v- Mackman* [1983] 2 AC 237.

31. Costello J. said as follows:

'Firstly, as a matter of construction, I cannot construe the new rules as meaning that in matters of public law Order 84 provides an exclusive remedy in cases where an aggrieved person wishes to obtain a declaratory order and that such a person abuses the courts' processes by applying for such an order by plenary action.

Secondly, I do not think that the court is at liberty to apply policy considerations and conclude that the public interest requires that the court should construe its jurisdiction granted by the new rules in the restrictive way suggested,

(a) because the jurisdiction it is exercising is one conferred by statute (the 1867 Act) and it is not for the court to decide that as a matter of public policy litigants who ask the court to exercise this jurisdiction abuse the courts' processes, and

(b) because it is not necessary to call in aid the doctrine of public policy to avoid the mischief which would otherwise result.'"

32. There is no case which finds that the utilisation of the plenary proceeding constitutes an abuse of the process where some or all of the claims in that plenary proceeding can be accommodated by means of Judicial Review.

33. Whilst I can well understand the wish of a regulator to ensure that an application which seeks to contest the validity of its decision should be by Judicial Review and whilst I can well see the merit in pursuing applications in that fashion, the plain fact is that, unlike other regulators, this regulator is not so favoured by the legislature. Consequently it does not appear to me that I am entitled to say that the institution of proceedings by way of plenary summons, desirable and all as Judicial Review might be, constitutes an abuse of the process of the Court.

34. But in any event, it seems to me that on the facts of this case there is very little to be said in favour of the proposition that the application should be, pursuant to whatever inherent jurisdiction there might be, directed to be pursued as a Judicial Review application. I come to that conclusion for a number of reasons.

35. First, Mr. Sreenan says that the regulator ought to be protected by ensuring that the application which is a necessary condition precedent for Judicial Review be made to a Judge on sworn testimony rather than the mere issue of a writ. Now, in fact, in the present case there was an application made to my colleague Ms. Justice Laffoy which resulted in an injunction being granted. And it is at least arguable, and I think very persuasively, that the standard of proof that has to be achieved on an application for an interim injunction is, if anything, higher than the standard which has to be achieved for leave to apply for Judicial Review using the criteria specified in the decision of the Supreme Court in *G -v- DPP*.

36. But secondly, and more to the point, it is conceded by the defendant here that if I were to stop these proceedings in their tracks and require the plaintiff to commence Judicial Review proceedings, leave would be granted. In other words, the necessary threshold of proof would be achieved. Consequently, I see little to recommend this approach in respect of that aspect of alleged protection. It is conceded that the necessary threshold of proof has already been achieved.

37. There are a number of other protections which, it is said, are available under the Judicial Review procedure which are not available here.

38. First, it is said that the trial by way of Judicial Review would be on affidavit. I don't see any reason why the Court in an appropriate case can't direct a trial on affidavit in respect of public law issues which fall to be dealt with by a plenary proceeding.

39. But in the present case it has to borne in mind that it is not just public law issues which are raised. There is also the private law issue which is contained at Paragraph 1 on the general endorsement of claim for which there is undoubtedly an entitlement to proceed by way of plenary hearing.

40. So given the bifurcated nature of the relief which is claimed here, I don't think that on the facts there is, in reality, any procedural protection given to the defendant by Judicial Review proceedings as such.

41. It is also said that the discovery which will be available in Judicial Review is by definition much more confined than on plenary proceedings. Again, I think that that is a protection which is more apparent than real having regard to the nature of these proceedings. They are being case managed and case managed in the commercial court to a much greater extent than they ever would be in the ordinary Judicial Review list.

42. As a result it will be possible to define with great precision what precisely are the issues which fall to be determined. Insofar as public law issues are concerned, the discovery pertinent to them will only be that which would be available in Judicial Review proceedings.

43. Indeed, it has to be said that the plaintiff has at all times conceded that insofar as there are public law issues which fall to be determined in these proceedings, public law principles are applicable to them.

44. In that regard, again I call in aid the views of Mr. Justice Costello in O'Donnell where he said precisely that. So both insofar as time and procedures and discovery are concerned, the public law element of the plaintiff's case will be governed by those proceedings notwithstanding that the action began by plenary summons.

45. The other area of protection which it is said is available in Judicial Review proceedings but not in plenary proceedings relates to the rights of third parties. In this case, there were two disappointed suitors who failed to convince the defendant of their entitlement to be awarded the contract. They are apparently aware of the proceedings but have not been furnished with them as such.

46. In Judicial Review proceedings, the Court would have a discretion to their being joined as notice parties since it might be said that they have a material interest in the outcome of the proceedings. Perhaps it is difficult to conceive what that might be given that neither of them were successful, but I wouldn't propose to make any adjudication as to whether or not they might be prejudiced. I propose to take a step which will ensure that if there is any possible prejudice, they will have the opportunity to make their case in that regard.

47. It also seems to me that given the dual nature of the claim which is made here, that even if I were to accede to the application and to direct that it should not go to trial but be dealt with as a Judicial Review application, I couldn't possibly accommodate the first

relief which has been claimed.

48. That is undoubtedly, in my view, a private law question which is sought to be agitated by reference to the existence of a concluded and binding contract.

49. So for these reasons I take the view that, first of all, there is no abuse of process involved in the institution of proceedings in this form. I say that in circumstances where I can well see the merit of having public law questions concerning the behaviour of regulators dealt with under the Judicial Review mechanism. But until such time as the legislature intervenes in the way in which it did in, for example, the planning code, there is no warrant for the Court to conclude, certainly on the facts of this case, that the institution of proceedings of this sort constitutes an abuse of the process. That is the standard which has to be met if the application is to be acceded to.

50. Secondly, having regard to the facts here, where it is conceded that there is a state able case which would achieve and surpass the necessary threshold of proof in Judicial Review proceedings, I am of the view that nothing would be gained by requiring Judicial Review proceedings to be instituted. In fact, all that would happen would be that further costs and delay would ensue. The other disadvantages which have been identified are more apparent than real in the context of the present proceedings.

51. Finally, given that there is a private law claim asserted in the plenary summons as well as those public law claims, it seems to me it would be inappropriate in the exercise of any discretion that I might have inherently to direct that this application in effect start again insofar as its public law element is concerned and proceed to trial insofar as the private law claim is concerned. So for those reasons I refuse the application which is sought in the notice of motion.

52. The judgment was then concluded.