Neutral Citation: [2012] IEHC 168

THE HIGH COURT

[2009 No. 8128 P]

[2009 No. 342 COM]

BETWEEN

DONATEX LIMITED AND BERNARD MCNAMARA

PLAINTIFFS

AND

DUBLIN DOCKLANDS DEVELOPMENT AUTHORITY

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 29th March, 2012

1. Introduction

1.1 By the standards of the commercial court these proceedings have a protracted procedural history. While it is unnecessary to set out that history in detail in this judgment I might note that I delivered judgment ("the earlier judgment") on the 15th April, 2011, in an application brought by Donatex and Mr. McNamara seeking a modular trial. Defined terms are used in this judgment in the same way as in the earlier judgment.

1.2 What now comes before the court is an application on behalf of Donatex and Mr. McNamara to amend the statement of claim. I turn first to the background to that application.

1.3 Before doing so, l should briefly note at this stage that the plaintiffs' application sought to make two amendments to their statement of claim. The first amendment, described as the "*vires* amendment", is the issue with which this judgment is concerned and is that to which any reference to the application to amend should be understand as referring. The second amendment involves an application to limit the scope of the plaintiffs' claim for damages and was not opposed. That application was, therefore, not a matter of dispute between the parties requiring any further consideration by the court.

2. Background

2.1 At para. 3.1 of the earlier judgment, I set out a brief synopsis of the issues which then appeared to arise in the proceedings for the purposes of analysing the merits of the suggested modular trial then under consideration. Under subheading (B) of that paragraph, I noted that Donatex and Mr. McNamara sought to question the legal power of the DDDA to enter into the contract which is at the heart of these proceedings, being one designed to facilitate the purchase and development of the Irish Gas Bottle site on the Pool beg Peninsula. As noted in the earlier judgment, Donatex and Mr. McNamara sought to put forward that argument under two separate bases. The first basis concerned an allegation that the agreement was impermissible for reasons similar to those identified by Finlay Geoghegan J. in *North Wall Quay Property Holding Company Ltd & Anor v. Dublin Docklands Development Authority* [2008] IEHC 305. The second basis was stated by me, in the same paragraph, to be one whereby it was argued that "it is outside the statutory entitlement of the DDDA to enter into a complex form of commercial arrangement as a result of which it is to gain profits as a developer". I further noted that the DDDA suggested that the second basis, just referred to, had not been pleaded.

2.2 While dealing with the earlier judgment it is also necessary to note that I identified, at section (C) of para. 3.1, a range of issues which were likely to arise as to what relief, if any, Donatex and Mr. McNamara might be entitled to even if it could be established that, on one or other of the bases asserted, the DDDA did not have authority to enter into the contract in question. For the reasons set out in the earlier judgment, I did not find it necessary to come to a conclusion as to whether the second claim in respect of lack of statutory authority was properly pleaded.

2.3 I gave a ruling on the 5th July, 2011, in relation to a question of the possible amendment of the plaintiffs' statement of claim and certain other discovery issues. I came to the view that, on the then pleadings, even in the then proposed amended form, the statement of claim did not specify with any sufficient precision the claim sought to be made in relation to the DDDA 's remit under the Dublin Docklands Development Authority Act 1997 ("the 1997 Act"). In particular, I ruled that the pleadings did not set out any basis on which Donatex and Mr. McNamara could ground a claim that the powers of the DDDA were limited under the 1997 Act generally, and under s. 18 in particular, or in what way it could be said that the DDDA had not acted within those powers. In the circumstances I refused the application to amend the statement of claim in the terms then proposed.

2.4 Against that background Donatex and Mr. McNamara now bring a further application to amend the pleadings for the purposes of setting out in a more detailed form the claim which they wish to make under that second vires heading. In order to understand the issues which arise in this application it is next necessary to turn to the arguments put forward on behalf of the DDDA against allowing the amendment.

