

THE HIGH COURT

[2003 No. 14633P]

BETWEEN

ANNE DONEGAN, LUCY DONEGAN AND ANNE O'MALLEY

PLAINTIFFS

AND
THE MINISTER FOR TRANSPORT, AER RIANTA cpt.
AND DUNLOE EWART plc.

DEFENDANTS

Judgment of Mr. Justice Brian McGovern delivered on 17th day of April, 2008

1. This judgment is given on a preliminary issue directed to be heard by the President of the High Court by order made on 6th March, 2006. The preliminary issue to be decided is:

"Whether the claims made by the plaintiffs in these proceedings can be brought or maintained against the first named defendant having regard to the provisions of section 58 of the Air Navigation and Transport (Amendment) Act, 1998 (hereinafter referred to as 'The 1998 Act')."

2. Submissions have been made by counsel for the moving party, the Minister for Transport (first defendant) and counsel for the plaintiffs (who are the respondents) on the hearing of this issue. Both parties to the issue have submitted written legal submissions which have been considered by me.

3. The plaintiffs are the former owners of 38.5 hectares of land situated at Harristown, County Dublin, adjoining the southern boundary of Dublin Airport. Hereinafter in this judgment this property will be referred to as "the lands".

4. The plaintiffs allege that on four occasions between 1990 and 1995, applications for planning permission for commercial development on the lands were made by them or their predecessors in title. On each occasion, they were refused planning permission following objections made to An Bord Pleanála by the first and second named defendants. The objections related principally to the proper planning and development of Dublin Airport, the location of the lands in relation to the runways at the Airport and safety considerations relating to the operation of the Airport.

5. The plaintiffs' claim against the first defendant is that misrepresentations were made by him in the course of his objections to the planning applications and that he did so indirectly through the objections submitted by the second named defendant, acting as his agent. Although allegations of conspiracy are made against the second and third named defendants, no such claim is made against the first named defendant.

6. The plaintiffs claim that as they believe the first and second named defendants would persist in making objection to the proposed development of the lands, there was no real prospect of the lands being developed. Accordingly, they sold the lands to Monaer (Cork) Ltd. The plaintiffs claim that ultimately the second and third named defendants entered a joint venture agreement to develop part of the lands for warehousing and ancillary works and that in due course planning permission was granted. The plaintiffs claim to have been deliberately misled by the first and second named defendants and that the policy objections raised by the first and second named defendants against the application of the plaintiffs or their predecessors in title were bogus and/or non-existent. The plaintiffs claim to have suffered loss and damage as a result.

The Statutory Scheme

7. The Air Navigation and Transport (Amendment) Act 1998 states in its title as follows:-

"AN ACT TO PROVIDE FOR THE VESTING OF DUBLIN AIRPORT, SHANNON AIRPORT AND CORK AIRPORT IN AER RIANTA, CUIDEACHTA PHOIBLÍ THEORANTA, THE ASSIGNMENT TO THE SAID COMPANY OF CERTAIN FUNCTIONS HERETOFORE EXERCISED BY THE MINISTER FOR PUBLIC ENTERPRISE RELATING TO THE MANAGEMENT, OPERATION AND DEVELOPMENT OF THOSE AIRPORTS, TO AMEND THE AIR NAVIGATION AND TRANSPORT ACTS, 1936 TO 1988, THE IRISH AVIATION AUTHORITY ACT, 1993, AND OTHER ENACTMENTS, AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH".

8. Statutory Instrument No. 326 of 1998 appointed the first day of January 1999 as the vesting day for the purposes of the 1998 Act. Under the Act the Minister retains certain powers. For example, s. 38 permitted the Minister to give directions in writing to the company requiring it:-

"(a) To comply with policy decisions of a general kind made by the Minister in relation to the functions assigned to the company by or under this Act, or

(b) To do or refrain from doing anything to which a function of the company relates, the doing, or refraining from doing of which is, in the opinion of the Minister, necessary or expedient in the national interest".

9. Section 58 of the 1998 Act deals with the question of liability for loss occurring before the vesting day and is crucial to the issue arising for my consideration. The relevant parts of the section are as follows:

"58 (1) A claim in respect of any loss or injury alleged to have been suffered by any person arising out of the performance before the vesting day of the functions assigned to the company by or under this Act shall, after that day, lie against the company and, subject to *sub-section (5)* not against the Minister, any other State authority or the State.

(2) Any legal proceedings pending immediately before the vesting day to which the Minister, any other State authority or the State is a party, that relate to a function of the company, shall be continued, with the substitution in the proceedings of the company, insofar as they so relate, for any such party".

