

THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

2007 1527 JR  
[2007 No. 188 COM]

BETWEEN

NORTH WALL QUAY PROPERTY HOLDING COMPANY LTD.  
AND SEAN DUNNE

APPLICANTS

AND  
DUBLIN DOCKLANDS DEVELOPMENT AUTHORITY

RESPONDENT

AND  
NORTH QUAY INVESTMENTS LTD.

NOTICE PARTY

**SUPPLEMENTARY RULING of Ms. Justice Finlay Geoghegan delivered on the 20th day of January 2009**

1. In these proceedings the applicants sought *inter alia* an order of *certiorari* of a decision of the respondent of 13th July, 2007, to grant certificate DD457 to the notice party pursuant to s. 25(7) of the Dublin Docklands Development Authority Act 1997. It was contended that the decision to issue the certificate was *ultra vires* the respondent on a number of grounds.

2. In a judgment delivered by me on 9th October, 2008, I decided that the decision was *ultra vires* the respondent, and for the reasons set out in that judgment, concluded that I would grant by way of relief:

(1) An order of *certiorari* of the decision 13th July, 2007, to grant certificate DD457 to the notice party pursuant to s. 25(7) of the Dublin Docklands Development Authority Act 1997; and

(2) A declaration that the Agreement of the 31st May, 2007, between the respondent and notice party was *ultra vires* the respondent.

3. Section 25 (7)(ii) of the Act of 1997 provides that the carrying out of any development in a relevant area which is certified by the respondent to be consistent with the planning scheme for that area is exempt development. The notice party was the beneficiary of certificate DD457. It has carried out certain development prior to 9th October, 2008, which it contends is in accordance with certificate DD457. The applicants dispute this fact and have, at the same time as these proceedings, commenced proceedings against the notice party pursuant to s. 160 of the Planning and Development Act 2000. Since the delivery of judgment, the applicants have issued further proceedings against the notice party pursuant to s. 160 of the Planning and Development Act 2000, in relation to the development purportedly carried out in accordance with certificate DD457.

4. Subsequent to the delivery of judgment I was informed that there was a dispute between the parties as to the meaning of the order of *certiorari* which I had indicated would be the relief granted, and also the notice party issued a motion seeking, in addition, certain declaratory relief.

5. I ultimately agreed to put the matter in for further submission and hearing in relation to the relief which I had indicated would be granted, whilst at the same time making clear that I was not prepared to either reopen any issue already determined in the judgment of 9th October, 2008, or address any further issue in the proceedings. The purpose of the further hearing was to ensure that there was no dispute between the parties as to the meaning of the order of *certiorari* which I had indicated would be granted. I had been informed by counsel that there was a dispute as to the temporal effect of the order of *certiorari* of the decision to grant certificate DD457.

6. The applicants, respondent and notice party put in very helpful and interesting written legal submissions but which, to some extent, go beyond what it is permissible for me to address in these proceedings, having delivered judgment on 9th October, 2008. In the course of oral argument by counsel, the differences between the parties narrowed. At the conclusion of the hearing, there remained, it appears to me, three issues which I need to address:

(i) Whether the Court should now grant any declaration or vary in any way the relief indicated in the judgment of 9th October, 2008, so as to limit or vary what is the normal temporal effect of an order of *certiorari*;

(ii) Clarification as to what is the normal temporal effect of the order of *certiorari* referred to in the judgment of 9th October, 2008;

(iii) Whether there should be any determination in these proceedings of the effect of the order of *certiorari* of the decision to grant certificate DD457 on the development carried out by the notice party prior to 9th October, 2008, and contended to be in accordance with certificate DD457.

**Temporal limitation or additional relief**

7. Counsel for the notice party and respondent submit that the Court has discretion in an application for judicial review such as this, even where it determines that the challenged decision was *ultra vires* the respondent, to grant relief which limits the temporal effect of its decision by *inter alia* declaring it to be prospectively invalid. This was not an issue raised prior to the delivery of judgment. Counsel for the applicants does not dispute, in substance, such jurisdiction of the Court in an application for judicial review, but submits that it is not now open to the Court in these proceedings to grant any further or different relief which would alter the relief already set out in the judgment of 9th October, 2008. He further submits that such relief is different to an order of *certiorari* which has only one meaning that the decision is quashed or rendered null and void *ab initio*.

8. I accept the submission of counsel for the applicants that the relief now sought by the respondent and notice party is different to an order of *certiorari*. Further that this Court, having delivered judgment on 9th October, 2008, and having set out in that judgment

the relief to be granted, has no jurisdiction to grant any differing or additional relief which would interfere with or limit in any way the normal effect of the order of *certiorari* referred to in its judgment. Accordingly, I am not, at this stage of these proceedings, prepared to entertain that part of the application of the notice party and respondent.

