Neutral Citation Number: [2007] IEHC 426

THE HIGH COURT

2006 No. 429 J.R.

BETWEEN/

CUMANN TOMÁS DAIBHÍS, SEAN DUNNE, CHRISTOPHER O'DONNELL, PATRICK LUCEY, JOHN COSTELLO AND MICHAEL DELANEY, TRUSTEES OF CUMANN TOMÁS DAIBHÍS

APPLICANTS

AND
SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

AND
SHAMROCK ROVERS FOOTBALL CLUB LIMITED

NOTICE PARTY

Judgment of Mr. Justice Roderick Murphy delivered the 14th day of December, 2007.

1. Background to Judicial review

1.1 Cumann Tomás Daibhís, the first named applicant, is affiliated to the Gaelic Athletic Association. The second to the fifth named applicants are its trustees. The applicants were granted leave, pursuant to s. 50 of the Planning and Development Act, 2000 by O'Neill J. on 20th April, 2007 to apply for judicial review of a decision made by South Dublin County Council, the respondent (the Council). That decision, the second decision, was made on 13th February, 2006 and purported to authorise variation to a decision of 12th December, 2005 in relation to the development of a sports stadium at Whitestown Way, Tallaght, County Dublin for the use of Shamrock Rovers Football Club Limited, the notice party.

The reliefs applied for are:

> (a) a declaration that the vote taken by the members of the County Council on 13th February, 2006, purporting to agree to proceed with the development of the stadium was null and void and of no effect;
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> (b) an order of prohibition by way of judicial review prohibiting the respondent from carrying out any works to the stadium save in accordance with the resolution passed by the respondent at its meeting held on 12th December, 2005 (some two months earlier), and
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> (c) an order of *certiorari* by way of judicial review quashing the purported decision made by the respondent.

1.2 Some six months earlier, the Council published a notice on 18th July, 2005 proposing to carry out works on the stadium and inviting submissions and observations from interested parties. Some 93 submissions were made including a submission from Cumann Tomás Daibhís, the first named applicant.

The submission received from the applicants on 26th September, 2005 was summarised as follows:

> "- support of development of a municipal and multifunctional sports stadium at this location catering for all the primary sports codes, including Gaelic football, hurling, camogie, rugby and soccer,
>
> - current proposals would not cater for Gaelic games due to the inadequacy of pitch dimensions and configuration/size of stadium,
>
> - Council should defer decision on proposal and the consultation with the sporting organisations affected within the County,
>
> - plans drawn up to meet requirements of one particular private company – not appropriate for a municipal stadium – Council should reassess plans,
>
> - current proposal does not conform with policy TDL2 Tallaght County Plan as it does not promote sufficiently intense use of the site, non-compliance with policy TDL3 which promotes a plan for major environmental upgrade and traffic calming of the gateway entrances to Tallaght Town Centre, impact of extension of LUAS line to Old Bawn,
>
> - plans taken over from private promoters, not secured in accordance with EU and Government procurement procedures,
>
> - in accordance with chapter 4 of South Dublin Development Plan 2004 – 2010 which identifies a priority aim of the Council as the provision of accessible community and recreational needs and in line with policy SCR2 community information and consultation, all citizens and sporting organisations should be consulted from the outset prior to preparation of plans."

1.3 Following receipt of the submissions the Deputy Manager of the County Council prepared a written report recommending the carrying out of works for the development of a soccer stadium. That report was submitted to the Council on 12th December, 2005. The Council passed a resolution modifying the Deputy Manager's report so as to increase the playing area of the pitch and carry out other alterations with a view to facilitating the playing of sports and other uses other than soccer.

1.4 Following the resolution of the Council on 12th December, the Council sought funding from the Minister for Arts, Sports and Tourism for the development. The Minister would not agree to do so. Thereafter, the Council held a further meeting on 13th February, 2006 and purported to pass a fresh resolution authorising the development originally proposed in the Deputy Manager's report.