10. The first named defendant (the applicant) argues that the plaintiffs' claim falls completely within the terms of s.58 (1) in that they allege that they have suffered a loss or injury which arises by virtue of the performance by the Minister of his functions prior to the vesting date. The applicant argues that for this reason, the plaintiffs' claims must lie against the second named defendant and "not against the Minister, any other State authority or the State". The plaintiffs, who are respondents on this preliminary issue, argue that they contend, in the proceedings, that the first named defendant acted wrongfully in the discharge of his policy remit and that

the second named defendant as his agent, wrongfully asserted policy based objections that did not in fact exist, as grounds for objecting to planning applications in respect of the lands.

11. It is accepted by counsel for the applicant that in deciding the preliminary issue I must accept the facts and allegations as contended for in the statement of claim. This appears to me to be a correct position and I am proceeding on that basis.

12. I have already stated that the conspiracy claims in the proceedings only relate to the second and third named defendants and do not concern the applicant. It seems to me that I must therefore look at the statement of claim other than the conspiracy issue and determine whether or not the case being made against the Minister is distinguishable from the case against the second named defendant, Aer Rianta and/or whether it comes within the ambit of section 58(1) of the 1998 Act. Counsel for the respondent (Aer Rianta) has pointed to the following paragraphs of the statement of claim as being relevant in determining this issue, namely paragraphs 11, 12, 16, 21, 36 (r) (s) (t), 39 (a) and (e), 43, 65, 66 and 67. Counsel in particular argues that paragraph 66 of the statement of claim amounts to a claim of misfeasance in public office against the first named defendant and he says that the Plaintiffs have pleaded a case which makes a claim directly against the Minister and that this is a matter to be determined by the trial judge. On the other hand, counsel for the applicant argues that the case made against the Minister is not distinguishable from the case against Aer Rianta and that the presence of the Minister as a defendant is not justifiable as necessary for the proper prosecution of the plaintiff's claim, particularly in the light of s.58 of the 1998 Act.

13. In *Fuller v. Dublin County Council* [1976] I.R. 20, the Supreme Court held that the Minister for Local Government was not a necessary party to proceedings because insofar as a claim was made against the Minister (who was the second named defendant), the plaintiffs based such claim upon the same grounds as those on which they relied to support their claim against the first defendant. The Court held that the basic issue raised by the plaintiffs in that case was whether or not the first defendant had power to make a compulsory purchase order. In the judgment of the Supreme Court, Henchy J. stated at p.28:

"The test, therefore, is whether the presence in the proceedings of the Minister as defendant is justifiable by the plaintiffs as necessary for the proper prosecution of their claim.

Were the nature of the plaintiffs' claim such as to raise a question as to some act, default or power of the Minister *distinct from what is alleged against the County Council*, there would be a case for retaining the Minister as a defendant. But that is not the case. If the point raised against the powers of the County Council is good, the compulsory purchase order will fall to the ground, not primarily because the Minister confirmed it, but because the County Council had no power to institute the compulsory purchase proceedings. If the point raised is bad, the plaintiff's claim will be dismissed because the County Council will be held to have had the power they are alleged to have lacked. Either way, the presence of the Minister as a defendant would be a redundancy. The fact that he confirmed the compulsory purchase order was merely a consequence and not a cause of the illegality alleged. If the Minister were retained as a defendant, it is conceivable that his counsel at the hearing of what is a net point of law at issue between the plaintiffs and the County Council might not feel called on to take any active part in the hearing other, perhaps, than to apply at its conclusion for an order providing for the Minister's costs". (My highlights).

14. In this case it is true that para. 66 of the statement of claim alleges that the second named defendant, as agent of the first named defendant, knowingly acted wrongfully and misconducted itself in the discharge of its public duties and its public office. But there is no separate claim on that point made against the applicant that was not made against the second named defendant. Indeed, the allegation is made against the second named defendant although in its capacity as agent of the first named defendant.

15. Having considered the entire statement of claim and given particular consideration to the paragraphs which were highlighted by counsel for the plaintiffs, it seems to me that (leaving aside the conspiracy claim which does not concern the first named defendant) that the case against the applicant is not distinguishable from that made against the second named defendant.

16. Section 58 of the 1998 Act is, in my view, clear and unambiguous. I am satisfied that it was intended by the Act that if the acts complained of arise out of the performance before the vesting day of the functions assigned to the company under the Act, any claim arising shall lie against the Company and not the Minister.

In the definition section of the 1998 Act, 'functions' "include powers and duties, and references to the performance of functions include, as respects powers and duties, references to the exercise of the powers and the carrying out of the duties".

17. I cannot envisage any circumstances in which the claim being made by the plaintiffs will be prejudiced or compromised if the Minister is removed from the proceedings. In those circumstances, and having regard to the provisions of s.58 of the 1998 Act, I am satisfied that the claims made by the plaintiffs in these proceedings cannot be brought or maintained against the first named defendant. Accordingly, I direct that the first named defendant be struck out from the proceedings.