### **Effect of order of certiorari**

9. Ultimately, in the oral submission, it appears to me that counsel for all parties accepted that the following were the principles which apply to the legal status of the decision made by the respondent under s. 25 of the Act of 1997 and the order of *certiorari* quashing that decision granted in the judgment of 9th October, 2008. They are principles which appear to me to be correct and may be summarised as follows:

(i) The decision of the respondent, being a decision of a public body, is presumed lawful (or valid) unless and until a Court declares it to be invalid or unlawful. Accordingly, at all times prior to 9th October, 2008, the decision of the respondent herein was presumed to be lawful;

(ii) The order of *certiorari* in the judgment of 9th October, 2008, rendered on that date the decision of the respondent of 13th July 2007 null and void *ab initio*;

(iii) Whilst the order of *certiorari* is expressed to be of the decision to grant certificate DD457, the respondent and notice party did not, correctly, seek to make any distinction between the decision and the certificate. Accordingly, the order of *certiorari* granted in the judgment 9th October, 2008, also rendered on that date the certificate null and void *ab initio*.

### **Effect of order of certiorari on development already carried out**

10. The final question relates to the determination of the effect of the order of *certiorari* granted in the judgment of 9th October, 2008, on the development carried out by the notice party prior to that date. In accordance with the above principles, that development was carried out at a time when the certificate was presumed to be valid. However, the effect of the order of *certiorari* on 9th October, 2008, is to render the certificate invalid, or null and void, *ab initio*. The issue is what is now the status of the development carried out prior to the 9th October, 2008, having regard *inter alia* to the Act of 1997 and the above principles.

11. It is not an issue which arises in the present proceedings. The applicants in these proceedings claimed no relief against the notice party in respect of the development being carried out or already carried out. It is an issue which will inevitably arise in the separate proceedings brought pursuant to s. 160 of the Planning and Development Act 2000. Notwithstanding that the parties opened to me a number of relevant authorities and judicial dicta, it does not appear to me that I should now express any view, save to indicate that it is a separate and distinct issue from those determined in these proceedings which remains to be determined in the section 160 proceedings.

### **Conclusion**

12. It does not appear to me that I should alter in any way or add to the relief already indicated in the judgment of 9th October, 2008.

### **Costs**

13. The applicants seek their costs against the respondent and the respondent accepts, as it must, that the applicants are entitled to such costs.

14. The notice party also seeks an order for its costs against the respondent. This is disputed by the respondent. Counsel for the notice party submits that it is an innocent party which has come to Court to protect its commercial interests; that it was reasonable, having regard to what was at stake, for it to do so, and that it should not have to bear its costs of appearing in Court. He relied upon the decision of Kelly J in *Deerland Construction Ltd v. The Aquaculture Licences Appeals Board & Anor.* [2008] IEHC 289 to award the notice party costs against the unsuccessful respondent therein.

15. Counsel for the respondent submits that the costs between the notice party and the respondent is a matter in the discretion of the Court and should be exercised on the facts of the individual judicial review proceedings. He submits that in the judgment of 9th October, 2008, the Court upheld four grounds of challenge to the decision of the respondent, and that in respect of three of those grounds the notice party participated, in the sense that two of the grounds arise out of the nature of the development for which the certificate was sought and the other related to an agreement between the notice party and the respondent. On the facts of the application, he submitted that both the notice party and the respondent had acted in good faith but, as determined by the Court, in legal error. He submits that there should be no order for costs as between the notice party and the respondent.

16. The costs between the notice party and the respondent are in the discretion of the Court and there is nothing in Order 99 of the Rules of the Superior Courts which applies any presumption or ordinary rule in respect of a notice party's costs. Both the notice party and the respondent have failed, on the positions taken by each respectively, in these proceedings. The discretion must be exercised primarily having regard to the facts of the application. The decision of Kelly J. in *Deerland* is not contended to establish any principle. It was the exercise of judicial discretion on the facts of that application.

17. I have concluded that I should exercise my discretion on the facts of this application by making no order for costs as between the notice party and the respondent. Whilst I accept the submission of Mr. Collins S.C. on behalf of the notice party that it was reasonable for the notice party to participate in the proceedings for the purpose of protecting its significant commercial interest, that, of itself, does not appear to me to entitle a notice party to an order for costs against a respondent where both the notice party and the respondent have failed in their respective legal positions in the proceedings. Whilst it may be reasonable for the notice party to participate, it does not appear to me to follow that it is necessarily entitled to do so at no cost to itself. On the facts of this application, there is no order for costs sought against the notice party. It is therefore in a relatively privileged position in the sense of being a party to proceedings supporting a position which failed but has no order for costs against it. There appears to me to be merit in Mr. Cush S.C.'s submission on behalf of the respondent that in respect of three of the four grounds upon which the Court upheld the challenge to the authority's decision, the notice party not only was unsuccessful in the proceedings on the legal position taken by it, but also had participated in the factual scenario which gave rise to those grounds. This distinguishes it from the decision in *Deerland Construction Ltd. v. The Aquaculture Licences Appeals Board & Anor.* where the challenge upheld was the failure of the respondent to give reasons a ground in which the notice party did not factually participate. Whilst I accept Mr. Collins' submission that it is, of course, primarily a matter for the respondent to ensure that any decision taken by it is in accordance with law, it appears to me that the Court should have regard to the fact that the notice party, which is an experienced developer, applied for a certificate for the development in question which was determined not to be consistent with the relevant planning scheme.

18. There will be no order for costs between the notice party and respondent.