Minister's reply

1.5 The letter from the assistant secretary of the Minister for Arts, Sports and Tourism, replied to the Council's letter of 21st December (which had enclosed a copy of the resolution and a reference to a subsequent meeting held on 22nd December, 2005). The

letter continued:

> "Over the period 2000 to 2002, this Department provided funding of €2.44 million under the Sports Capital Programme towards the construction of a soccer stadium at Tallaght for use by Shamrock Rovers F.C. Following difficulties in completing the project, South Dublin County Council intervened with the support of and in consultation with my Department to regain control of the site.
>
> South Dublin County Council had previously been advised that the Minister was willing to support the Council in putting together a financial package which would ensure the completion of the stadium. However, such support was based on the plan to provide a soccer stadium for Tallaght which would serve as a viable long-term home for Shamrock Rovers Football Club. Indeed, South Dublin County Council held a similar view, as articulated in the press release issued following its meeting of January 10th, 2005 where it stated that 'other non-soccer sporting organisations must develop their own sporting facilities'.
>
> …
>
> The recent Council decision to adopt the manager's report subject to increasing the size of the playing pitch and extending the stands seriously undermines the basis of the previously agreed approach. A larger pitch cannot easily be accommodated within the present site given the buildings already in place and would mean that a future stand at the far side of the existing uncompleted stand would be about half the size as originally envisaged, thus limiting the future capacity to about 4, 500. Given that the ends of the partially completed west stand are curved means that any proposal to extend along the length is likely to involve significantly increased costs. …
>
> The Chief Executive of the Football Association of Ireland has already outlined to the Minister the serious concerns of his organisation in relation to this latest decision of the Council. The Department must now question the viability of further investment under the Sports Capital Programme in what looks likely to become an altogether different project to the one the Department had originally agreed to support, i.e. a facility for the playing of soccer.
>
> In response to the request from South Dublin County Council that funding be provided towards the new development as envisaged by the resolution recently passed by your Council, I wish to confirm that the Minister cannot agree to make the funding available on the basis of the new proposed development."

2. Chronology

10 February, 1997 South Dublin County Council pass a resolution approving the disposal of a site at Whitestown Way, comprising 12.18 acres approximately, by way of lease to facilitate the provision of a stadium for Shamrock Rovers Football Club.

14 January, 1998 Planning permission granted by An Bord Pleanála to Shamrock Rovers Football Club to construct a stadium.

24 March, 2000 South Dublin County Council granted a lease of the site at Sean Walsh Memorial Park to Mulden International Limited, subject to a condition that the stadium development would commence within six months of 24th March, 2000.

20 October, 2000 Mulden International Limited assigned their interest under the lease in the stadium lands to an associated company, Slonepark Company Limited, thereby transferring their obligation to build the stadium to Slonepark Company Limited.

October, 2000 Construction work on the stadium commenced.

November, 2001 Construction work ceased.

July, 2003 Shamrock Rovers Football Club were granted an extension of the duration of the planning permission for one year up to 31st October, 2004 to complete the stadium but no work was carried out during the extension period.

October, 2004 Shamrock Rovers Football Club applied for a further extension period of 1½ years to complete the stadium.

14 December 2004 Planning authority refused application for further extension.

4 January, 2004 South Dublin County Council serve forfeiture notices on lessees.

11 April, 2005 An examiner is appointed to Shamrock Rovers Football Club. Thereafter, Council engage in discussions with the examiner with regard to the completion of the stadium and its use by Shamrock Rovers Football Club when completed.

18 July, 2005 Public consultation procedure under s. 179 of the Planning and Development Act, 2000/Part 8 of the Planning and Development Regulations 2001-2003 is commenced to complete the construction of a soccer stadium at Sean Walsh Memorial Park. Applicant fully participated in the public consultation procedure.

