THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 281 J.R.]

BETWEEN

CARRONS WINDFARM LIMITED

APPLICANT

AND

THE VALUATION TRIBUNAL

RESPONDENT

AND

THE COMMISSIONER OF VALUATION

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 14th day of February, 2018

Introduction

1. This is an application for judicial review by which the applicant seeks to quash a decision of the respondent ("the Tribunal") of the 7th February, 2007, whereby the Tribunal refused an application for discovery by the applicant.

Background Facts

2. The applicant is the proprietor of a wind farm in County Limerick which was developed in 2010 and became operational in 2011. The commercial rateable valuation of the wind farm was determined originally on the 16th November, 2011. Subsequent to that date, the Valuation Office, being the property valuation agency of the State, embarked upon a national revaluation programme of all non domestic properties in the State. In the course of that undertaking, the Valuation Office conducted a revaluation of the Limerick City and County Council rating authority areas which was ongoing during 2014.

3. On the 20th March, 2014, the Valuation Office issued a notice pursuant to s. 45 of the Valuation Act, 2001 to the applicant in which it indicated that a revaluation would be undertaken in relation to the applicant's property and seeking detailed information concerning the wind farm. Arising from that exercise, the Valuation Office issued a proposed valuation certificate pursuant to s. 26 of the Valuation Act, 2001 to the applicant on the 10th June, 2014. This certificate indicated that the Valuation Office proposed to attribute a valuation, referred to as the net annual value ("NAV") to the applicant's wind farm of €315,000.

4. The notice further indicated that if the applicant was dissatisfied with any of the particulars contained therein, representations could be made to the valuation manager within 28 days. A detailed written submission was submitted by the applicant to the valuation manager on the 7th July, 2014, contesting the proposed valuation and pointing to the fact, inter alia, that it would have the effect of increasing the rates payable by the applicant by over 380%. Subsequently on the 31st December, 2014, the Valuation Office published the Valuation List details for the wind farm which now attributed a NAV of €362,000 to it.

5. The valuation was appealed by the applicant on the 8th February, 2015, to the notice party ("the Commissioner"). The applicant retained Messrs. Eamonn Halpin & Co. Ltd as expert valuation surveyors to represent its interests in the appeal and the principle of the company, Mr. Halpin, made a detailed written submission to the Commissioner on the 26th June, 2015. A further written submission dated the 8th July, 2015, was submitted by the applicant from the Irish Wind Farmers Association. The appeal was determined by the Commissioner on the 6th August, 2015, and a new valuation certificate was issued on the 14th August, 2015, to the applicant this time attributing a NAV to the wind farm of €320,000.

6. The Commissioner's decision was in turn appealed to the Tribunal in a pro forma notice of appeal signed on behalf of the applicant on the 4th September, 2015, and submitted on the 10th September, 2015. The form provides for the grounds of appeal to be inserted at para. 6 which states at the outset:

> "Parties should note that this Notice must set out exhaustively the Grounds of Appeal upon which the appellant intends to rely. Those Grounds of Appeal may NOT be changed or extended (and liberty to amend will not be granted) save in exceptional circumstances."

7. This wording is intended to reflect s. 35 of the Valuation Act, 2001 which provides that an appeal shall specify the grounds on which the appellant considers that the value of the property does not accord with the requirements of the Act. The section also requires the appellant to submit a valuation which it considers ought to have been determined as the property's value. The applicant sets out in the notice a number of grounds of appeal as required by s. 35 and also what it considers to have been the appropriate valuation being €102,300.

8. It would appear that the Tribunal fixed the hearing of the appeal for the 18th and 19th February, 2016. The applicant was represented by solicitor and counsel with Mr. Halpin as its expert witness. The Commissioner was also represented by solicitor and counsel and the valuation manager Mr. Patrick McMorrow, himself an expert valuer, proposed to give evidence on behalf of the Commissioner, the respondent to the appeal. The appeal hearing proceeds not only on foot of written submissions and expert reports but also by way of oral evidence of the experts which is led in the normal way by the party calling them and is then subject to cross examination by the opposing party.

9. Mr. McMorrow prepared a précis of evidence for the purposes of the appeal dated the 4th February, 2016, which was furnished to the appellant. In his précis of evidence, Mr. McMorrow prepared a valuation table or "schematic" which referred to certain information gleaned not only from the applicant's accounts and other information but also from that of the nine other wind farms in County Limerick given in confidence to the Valuation Office who were also separately the subject matter of revaluation.

