Neutral citation Number: [2007] IEHC 118

THE HIGH COURT
JUDICIAL REVIEW

[2006 No 429 JR]

BETWEEN

CUMANN THOMAS DAIBHIS

APPLICANT

AND
SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

AND
SHAMROCK ROVERS FOOTBALL CLUB LIMITED

NOTICE PARTY

Judgment of Mr. Justice O'Neill delivered on the 30th day of March 2007

1. The applicant is a GAA club located in the Tallaght area. In these proceedings the applicant seeks leave pursuant to s. 50 of the Planning and Development Act 2000, to take these judicial review proceedings against the respondents.

2. The reliefs sought by way of judicial review are the following:-

> "1. A declaration that the vote taken by the members of the respondent at their meeting held on 13th February 2006, purporting to agree to proceed with the development of the stadium at Whitestown Way, Tallaght, Co. Dublin is null and void and of no effect.
>
> 2. An order of prohibition by way of judicial review prohibiting the respondent from carrying out any works to the stadium at Whitestown Way, Tallaght, in the County of Dublin save in accordance with the resolution passed by the respondent at its meeting held on 12th December 2005.
>
> 3. An order of *certiorari* by way of judicial review quashing the purported decision made by the respondent at its meeting on 13th February 2006."

3. By order of this court made on 26th June 2006, Shamrock Rovers Limited was joined as a notice party to the proceedings.

4. The background to this matter is as follows.

5. On 10th February 1997, the respondents passed a resolution approving of the disposal of a site at Whitestown Way, by way of a lease to provide a stadium for Shamrock Rovers. On 14th January 1998, planning permission was granted to Shamrock Rovers to build a football stadium and on 24th March 2000, the respondents granted a lease of the site to Mulden International Limited. Under the terms of that lease Mulden International Limited were required to commence building works in accordance with the said planning permission within six months of 24th March 2000. On 20th October 2000, Mulden International Limited assigned their interest under the lease in that portion of the leased land comprising eight acres upon which the stadium was to be built, to an associated company, Sloan Park Company Limited, thereby transferring their obligation to build the stadium to Sloan Park Company Limited. Work on the stadium commenced in October 2000 and progressed well for twelve months. Construction works ceased on the site in November 2001 and there has been no work done since. The building contractor is still in possession of the site. In July 2003 Shamrock Rovers applied for and was granted an extension of the planning permission for a period of one year to 31st October 2004, to enable them to complete the stadium. No work was carried out during that twelve month period. In October 2004 Shamrock Rovers applied for a further extension for a period of one and a half years to complete the stadium. On 14th December 2002, the respondents as planning authority refused that application.

6. The respondents considered the terms and conditions of the lease under which Mulden International Limited and Sloan Park Company Limited held their respective interest in the stadium site and decided that the objective of the respondents in making the site available to Shamrock Rovers had not been met. The respondents took the view that the interest of Shamrock Rovers and the public would best be served by a repossession of the lands and the formulation of a separate agreement for the completion of the stadium. On 4th January 2005, a Managers Order authorised the service of a notice of forfeiture of the lease. On 11th April 2005, an examiner was appointed by the High Court to Shamrock Rovers Football Club then trading as Branvard Limited with the view to putting together a financial package to prevent the liquidation of the club. The respondents engaged in discussions with the examiner with regard to the completion of the stadium and its use by Shamrock Rovers when completed. The following terms were offered to the examiner by the respondents to cater for Shamrock Rovers need for playing facilities as well as assisting its income stream:-

> · The pitch and stand to be made available to the club for up to forty home games per annum.
>
> · Advertising revenue derived from the stadium to be shared on a fifty fifty basis between the club and the respondent.
>
> · The respondent to retain ownership of the stadium following its completion from public funds and to maintain and manage the stadium grounds including the pitch.
>
> · The respondent to make available a site within the grounds to enable the club to provide its own clubhouse.
>
> · The respondent to purchase the clubhouse at cost in the future should the club decide to relocate.
>
> · The respondent to construct or to provide financial assistance to enable Shamrock Rovers to provide modern changing facilities (to include two changing rooms, showers toilets, referees room, some storage facilities) on off site grounds to assist in the promotion of soccer; and the respondent to be provided with a deed of covenant for a period of ten years protecting this investment in the event of the lands being sold within that period.
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> · In addition to the above the club was to have the following options:
>
> (a) The use of the adjacent training pitch which was to be upgraded to all-weather specification.