3. The DDDA's Position

3.1 Counsel for the DDDA made four points in opposition to the application to amend. The points were as follows:-

> A. It was asserted that the claim under this heading amounted to a public law claim which, although capable of being maintained in plenary proceedings, was, therefore, subject to the same time limit requirements as would apply in the event that leave to seek judicial review was sought. On the basis that the proceedings (and in particular the raising of these issues) is well outside the ordinary period for the grant of leave to seek judicial review, it is said that an amendment allowing such issues to now be raised should not be granted unless Donatex and Mr. McNamara were to establish circumstances which would ordinarily persuade the court to extend time to seek judicial review;

B. It is said that the argument sought to be raised by the amendment as to the lack of vires on the part of the DDDA to enter into a contract, of the type with which I am concerned in these proceedings, is unstateable having regard to the terms of the 1997 Act;

C. It is said that there are no arguable practical consequences, favourable to Donatex or Mr. McNamara, could flow from a finding of *ultra vires* having regard to the jurisprudence as to the circumstances in which a claim in damages can be maintained arising out of an *ultra vires* contract; and

D. It is said that having regard to the protracted history of this case it would not be fair to allow an amendment at this late stage.

3.2 In making his application counsel, on behalf of the DDDA, accepted that the principles applicable to the grant of an amendment were as to be found in *Woori Bank & Anor. v KDB Ireland Ltd* [2006] IEHC 156. There was no dispute between the parties on that question. It follows that, in the absence of prejudice, an amendment will ordinarily be allowed unless the issue sought to be raised by the proposed amendment would be bound to fail in the sense in which that term was used in *Barry v. Buckley* [1981] I.R. 306 and the jurisprudence which followed on from that decision.

3.3 Issues B and C above are those issues which are concerned with the "bound to fail" question. If the proceedings are bound to fail then there would be no point in allowing an amendment in any event and questions concerning delay and/or the application of judicial review time limits would not arise. Issue D is, of course, concerned with prejudice while issue A is concerned with delay.

3.4 In the circumstances it seems to me that the appropriate course of action is to consider: first, the question of prejudice; second, the question of delay on the assumption that the proceedings, or at least some of them, are not bound to fail; and third, to address issues B and C on the basis of whether the claims sought to be raised are bound to fail. I turn, therefore, to the question of prejudice.

4. Prejudice

4.1 There can be little doubt but that these proceedings have become protracted and that, at least in many respects, delay has been caused by both Donatex and Mr. McNamara. A series of time limits imposed by the court for the filing of documentation were missed, in some cases by a significant margin. Time for the carrying out of procedural steps has also had to be extended. A previous hearing had to be abandoned in circumstances where, apparently due to inadvertence, all of the directors of Donatex had resigned such that there was no one in control of the company who could give instructions to its legal team to pursue the case. It is unnecessary for the purposes of this application to deal with each and every cause of delay save to note the significant culpability of Donatex and Mr. McNamara to which I have referred.

4.2 The whole purpose of cases being admitted into the commercial list is to ensure that they come on for hearing in the earliest possible time, consistent with affording all parties a reasonable opportunity to be ready for trial, having availed of any appropriate pre-trial steps. That these proceedings have not progressed at the pace that might reasonably be expected of a case admitted into the commercial list can hardly be doubted. I am satisfied that Donatex and Mr. McNamara must at least bear a material part of the blame for that situation.

4.3 However, on the other hand, the case is not now even close to trial. Allowing the amendments would, doubtless, expand the trial somewhat and might lead to some additional pre-trial steps being required to ensure that the case comes properly on for hearing. However, on the basis of my current understanding of the status of the proceedings generally and of the additional issues which are sought to be raised by amendment, I am not satisfied that, provided appropriate procedural measures were put in place and provided that same were strictly enforced as against Donatex and Mr. McNamara, any significant further delay in this case coming to trial would be effected by reason of the amendments, if allowed. Subject to putting in place such procedural measures and making it clear that no further material slippage on the part ofDonatex and Mr. McNamara can be tolerated, I have come to the view that any prejudice that might be suffered would not be sufficient to warrant refusing the application for the amendments sought should those amendments not be inadmissible on other grounds.