10. When the matter came for hearing before the Tribunal, the applicant indicated that it now wished to make an application for

discovery of documents in relation to the nine other wind farms which had informed Mr. McMorrow's schematic. The Tribunal accordingly directed that requests for voluntary discovery and responses should be exchanged between the parties and ultimately if the matter was not resolved, the Tribunal would hear an application for discovery.

11. By letter of the 24th February, 2016, the applicant's solicitors wrote to the Chief State Solicitor on behalf of the respondent seeking discovery of the following:

> "1. All documentation relating to the 'Scheme of Valuation' which is appendix 1 to the précis of evidence of Patrick McMorrow MSCSI, MRICS dated 4th February, 2016:
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> 2. All documents relating to 'Wind Farm Development Costs – Summary Sheet' which is appendix 4 to the précis of evidence of Patrick McMorrow MSCSI, MRICS dated 4th February, 2016…"

12. The letter further stated:

> "It is necessary that discovery of the documents relied on by the Commissioner be made for disposing fairly of the appeal and for saving costs. The valuer for the appellant requires the information to appraise the individual R & E valuations relied upon by the Commissioner and how they might be employed in the consideration of the value of the subject property."

13. The CSSO delivered a lengthy reply on the 2nd March, 2016, essentially refusing the request for discovery on the basis that it constituted a "speculative trawl" without any reference to the issues in the appeal and contended that the discovery was neither relevant nor necessary for any of the grounds of appeal advanced by the applicant. In an equally extensive letter of rejoinder from the applicant's solicitors on the 10th March, 2016, the legal principles applicable to applications for discovery were canvassed in detail. The letter said, inter alia:

> "The appeal is concerned with the value of the property as determined by the Commissioner and which the appellant has challenged. The function of discovery is to clarify factual matters and, in this case, to ascertain what facts the respondent has relied upon. Without the facts, it will be impossible for the Tribunal to determine whether the value as determined is correct or incorrect. The appellant contends that discovery is sought to establish the true, factual and evidential basis upon which the respondent performed his functions under the Valuation Act."

14. It was accordingly necessary for the Tribunal to rule on the issue of discovery and in that regard, both parties made extensive written submissions to the Tribunal as to the appropriate legal and other principles to be applied. In essence, the Commissioner contended that the application was a pure "fishing expedition" and none of the documents sought were either relevant or necessary for the fair disposal of the grounds of appeal actually raised by the applicant. The applicant was permitted to make two sets of written submissions on the issue arising. An oral hearing of the discovery application was held on the 16th June, 2016.

The Tribunal's Decision

15. The Tribunal issued its decision on the discovery application on the 7th February, 2017. It is a detailed written decision running to some ten pages. The Tribunal comprised three members, two of whom are chartered surveyors and the third is a practicing barrister. As is clear from the decision, in addition to written submissions, the parties were permitted to appear before the Tribunal for the purposes of advancing further oral argument. The Tribunal noted that at the hearing, the applicant withdrew the request for discovery of the second category and confined the application to the first.

16. The decision then goes on to record that the parties were agreed as to the principles to be applied to discovery applications. Reference was made to the judgment of the Supreme Court in *Ryanair Ltd v. Aer Rianta* [2003] 4 I.R. 264 and a passage from the judgment of Fennelly J. was cited. The decision also referred verbatim to each of the grounds of appeal set out in the applicant's notice of appeal. The decision then identified the central issue in the application:

> "6. The appellant seeks discovery of all documentation in relation to the 'scheme of valuation' which is detailed in appendix 1 to the précis of evidence of Patrick McMorrow MSCSI, MRICS stated the 4th February, 2016. The scheme of valuation is derived from an analysis of nine full sets of certified or audited accounts of the other wind farms in County Limerick. The crucial question, therefore, is whether such discovery is both relevant and necessary to fairly dispose of the ground raised by the notice of appeal to the valuation Tribunal."

17. The decision then goes on to summarise the arguments of each party. The applicant contended that the documents sought were both relevant and necessary with the Commissioner contending the opposite. The Commissioner also resisted the application on the grounds that the documents sought constituted commercially sensitive information given in confidence.