(b) Liberty to negotiate on a match per match basis or for specific other functions, the use of the main pitch and/or facilities contained within the stand.

(c) The use, subject to demand and availability, of other soccer pitches proved by the Council in its public parks.

7. Because of the fact that the planning permission for construction of the stadium had expired and the development was to be completed as a local authority project the respondent initiated a public consultation process in accordance with s. 179 of the Planning and Development Act 2000, and Part 8 of the Planning Development Regulations 2001- 2003.

8. The respondent published a notice on 18th July 2005, in which it was proposed to complete the stadium based on the plans which had already received planning permission from An Bórd Pleanala and these plans were placed on public display in accordance with the notices published in the Irish Independent on 18th July 2005, and the Echo newspaper on 21st July 2005, and a further notice published on 15th August 2005, when the time for receipt of submissions was extended to 26th September 2005, to allow for the summer holiday period.

9. After the expiration of the period for submissions and observations a written report pursuant to s. 179(3) of the Planning and Development Act 2000, was prepared by Thomas Doherty, Deputy Manager of the respondents. This report recommended that the proposed development comprising the completion of this stadium should proceed and the report was submitted to the full members of the respondent on 12th December 2005.

10. On 12th December 2005, the respondents adopted a resolution to modify the proposed development by making modifications to the design of the stadium to provide for an increase in the playing area and some alterations to the stand facilities to facilitate other sports and uses. The resolution thus passed by the respondents was in the following terms:-

> "That the manager's report be adopted subject to the playing pitch being increased to 140 by 85 metres and to appropriate modifications to increase the changing room accommodation. The stands to be extended either in the current phase or in a future phase in line with the increased length of the playing surface and adequate car parking provided on site and if necessary in the area previously approved by An Bórd Pleanala for stadium car parking referred to as Site B on Whitestown Way."

11. This resolution had previously been passed by the Tallaght Area Committee, of the respondents.

12. The significance of the increasing of the pitch to the size in question namely to 140 by 85 metres was to enable GAA games to be played on the pitch.

13. The minutes of this meeting of the Council noted that:

> "The manager advises that the signing of the building contract and the commencement of the works is subject to the allocation of significant further funding by the Department of Arts, Sports and Tourism."

14. By letter dated 21st December 2005, the respondents informed the Department of Arts, Sports and Tourism of the Council's decision of 12th December 2005, and requested clarification on funding for the development. On 24th January 2006, the respondents received a letter from Mr. Con Haugh of the Department of Arts, Sports and Tourism stating that the Minister could not agree to make funding available to the modified development.

15. Because of the contents of this letter from the Department, a further report was presented to the members of the respondent at its meeting on 13th February 2006, recommending, that having regard to the Minister's response on funding, the development as originally proposed in the managers report presented to the Council on 12th December 2005 should be proceeded with. Following discussions the Council members agreed by a vote of 22 to 4 to proceed with the development of the stadium as proposed in the managers report presented to the meeting on 12th December 2005.

16. The relevant part of the report presented by the Deputy Manager to the meeting of 13th February 2006, is as follows:-

> "In the light of the Department's response it is now proposed to proceed to complete the stadium on the basis of the manager's report as presented to both the Tallaght Area Committee and the full Council."

17. The minutes of this meeting of the respondents records as follows:-

> "A roll call vote was taken on the proposal contained in the manager's report and the result was as follows:
>
> FOR: Twenty Two (22) …
>
> AGAINST Four (4) …
>
> The report was NOTED and it was AGREED that the development of the stadium would proceed as proposed in the manager's report."

18. It is this decision of 13th February 2006, to proceed with the development as originally planned without the modifications contained in the resolution of 12th December 2005, that is now sought to be challenged in these judicial review proceedings.