4.4 To the extent that any marginal prejudice might be suffered by the DDDA by reason of the amendments, it seems to me that that prejudice would best be met, in the event that the amendments are otherwise appropriate, in a proportionate manner, by putting in place and rigorously imposing a procedural regime designed to ensure that all aspects of these proceedings can be brought to trial in an appropriate and timely fashion without any further uncertainty over the affairs of the DDDA. On the basis of that finding, and in the light of the sequence referred to earlier, it seems to me to be appropriate to now turn to the issues which arise out of the public law/delay point made by counsel on behalf of the DDDA.

5. Public Law and Delay

5.1 It is clear from *O'Donnell v. Dun Laoghaire* [1991] ILRM 301 that it is permissible in plenary proceedings to seek relief which ought ordinarily be pursued in a judicial review application but that, where so doing, a plaintiff cannot bypass the procedural obligations or limitations which arise in judicial review cases, such as the obligation to move expeditiously and, ordinarily, and in the absence of an extension of time, within the time limits provided for the time being, either by statute or by rules of court.

5.2 It seems to me that three questions arise under this heading. They are as follows:-

A. Whether the aspect of the case which Donatex and Mr. McNamara wish to make, as a result of the proposed amendment, amounts to the type of claim which ought ordinarily be brought in judicial review proceedings;

B. If so, whether any relevant time limit for seeking leave to obtain judicial review has passed; and

C. If so, whether it would, in all the circumstances of the case, be appropriate to extend time.

5.3 I am also mindful of the fact that counsel for the DDDA did not, in making the public law point, confine himself to the suggestion that it was necessary to move on time but also referred to the other restrictions which apply to cases brought by judicial review such as the need to pass the, admittedly low, threshold for leave before the proceedings can be progressed. However, it seems to me that this latter point, in the particular circumstances of this case, is of little practical application. It will be necessary for me to consider whether the case sought to be made by this amendment on behalf of Donatex and Mr. McNamara is bound to fail. While that test may not be identical to the threshold for leave to seek judicial review, nevertheless, because Donatex and Mr. McNamara did not include the relevant claim in their pleadings from the beginning, they are required to satisfy me that the claim which they seek to make by amendment is not bound to fail (at least where, as here, that question has been put in issue by the defendant). It follows that there

will be at least an analogous review, by reference to a low threshold, of the merits of the case sought to be made by amendment in this application in much the same way as there would, by reference to a low threshold, be an analysis of the merits in an application for leave to seek judicial review.

5.4 However the delay point is one of much greater substance. If the DDDA is correct in stating that the claim made on behalf of Donatex and Mr. McNamara is, in substance, a public law claim which ought ordinarily be brought by judicial review, then it follows, on the authority of *O'Donnell*, that that claim could only proceed if it met the relevant judicial review time limits or if there were circumstances which would justify extending time.

5.5 There was debate at the hearing of the motion on both questions of substance being whether the remedy is, in truth, a public law remedy sufficient to require compliance with judicial review time limits and whether, as the DDDA argued, no real explanation for the delay in raising this point has been put forward on behalf of Donatex and Mr. McNamara such that an extension of time would not be allowed in the event that those time limits applied.

5.6 I have come to the view that it would not be appropriate to reach a definitive conclusion on either of those points on this motion. As pointed out earlier the question of whether the public law/delay point is of any relevance is, of course, dependent on whether there is any point in allowing the amendment at all, having regard to the "bound to fail" point. However assuming, for the purpose of the argument at this stage, that I were to conclude that the proceedings are not bound to fail, then the public law/delay point becomes one of significant importance for, if the DDDA is correct such that judicial review time limits apply, were not complied with, and that there is no adequate basis for extending time, then, even though the points may be arguable from the perspective of Donatex and Mr. McNamara, those parties have lost the opportunity to raise the points concerned by their delay. Viewed in that light the public law/delay point is one of potentially significant moment.