12 December, 2005 Manager's written report in relation to the proposed development submitted to the members of the authority. Resolution passed to modify proposed development to provide for increase of playing area and alterations to stand facilities to facilitate other sports and uses, subject to allocation of significant funding by the Department of Arts, Sport and Tourism.

13 December, 2005 Council press release referring to Council's decision at meeting on 12 December, 2005 and stating need to clarify position regarding the availability of funding from Department of Arts, Sport and Tourism.

21 December, 2005 Council inform Department of Arts, Sport and Tourism of resolution made on 12 December, 2005 and request clarification on funding for the development.

24 January, 2006 Department of Arts, Sport and Tourism write to Council stating that Minister cannot agree to make funding available for the modified development.

13 February, 2006 Further report presented to Council's elected members recommending, having regard to Minister's response on funding, that the development originally proposed proceed. Council vote in favour of proceeding with the development as originally planned without the modifications contained in the resolution of 12th December, 2005.

24 February, 2006 Council notify all prescribed bodies and persons who made submissions/observations in respect of proposed development of Council's decision of 13th February, 2006.

3. Applicants' submissions

3.1 The applicants contend that subsection (4) of s. 179 is clear and unambiguous. If the members of the Council decide to vary or modify the development, and pass an appropriate resolution as they did on 12th December, 2005, then the Council does not have any legal authority to carry out the development in accordance with the recommendations contained in the manager's report.

The applicants say that there is no provision in the section whereby the members are required to pass a resolution to adopt the manager's report where there is no variation or modification. It was submitted that, having considered the report, the proposed development would be carried out as recommended in the manager's report unless a resolution were passed not later than six weeks after receipt of the report.

The court was referred to *Kiely v. Minister for Social Welfare* [1977] I.R. 267, at 279; to *Whiteman v. Sadler* [1910] A.C. 514 at 527; and to *Keane v. An Bord Pleanála* [1997] 1 I.R. 184 at 212.

Kiely was, however, a matter of fair procedures in relation to a written report which was *contra* oral evidence given by doctors at the Social Welfare Appeals hearing. It does not appear to be relevant to the present decision-making process.

Keane related to the powers of the Commissioners for Irish Lights to employ technology not provided for in the 1897 Act. The respondent in this case did have power to make the first decision. What is in issue is whether, having done so it can revert to the recommendation of the deputy manager.

The applicants submit that the second resolution of 13th February, 2006 was contrary to the members' considered decision and resolution of 12th December, 2005 which had been made following consideration of submissions and observations made by the public and consideration of proper planning and sustainable development. The subsequent resolution would negate the entire process laid down in s. 179 by reverting to the original proposal as if no public consultation, no submissions and no consideration to modify had taken place.

3.2 The applicants relying on *Cobh Fishermen's Association Limited v. Minister for the Marine and Natural Resources*, Unreported, High Court, O'Sullivan J., 29th August, 1997, say that the fact that some new information had emerged following the conclusion of the statutory process was no basis upon which statutory powers could be altered. They rely on the following passage at 6 of 7:

> "I can see no warrant, either, for holding that apart from the four corners of the statutory regime, the Minister had some additional extra statutory obligation in fairness to the applicants to re-open the closed phase of the application procedure or to duplicate it. On the contrary, to take that view would greatly diminish the object and value of the statutory procedures themselves."

However, in the present case, the respondent did not re-open the consultation process.

3.3 The applicant say that strict time limits are prescribed in the planning legislation. The prescribed time limits are mandatory and not merely directory.

Subsection (4)(b) and (c) refer to resolution in the singular. This section does not permit or have the power to reconsider a decision or resolution and reverse it. The local authority exceeded its powers.

This Court believes that this identifies the issue.

4. Submissions of the notice party

4.1 It was submitted that the effect of the relief sought by the applicant would be to frustrate the development of the stadium.

The background of the development is referred to in the replying affidavit of Thomas Doherty, sworn on 19th May, 2006. This is referred to in the chronology at 2.0 above which has not been controverted by the notice party or the respondent.