19. Pursuant to s. 50 of the Planning and Development Act 2000, the applicant in order to obtain leave to bring these judicial review proceedings must establish that there are substantial grounds for contending that the decision challenged is invalid or ought to be quashed and that the applicant has a substantial interest in the matter which is the subject of the application. This requirement is contained in s. 50(4)(b) which is as follows:-

> "(b) An application for leave to apply for judicial review shall be made by motion, on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave)- …
>
> and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the

subject of the application."

20. The applicant is qualified to bring the application pursuant to s. 50(4)(c)(ii), they having made submissions or observations in the consultation process conducted under s.179 of the Act.

Has the Applicant demonstrated a substantial interest in the subject matter of the application.
21. In ascertaining whether or not the applicant has a substantial interest one must look at what precisely is the subject matter of the application in this case. The applicant seeks to challenge the resolution of 13th February 2006, which has the effect of rescinding the resolution of 12th December 2005. Thus whatever benefit accrued under the resolution of 12th December 205 to the applicants was withdrawn by the resolution of 13th February 2006. In practical terms the resolution of 12th December 2005, made possible the playing of GAA games in the proposed development, whereas the smaller pitch proposed in the original proposal makes it impossible to play GAA games except at underage level.

22. The applicant avers on affidavit that the proposed stadium is located in the geographical area serviced for the purposes of the GAA by the applicant. The applicant as a club was established in 1887 and is one of the oldest GAA clubs in Dublin and easily the oldest club in Tallaght. The applicant club was and remains located in the central Tallaght area comprising the parishes of St. Martin de Porres covering, Ailsbury and Old Bawn, the Parish of St. Mary's in Tallaght village itself and the parish of St. Dominic's, covering Avonbeg and Seskin View.

23. In the last thirty years Tallaght has grown exponentially to the point where it now has a population of 100,000 approximately. This has resulted in recent years in an increase in the number of GAA clubs in the greater Tallaght Region to a total of six. Each of these separate clubs has their own separate primary catchment area in which they operate. St. Annes's GAA club serves the Parish of St. Anne's, in Bohernabreena; St. Mark's GAA club serves the Parish of St. Mark's in Springfield; Croi Ro Naofa GAA club serves the Parish of Killinarden and St. Jude's GAA club serves the Parish of St. Aonghus in Balrothery. Apart from the fact that the applicant is the traditional central Tallaght club, its home ground is located in the same Parish as the proposed Tallaght stadium, namely the Parish of St. Martin de Porres.

24. The applicant is the only GAA club operating and physically located in this Parish, as a result of which the applicant is the closest GAA club to the proposed stadium and the one which would be most affected by the stadium being used exclusively for soccer. Until the early 1980s the applicants grounds were located 200 yards from the new Tallaght Town Centre, that is across the current dual carriageway from the proposed stadium. During the 1970s and 1980s the applicants had three GAA pitches on the area in which the proposed partially completed stadium currently stands. The applicant gave up these pitches at the request of the respondent, because, the respondent proposed that the area would be developed as a leisure park for the entire community and commitments were given for replacement pitches elsewhere.

25. It is further averred by Dominic Finnegan that within the code of the GAA the applicants club is the appropriate club to protect the interests of the GAA in the immediate area of the proposed stadium and it has its own particular interest in having access to the stadium in that, the stadium will be the main sporting facility in the area, and if it is reserved exclusively for soccer then that would put the applicants at a significant disadvantage in attracting young people in the area to participate in the games and other activities of the GAA. In addition access to the stadium would be of great importance to the applicant for staging a variety of games including important club matches, school competitions and some inter county games. The applicants contend that any such access that they might enjoy to this facility would not interfere with the proposed use of the facility by Shamrock Rovers, namely for forty games per year.

26. On the face of it, the loss of the possibility of any use of the stadium consequent upon the decision of 13th February 2006, would appear to be a substantial detriment to the applicant while on the other hand the development if carried out pursuant to the resolution of 12th December 2005, would have a significant potential benefit for the applicant.