5.7 I propose, therefore, to turn to the "bound to fail" issue. However, before so doing I should note that it seems to me that, in the event that the proceedings are not held to be bound to fail and that the amendment sought would, therefore, *prima facie* be justified, it would be my view that the public law/delay point should be determined first as a stand alone issue. If the DDDA is correct on this point then the DDDA should not be exposed to having to defend the claim under this heading for it would, in those circumstances, be a claim which Donatex and Mr. McNamara have lost the right to pursue by virtue of delay. When I have dealt with the "hound to fail" question I will return to the delay point.

6. Bound to Fail

6.1 While borrowed from the jurisprudence which evolved in the context of applications for leave to seek judicial review on notice in immigration cases, there is, in my view, merit in the view that a court, which has come to the view at an earlier procedural hearing that proceedings should continue, should be sparse in the detail into which it goes as to the merit of the case which will now fall to be decided at a full hearing. For those reasons many judges dealing with leave applications in the immigration field (which, it will be recalled, are required to be dealt with on notice and require substantial grounds to be established) have given detailed reasoned judgments in cases where leave has been refused (on the basis that a party whose proceedings are coming to an end is entitled to know why) but have not given detailed reasons when the case is to go ahead and leave is to be granted.

6.2 While the considerations may not be identical on a motion such as this, there does seem to me to be at least some basis for analogy. If a party is to have their proceedings dismissed as being bound to fail or, as here, to be declined permission to pursue a particular claim by amendment because the issues sought to be raised by amendment are bound to fail, then that party is entitled to know why. However, if the case is to be allowed to go ahead then the court should address the merits only to the minimum extent necessary to explain why the court has taken the view that the proceedings are not bound to fail. It would then be for the trial judge to consider the merits without any possible prejudgment on the part of the judge dealing with the procedural motion.

6.3 Against that background it is necessary to address the two points raised by the DDDA under this heading. First, it is said that the 1997 Act itself expressly permits commercial activity and joint ventures so that, it is said, the points sought to be raised by Donatex and Mr. McNamara cannot succeed. There is no doubt but that Donatex and Mr. McNamara will need to carefully address the arguments made by the DDDA under this heading. The 1997 Act clearly does not, of itself, rule out commercial activity on the part of the DDDA or joint ventures. However, I have come to the view that it could not safely be said, after the limited form of hearing possible on a motion such as this, that there are no circumstances in which a case of the type sought to be raised by the proposed amendment could succeed. For the reasons already addressed I do not think it would be prudent for me to analyse the matter further.

6.4 So far as the second point made under this heading is concerned, the DDDA quite properly draws attention to the case law (see, in particular, *Crédit Suisse v. Allerdale B.C*. [1997] 1 QB 306) which suggests that a party entering into an *ultra vires* contract with a statutory body cannot claim damages for to do so would be to permit the statutory body to incur obligations in circumstances where the statute itself does not permit the obligation concerned. It is argued by the DDDA that, by a parity of reasoning, proceedings for damages could not be maintained for a breach of warranty of authority contained in a contract by a public authority. In partial answer, Donatex and Mr. McNamara seek to rely on other possible causes of action. In respect of many of the points raised as an alternative means of seeking damages, counsel for the DDDA argues that the pleadings, even if the amendment be allowed, do not permit such claims to be brought.

6.5 While again acknowledging the significant barrier which the established jurisprudence places in the way of Donatex and Mr. McNamara, r have come to the conclusion that it could not safely be concluded, after the limited hearing possible on a motion such as this, that Donatex and Mr. McNamara have no chance of success in the sense of being able to overcome the problems, which the jurisprudence relied on by the DDDA places in their way. I cannot, therefore, in my view, safely conclude that the proceedings are bound to fail on those grounds either.