4.2 The applicants' complaints are essentially procedural. However, the decision of 13th February is not otherwise impugned. It is not suggested that the elected members were subordinate in any way or that the decision taken by them was anything other than a product of their free will and judgment. There were no unfair procedures. The decision was not made in ignorance of the position of the applicant nor that the development is objectionable in planning terms.

In essence, the applicants say that the decision made by the elected members on 13th February, 2006 ought to be quashed because the members were not entitled to re-visit the decision they had made some two months earlier, notwithstanding the fact that it had become clear that the earlier decision could not be implemented.

4.3 It is submitted that there was substantial compliance with s. 179. Even if there were a failure to comply with the section, it did not follow that the decision of 13th February, 2006 ought to be quashed. Reference was made to *London and Clydeside Estate Limited v. Aberdeen Council* [1980] 1 W.L.R. 182; *Wang v. Commissioner of Inland Revenue* [1994] 1 W.L.R. 1286; *Charles v. Judicial and Legal Services Commission* [2003] 2 L.R.C. 422; and *Regina v. Soneji* [2006] 1 A.C. 304.

The court should in its discretion decline to grant any relief to the applicant: *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381; *Farrell v. Farrelly* [1988] I.R. 201; *Hevey v. Pilotage Committee* (Unreported, High Court, Blayney J., 7th May, 1992); and *Dunne v. An Bord Pleanála* (Unreported, High Court, McGovern J., 14th December, 2006 applied.

4.4 Moreover, there was an absence of any real prejudice to the applicant (*Kenny v. Dublin City Council* (Unreported, High Court, Murphy J., 8th September, 2004) applied. In that case this Court held that:

> "In such circumstances the order of *certiorari* … would appear to be inappropriate …
>
> It is clear that the granting of such order and, indeed, even the seeking of such order would require a finding of wrongdoing on a scale that has no application to the present facts. The court, accordingly, rejects the application for certiorari as being, in the circumstances, inappropriate."

Finally, the impact of delays on the notice party were such as to weigh heavily in the application of the discretion of the court.

5. Replying submissions of the applicants
The further submissions on behalf of the applicants, of over eighteen pages, were considered, notwithstanding the fact that many of the points raised could have been dealt with in the original submissions.

The applicants say that they are not obliged to prove that the Council had not the power to change its mind. This would turn the entire doctrine of *vires* on its head. The onus is placed on the party asserting the existence of a statutory power to show its origin as was referred to by O'Sullivan J. in the *Cobh Fishermen's Association* case.

What was in issue was not a mere breach of a statutory process but the purported exercise of a non-existent power.

It was accepted that An Bord Pleanála could not revoke a decision to grant or refuse planning permission that it had already made.

The Local Government Act, 2001 at s. 44 in Schedule 10 in relation to standing orders is restricted to regulating meetings and proceedings. None of the arguments made asserted that a power was to be found in any other statutory provision.

The interest of the applicants was not a threshold test at the leave stage. O'Neill J., in granting leave, referred to what appeared to be a substantial detriment to the applicant if the decision of 13th February were implemented while it would have a significant potential benefit if the resolution of 12th December, 2005 were to be implemented.

Moreover, the stadium was not limited to one sport. Moreover, any financial shortfall could have been addressed with "a little imagination and engagement between the parties".

The six week time limit did apply to the resolution of 13th February, 2006 under s. 179(4)(b).

The applicant was not seeking an order or *mandamus*.

6. Decision of the Court
6.1 The court has considered the affidavit of Dominic Finnegan, exhibiting the notices and resolutions referred to and that of Thomas Doherty replying thereto.

Further affidavits of Jonathan Roche, David Kennedy and Noel Byrne were considered together with submissions on behalf of the respondent and the notice party. The reference to some of the cases referred to has also been considered. There is no issue in relation to the others.