27. Both the respondent and Shamrock Rovers dispute that the applicants have any substantial interest in the subject matter of the application on the grounds that the challenge made by the applicant to the resolution of 13th February 2006, is of a purely technical or procedural nature and that the applicant is not prejudiced by the resolution; it was never intended that the applicants would have access to this stadium; at all times it was planned as a soccer only stadium; the use the applicants suggests would be made of the stadium would be by other elements in the GAA organisation namely the Dublin County Board for the purpose of inter county matches, and other clubs for their games, and, therefore, the interest thus advanced by the applicant is an interest shared by a great many GAA clubs in the Tallaght area and generally in South County Dublin and hence the interest advanced by the applicant is not one which is personal or peculiar to them; the fact that the Minister for Arts, Sports and Tourism has refused funding for the development as modified by the resolution of 12th December 2005, means that the development thus modified cannot go ahead and hence even if the applicant were to be successful in having the resolution of 13th February 2006, quashed, there would be no benefit whatever to the applicants.

28. Determining what is meant by a concept which is essentially as broad as "substantial interest" presents obvious difficulty. Section 50(4)(d) which provides "a substantial interest for the purpose of paragraph (b) is not limited to an interest in land or other financial interest" if anything makes the concept broader and more difficult to define.

29. The change to "substantial interest" from the previous requirement of "sufficient interest" indicates and indeed has been held by this Court in a number of cases to necessitate an interest of significantly greater weight or personal connection of the applicant to the subject matter of the application.

30. In *Harrington v. An Bord Pleanála* (Unreported, High Court, Macken J. 16th March, 2006) the learned Judge held at page 21 as follows:

> "While I accept the applicants argument and the Act make its clear such substantial interest may be wider than an interest in land, or other financial interests, and therefore, in theory, it can cover a wide variety of circumstance, I consider that the substantial interest which the applicant must have is one which he has already expressed as being peculiar or personal to him…"

31. I would respectively agree with this passage from the judgment of Macken J. Both the respondent and the notice party relied heavily on this dicta from the judgment of Macken J. to submit that the interest advanced by the applicant could not be a "substantial" interest because it was an interest which was shared by all of the other GAA clubs in the immediate area and in South County Dublin and other parts of the GAA organisations specifically, the Dublin County Board and hence the interest was not "peculiar or personal" to the applicant.

32. In my view the requirement that an interest must be "peculiar or personal" to an applicant does not mean that if some other party has the same or similar interest in the subject matter of the application that both are thereby excluded from having a "substantial" interest. If this were so it would have the bizarre consequence of excluding householders from an estate of houses for having a "substantial" interest in a development taking place adjoining their estate. Clearly this could not be so.

33. In my view what the phrase "peculiar or personal" imports is that the proposed development the subject matter of the application is one which affects the applicant personally or individually in a substantial way as distinct from any interest which the wider community, not so personally and individually affected, might have in the proposed development. Thus, as in the case of a housing estate many people might be affected substantially in this way and have a "substantial" interest.

34. In this case the resolution of the 12th December, 2002 had as its primary and sole objective an alteration of the proposed development so as to enlarge the pitch so that GAA games could be played on it. The resolution of the 13th February, 2006 had the opposite affect namely the carrying out of the proposed development as originally planned as a soccer only stadium with a pitch of such size as would exclude the playing of GAA games except at underage level. In my view the subject matter of the impugned decision namely that of the 13th February, 2006 is such as to individually and indeed exclusively affect the GAA. As the constituent part of that organisation with the most immediate connection to the stadium, i.e. the club in whose area the stadium, is located, and as the GAA club who would be likely to derive the most immediate and frequent benefit from access to the stadium, in my view the applicant have clearly discharged the onus which is on them to demonstrate that they have a "substantial" interest in the subject matter of this application which is the quashing of the resolution of the 13th February, 2006.

Has the Applicant shown substantial grounds for contending that the resolution of the 13th February, 2006 should be quashed.

35. The test for establishing "substantial grounds" has been discussed in several cases namely *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at 130 (Carroll J.), *Jackson Properties Limited v. The Minister for the Environment* (Unreported, High Court, 2nd July, 1999 Geoghegan J.), *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 McKechnie J., *Harrington v. An Bord Pleanála* (Unreported, High Court, 26th July, 2005 Macken J.) and *O'Brien v. Dun Laoghaire Rathdown County Council* (Unreported, High Court, 1st June, 2006, O'Neill J.), and it is unnecessary here to repeat the various dicta set out in those cases save to express my agreement with the now well known passages from those judgments, as identifying the essential characterises of what is meant by the term "substantial grounds".