18. In particular, the Tribunal noted that among its submissions, the applicant had contended that it was entitled to enquire into each and every element of the valuation, and the facts, figures and assumptions underpinning it. The Tribunal rejected this contention, stating:

> "10. As the appeal is limited to the grounds specified in the notice of appeal, the Tribunal does not accept that the appellant is entitled to examine all documents in the possession of the respondent by reference to which the respondent made his determination or to enquire into each and every element of the valuation including the facts, figures and assumption underpinning it.
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> 11. The question on this application is whether the discovery sought is relevant and necessary to fairly dispose of the appellant's grounds of appeal. Applying the test of relevance set out in *Compagnie Financiere Du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 and restated by the Supreme Court in *Ryanair* the Tribunal has to ask if it is reasonable to suppose that the document sought contained information which may directly or indirectly enable the appellant to either advance the grounds of appeal or undermine the respondent's position. In this regard the onus is on the appellant to establish that the discovery sought is both relevant and necessary for disposing fairly of the appeal and in the Tribunal's view that onus has not been discharged."

19. The Tribunal then went on to give reasons as to why it considered that the documents were neither relevant nor necessary. It concluded that the applicant would be able to make its case by reference to its grounds of appeal as matters stood and there was no necessity for the documents sought. The Tribunal went on to note in para. 17:

> "The appellant will have the opportunity to cross examine Mr. McMorrow on his evidence as to how he ascertained the

rental value of the appeal property by reference to the R & E and the Tribunal will have to be satisfied that sufficient evidence of the scheme of valuation is adduced at the hearing to properly assess the value of the appeal property in accordance with s. 48 of the Valuation Act, 2001."

As this disposed of the application, it was unnecessary for the Tribunal to consider the issue of confidentiality.

The Grounds for this Application
20. By order of this court (White J.) made on the 28th March, 2017, the applicant was given leave to challenge the Tribunal's determination on the grounds set out in its statement of grounds. It seems to me that the essential thrust of the challenge brought here is to be found in the first three paragraphs of the grounds:

> "1. The fundamental contention of the applicant, by specific reference to s. 35 (a) of the Valuation Act, 2001, is that the value of the applicant's property as determined by the notice party is incorrect.
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> 2. It therefore follows that the applicant is entitled to examine all of the documents in the possession of the notice party by reference to which the notice party made his determination, which may enable the applicant to advance its case or damage the notice party's case.
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> 3. Accordingly, the decision of the respondent dated the 7th February, 2017 to refuse the applicant's application for discovery was *ultra vires*, arbitrary and unreasonable, contrary to natural and constitutional justice and was contrary to the respondent's obligations under the European Convention of Human Rights."

21. The remainder of the applicant's grounds continue in like fashion to plead that the Tribunal erred in law in holding that the documents were not relevant or necessary. The statement of grounds contends that the refusal of the Tribunal to order discovery of the documents means that the applicant would be prevented from effectively cross examining the Commissioner's valuer. There is a plea that the Tribunal failed to consider the entirety of the applicant's grounds of appeal and particularly the final ground. There is further a reference to a preliminary ruling made by the Tribunal in another Limerick wind farm case which the applicant contends appears to suggest that the Commissioner would have to provide an evidential basis for the valuation of the other nine wind farms and if that information was not available an application for discovery might be appropriate.

Discussion
22. It is notable in none of the applicant's rather generic grounds of challenge is there any suggestion that the Tribunal lacked jurisdiction to decide the discovery issue, that it applied the wrong legal test in coming to its determination or that there was any want of fair procedures arising in relation to the discovery application.

23. It is of course trite to say that judicial review is concerned not with the correctness of a decision, but whether it was made lawfully. This is clearly illustrated in the leading and oft cited case of *O'Keeffe v. An Bord Plean*ála [1993] 1 I.R. 39 where the leading judgment was delivered by Finlay C.J. with whom the other four members of the court agreed. He said (at p. 71):

> "Griffin J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 in agreeing with the principles laid down by Henchy J., quoted with approval the speech of Lord Brightman in *R. v. The Chief Constable of North Wales Police*, ex p. Evans, [1982] 1 W.L.R. 1155 where he stated as follows at p. 1160:—
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> > 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power . . . Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.'
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> With this statement of the position with regard to judicial review I would also agree.
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> It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene."

24. The Chief Justice went on to say (at p. 72):

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

25. It seems to me that throughout all of the applicant's statement of grounds and legal submissions, it is very difficult to discern any complaint other than the fundamental one that the Tribunal made the wrong decision. It is repeatedly suggested that the conclusion of the Tribunal that the documents were neither relevant nor necessary must be an error of law or fact because the applicant says they were both relevant and necessary.