6.2 Grounds of challenge
The applicants challenge the validity of the resolution of 13th February, 2006 on the basis that this resolution is *ultra vires* the powers of the respondent as prescribed in s. 179(4) of the Planning and Development Act, 2000. That provides:

> "(4)(a) The members of a local authority shall, as soon as may be, 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 may be carried out as recommended in the manager's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than 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."

The applicants contended that it was not open to the respondent, having decided by resolution on 12th December, 2005 to modify the proposed stadium development pursuant to s. 179(4)(b), to carry out the development otherwise than in accordance with that resolution. Specifically, the applicants argue that s. 179(4)(c) expressly provides that a resolution adopted under para. (4)(b) must be passed not later than six weeks after receipt of the manager's report and that when that period of six weeks had expired, the respondent did not have power to make the decision of 13th February, 2006.

6.3 The resolution of 13th February, 2006 was adopted outside the six-week period from 12th December, 2005.

Is the period of six weeks, as provided for in s. 179(4)(c) mandatory or merely directory? *O'Reilly v. Mackman* [1983] 2 A.C. 237 at 275a – 276a, posed that question.

Put, perhaps, too simply, the issue before the court is whether s.179(4) of the Planning and Development Act, 2000 disempowered the Council from ever considering the matter again or whether the proposal of 13th February which was resolved, effectively overruling that earlier decision, can stand on its own or, alternatively, whether the six-week stipulation for a resolution to be passed after the receipt of the Manager's report (4)(c) of s. 179.

In *O'Reilly v. Mackman* [1983] 2 A.C., 237 at 275A - 276A, Lord Diplock stated:

> "Where the legislation which confers upon a statutory tribunal its decision-making powers also provides expressly for the procedure it shall follow in the course of reaching its decision, it is a question of construction of the relevant legislation, to be decided by the court in which the decision is challenged, whether a particular provision is mandatory, so that its non-observance in the process of reaching the decision makes the decision itself a nullity, or whether it is merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, the exceptional

circumstances of a particular case justify departing from it."

Section 179(4)(c) provides that a resolution under para. (b) must be passed not later than six weeks after the receipt of the manager's report. The Planning and Development Act, 2000 is silent as to the consequence if the planning authority fails to make a decision within the six-week period. In Maxwell on Interpretation of Statutes, chapter 13, p. 314, headed "Intentions Attributable to the Legislature when it Expresses None", after posing the question:

> "… when a statute requires that something shall be done, or done in a particular form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely directory (or permissive)?"
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> …
>
> "It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule' said Lord Campbell L.C., 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed'. And Lord Penzance said, ' I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'"

6.4 Keane on Local Government, 2nd edition, at 188, referring to s. 179 states as follows:

> "The members of the local authority must then consider the report. They must act within six weeks of receiving the report. An important part of the provision is that the members, having considered the report, if they do not by resolution decide to vary or modify the development, the development may be carried out as recommended in the manager's report. Therefore, it is quite clear the decisions to be made under the section are executive decisions in relation to the carrying out of the development. There is no provision in the section for the members to approve, adopt or consent to the development by resolution. It is only where by resolution the members decide to vary or modify the development that the elected officials have an act or part to play in the process. If it is decided to vary or modify the development there is no requirement for a further consultation process."

The emphasis on the executive function, in the absence of a resolution, is instructive. If such were the case, and funding were not available, the Council would have to reconsider the matter in the light of available funding in order to facilitate the implementation of the development.

It seems that the provision is indeed mandatory in relation to the intervention of the Council's resolution to vary. However, it does not follow that the proviso can affect the power of the Council to change its mind where no variation is resolved. The works were consistent with the proper plans and sustainable development of the area.

It is clear that the court has a discretion, having regard to the scheme provided for consultation and submission, to interpret the provision. If the time limit were to apply, it could not be deemed to be other than directory.

In any event, the consultation process and the submissions made, including those of the notice party, had been considered by the Council in making each decision.