6.6 However, I would add one important rider. The procedural history of this case demands, for the reasons which I have already sought to analyse, that the case now proceeds to trial in an expeditious and timely fashion. Even if the proposed amendments are allowed, the case will have to be confined within the parameters of the pleadings as they then will be. It must be made clear that, in the absence of wholly exceptional circumstances, Donatex and Mr. McNamara will not be allowed to amend the proceedings further. In addition, it should be made clear that it will not be possible, whether in a reply, or by the filing of additional particulars, to extend the claim beyond the reasonable parameters of those which are included in the proposed amendments. Detailed particulars of a claim already clearly made are, of course, permissible. Extending the claim beyond the parameters of that already made under the guise of furnishing additional particulars is not. I make these comments for the purposes of emphasising my view that Donatex and Mr. McNamara must now live within the parameters of the pleadings which they propose. If that causes them any difficulties further along the line, then so be it. Donatex and Mr. McNamara have had more than an adequate opportunity to mend their hand. They have run out of road on this issue and will not be allowed any further latitude. To the extent, therefore, that there may be merit in the argument made by counsel on behalf of the DDDA that certain of the arguments sought to be relied on are not pleaded, then that is

an issue which can be revisited before the trial judge who I trust will not, for the reasons which I have already ruled on, afford Donatex and Mr. McNamara any latitude beyond that which may be given as a result of this motion.

6.7 It follows that I have concluded that the proceedings are not bound to fail and that the amendments should not be refused on that ground. It follows that it is necessary to return to the delay/public law issue.

7. Public Law and Delay Revisited
7.1 Having determined that the amendments sought would not give rise to a claim which is bound to fail, it seems to me that the amendments should be allowed. However, before the case which is sought to be made by virtue of the amendments comes to trial, it seems to me that the question raised by the public law/delay point needs to be definitively determined. I, therefore, propose to allow the amendment sought but to direct that the question, of whether the case set out in the amendments to the pleadings thus allowed should be permitted to proceed to a full hearing, be tried as a stand alone issue to the intent that if Donatex and Mr. McNamara fail on that issue, that aspect of the case will not proceed to trial and the case will continue as if the relevant amendments had not been allowed.

7.2 For clarity, it seems to me that the issues which require to now be tried are as per para 5.2 above.

8. Conclusions
8.1 I, therefore, propose to make the following orders:-

> A. An order amending the pleadings in the manner sought on behalf of Donatex and Mr. McNamara;
>
> B. A direction that the issue as to whether those aspects of the claim which have been included by that amendment, and which concern the powers of the DDDA to enter into commercial agreements, should be permitted to go to trial to be dealt with as a separate issue with the following specific questions being tried:-
>
> > i. Whether the claim made in respect of that issue amounts to the type of claim which ought ordinarily be brought in judicial review proceedings;
> >
> > ii. If so, whether any relevant time limit for seeking leave to obtain judicial review has passed; and
> >
> > iii. If so, whether it would, in all the circumstances of the case, be appropriate to extend time.

8.2 So far as bringing that matter to early hearing is concerned, it seems to me that the issues raised have already been the subject of debate between the parties. To the extent that Donatex and Mr. McNamara may wish to put in any further evidence I will direct that such evidence be filed within three weeks of today's date (making all allowance for Easter). If the DDDA wishes to put in any further evidence, same can be filed within two further weeks. The DDDA should file written submissions at the same time as filing any additional evidence and Donatex and Mr. McNamara can file any replying submissions within two weeks of that date.

8.3 On the basis of that timescale, the issue should be ready for hearing within seven weeks of today's date being Thursday, 17th May. On that basis I will put the case generally, together with the issue which I have directed to be tried, in for mention in the ordinary Monday commercial list on Monday the 14th May, for the purposes of ensuring that the timescale referred to is met and for the purposes of fixing a date for the hearing of the issue directed to be tried.