36. In this case the challenge to the validity of the resolution of the 13th February, 2006 is on the basis that this impugned resolution was beyond the powers of the respondent as prescribed in s. 179(4) of the Planning and Development Act, 2000.

37. This sub section reads as follows:

> "(4)(a) The members of a local authority shall, as soon as maybe, consider the proposed development and the report of the manager under sub-s(3).
>
> (b) Following the consideration of the manager's report under paragraph (a), the proposed development maybe carried out as recommended in the manager's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise then as recommended in the manager's report, or decides not to proceed with the development.
>
> (c) A resolution under paragraph (b) must be passed not later than six weeks after the receipt of the manager's report."

38. The applicants' case is that the respondents having decided by its resolution of the 12th of December, 2005 to modify the proposed development pursuant to s. 179(4)(b), it was not open to the respondents to carry out the development otherwise than in accordance with this resolution unless of course the respondents were to repeat the consultation process pursuant to s. 179 of the Act, 2002. Specifically the case was made that s. 179(4)(c) expressly provides that a resolution under paragraph (b) must be passed not later than six weeks after receipt of the manager's report. Manifestly the resolution of the 13th February, 2006 was outside this six week period and hence it was submitted by the applicant that, having regard to the mandatory terms of s. 179(4)(c) this resolution was prohibited by the express terms of s. 179(4)(c) and hence was ultra vires the powers of the respondents.

39. For the respondent and the notice party it was submitted that the complaint of the applicants were of a purely technical nature; that no complaint of any substantial departure from the requirements of the procedures set out in s. 179 was made, nor of any failure of compliance with its underlying democratic principles; that the term "resolution" as expressed in the singular in s. 179(4) contemplated, pursuant to s. 18 of the Interpretation Act, 2005, the "plural", hence permitting the resolution of the 13th February, 2006; that in the absence of any complaint concerning the carrying out of the s. 179 consultation procedure, that a repetition of it would be futile in the sense that the same proposal would be the subject matter of a fresh consultation procedure and as the applicant and indeed all others had an ample opportunity to make submissions and these have been received and considered in the manager's report no legitimate interest would be served by a repetition of the process and in this regard reliance was placed upon the case of *Duffy v. The Major Alderman and Burgesses of the City of Waterford* (Unreported, High Court, 21st July, 1999, McGuinness J.).

40. It would seem to me that the applicant has raised a substantial ground and that is whether, in the face of the apparent mandatory requirement in s. 179(4)(c) that a resolution pursuant to s. 179(b) be passed not later than six weeks after receipt of the manager's report, a resolution such as that of the 13th February, 2006 could be passed by the respondents outside of the six week period or whether the respondents had no power to pass such a resolution outside of that six week period.

41. In the light of my conclusion that the applicant has demonstrated substantial ground in this regard it would be inappropriate for me to say anything further about it.

42. As mentioned earlier the respondent and the notice party contended that the applicant had neither a substantial interest nor had it demonstrated substantial grounds for having the decision quashed because the withdrawal of funding by the Minister for the modified development meant that development as modified by the resolution of the 12th December, 2005 could not go ahead and hence there was no benefit to the applicant from the quashing of the resolution of the 13th February, 2006.

43. I am inclined to agree with Mr. Barron's submission, to the effect that the absence or otherwise of funding is a matter which would go towards the exercise of the courts discretion to grant refief by way of judicial review in circumstances where the court having heard the judicial review application was of the view that the relief claimed was otherwise merited.

44. That being so this not a factor which would warrant the refusal of leave.

45. For the respondent it was submitted that the applicant lacked a capacity to apply for judicial review because it was constituted as an unincorporated association. I am not satisfied that the authorities advanced for that proposition establish it and in any event the only basis relevant to this case under the Act of 2000, upon which an applicant can be precluded from bringing proceedings such as these, is if the applicant fails to show either a substantial interest or substantial grounds for contending that the impugned decision should be quashed. The fact that there maybe risks to the respondent ultimately in relation to costs is not a factor which should at this stage or on this application lead to refusal of leave.

46. In conclusion therefore I am satisfied that the applicant should have leave pursuant to s. 50 of the Act to apply for judicial review for the relief claimed.