6.5 While the applicants were entitled to make submissions, the court finds that they do not have any financial or proprietary interest in the development site. They were not involved in any of the negotiations with the respondent in relation to the chronology of events above from 10th February, 1997 to the date of the notice of motion seeking leave for judicial review on 8th May, 2006. The meeting of Tallaght area committee on Monday, 28th November, 2005 proposed to honour the original commitment to provide a facility to Shamrock Rovers Football Club for the playing of its home games (up to 40 games per annum) and a revenue stream to include 50% of the advertising revenue derived from within the stadium. Otherwise the facility would be available for hire for appropriate sporting, municipal and community events.

Moreover, the evidence on affidavit from Mr. Doherty deposes to the extensive facilities that the applicant has already been given by the Council.

6.6 In the present case no rights were granted by the first resolution to the notice party. That resolution was subject to a pre-condition to its implementation: that of the allocation of significant further funding by the Department.

If this were to be interpreted as a condition precedent then, clearly, in the absence of such funding, the resolution could not stand or, more properly, could not be implemented.

In such a circumstance it would seem logical that a proposal be put to the Council which was feasible.

Had there been a gap of, say, a year between the resolution which could not be implemented and a fresh resolution then, it seems to me that the Council could not be bound by its previous decision so as not to be able to reactivate its decision-making process. It would be absurd to fetter the discretion in the exercise of an unimplementable resolution.

6.7 It seems to this Court that the requirement of justice in the substance of the procedure having been observed (see Hogan and Morgan, 3rd edition, at 441), the court would be slow to countenance any defect in form.

It seems to the court that the overarching purpose of s. 179, to oblige a local authority to give notice to the public and prescribed bodies of certain classes of development proposed to be carried out and to afford them an opportunity to make submissions and observations in respect of the proposed development, has been complied with. The deputy manager reported: the Council sought initially to vary the recommendation in the hope of getting additional funds and, where those funds were not available, took a pragmatic decision. There was no requirement for further consultation or submission and observations in respect of the proposed development. The applicant was not prejudiced by the failure to make the resolution in the third week of January rather than the second week of February.

6.8 Section 69 of the Local Government Act, 2001 is also of relevance in relation to funding. It provides:

> "69.-(1) Subject to subsection (2), a local authority, in performing the functions conferred on it by or under this or any other enactment, shall have regard
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> (a) the resources, wherever originating, that are available or likely to be available to it for the purpose of such performance and the need to secure the most beneficial, effective and efficient use of such resources,
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> b) the need to maintain adequately those services provided by it which it considers to be essential and, in so far as practicable, to ensure that a reasonable balance is achieved, taking account of all relevant factors, between its functional programmes,
>
> c) the need for co-operation with, and the co-ordination of its activities with those of other local authorities, public authorities and bodies whose money is provided (directly or indirectly) either wholly or partly by a Minister of the Government the performance of whose functions affect or may affect the performance of those of the authority so as to ensure efficiency and economy in the performance of its functions,
>
> (d) the need for consultation with other local authorities, public authorities and bodies referred to in paragraph (c) in appropriate cases,
>
> e) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions,
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> …
>
> (3) Every enactment relating to a function of a local authority should be read and have effect subject to this section."

It seems to this Court that this is an overriding provision which relates to the issues the subject of this application for judicial review. While it might, of course, be said that the *volte-face* of the Council in the light of insufficiency of funds, deprived them of their power, it is clear that that power has to be exercised not alone within the policies and objectives of the Government and any Minister of the Government so far as it may affect or relate to the function at issue, but is also subject to the provision of exchequer funding. There has been no change in the position regarding funding since the initiation of the proceedings.

The court in its discretion is further of the view that it would be wrong of the respondent to commit itself to unbudgeted expenditure or to delay the implementation of its resolution of 13th February, 2005.

The court, accordingly, refuses the relief sought by the applicants.