26. I cannot see any conceivable basis upon which this could give rise to a judicial review of the decision. The Tribunal considered detailed submissions both written and oral from counsel for each party. The applicant argued that the documents were both relevant and necessary. The Commissioner argued that they were not. It fell to the Tribunal to reach a conclusion based on these competing submissions and I can identify no basis for the suggestion that the decision arrived at as between these two competing positions could be said to be unlawful.

27. Although not specifically pleaded in the statement of grounds, it seems to me that the closest the applicant comes to what might be described as a true judicial review ground is that the decision was so wrong as to be irrational. As the judgment of Finlay C.J. in *O'Keeffe* makes clear, the court could not arrive at such a conclusion of irrationality unless satisfied that there was no material before the Tribunal which could have supported its decision. Even the applicant does not make that suggestion. Accordingly it seems to me that insofar as irrationality could be said to be relied upon by the applicant, it is again no more than a contention that the Tribunal got it wrong.

28. In my view, it has to be borne in mind that the Tribunal is itself an expert body which, perhaps unusually for such an appellate Tribunal, hears only expert evidence. As such, the Tribunal is uniquely equipped to determine the issues of relevance and necessity where discovery is concerned. It would be idle for the court to attempt to second guess the views of the Tribunal as to whether some particular document is either relevant or necessary to the applicant's grounds of appeal. It is by now well settled that tribunals such as the respondent are entitled to significant curial deference in matters within their own areas of expertise. As stated by Hamilton C.J. in *Denny v. Minister for Social Welfare* [1998] 1 I.R. 34, at 37-38:

> "…I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

29. Keane J. (as he then was) in delivering a judgment with which the Chief Justice agreed, cited with approval the comments of the High Court judge whose decision was under appeal (at p. 44):

> "In her judgment, the learned High Court judge (Unreported, High Court, Carroll J., 18th October, 1995), having pointed out that the appeal was on a question of law only, observed:-
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> > 'In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law.' "

30. *Denny* was of course an appeal to the High Court on a point of law. In a judicial review such as the present case, the threshold the applicant must cross is no less onerous. Much of what was argued by the applicant in these proceedings amounted to a recast of the arguments made on the central issue before the Tribunal itself. This merely serves to highlight the fact that the applicant in reality seeks to appeal the decision of the Tribunal on its merits, something which is clearly outside the scope of judicial review. Indeed it would even be outside the scope of an appeal on a point of law which of course does not arise here.

31. Insofar as the applicant suggests that the Tribunal's decision on relevance and necessity does not exhaustively consider all its grounds of appeal, I do not believe that it is necessary that it should have done so. It clearly set out all the grounds of appeal in the decision and it must be presumed that they were taken into account. As with the judgment of any court, it is not necessary for the Tribunal or any other decision making body to refer exhaustively to every point that is raised in order for its decision to be made lawfully.

32. The applicant submits that there is an inherent contradiction in the decision to the extent that the Tribunal having decided that the documents were not relevant then considered that they were by implication at para. 17 of the decision. I do not accept that contention. The Tribunal properly concluded that it would have to be satisfied from the evidence adduced by the Commissioner that it had properly assessed the value of the appeal property. It does not follow automatically that this is in some way a concession by the Tribunal that the information relied upon by the Commissioner's valuer is relevant or even if it is, that it also satisfies the necessity requirement.

33. That is something yet to be determined in the course of the appeal during which the applicant will have a full opportunity to test that evidence in cross examination, assuming of course it is ruled admissible. Similarly, I cannot see how comments made by the Tribunal in another case concerning another Limerick wind farm at an interlocutory stage can be regarded as determinative of the issue in this case. Here again, that amounts to no more than a suggestion that because the Tribunal took a different view in another case, it must therefore be regarded as being wrong. Even if that were true, it does not give rise to any want of jurisdiction.

34. Far from being a decision which no reasonable decision maker could have made, the decision appears to me to be one which correctly identifies the issue and correctly applies the law to the resolution of that issue.

Conclusion

35. I am satisfied that the decision made by the Tribunal on the applicant's discovery application was made lawfully and within jurisdiction. The Tribunal clearly brought its expertise to bear on the issue of both relevance and necessity of the documents, a mixed question of fact and law, and concluded that the applicant had not discharged the onus which lay upon it of satisfying the Tribunal that an order for discovery should be made. Having failed in that endeavour, it is very difficult to escape the conclusion that this application is no more than an attempt to revisit the merits of that decision, something which is clearly outside the scope of judicial review.

36. Accordingly, I will dismiss this application.