Neutral Citation: [2014] IEHC 89

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 586 J.R.]

BETWEEN

DUBLIN CITY COUNCIL AND OISÍN QUINN

APPLICANTS

AND

STANDARDS IN PUBLIC OFFICE COMMISSION

RESPONDENT

AND

MICHAEL SMITH AND CIARAN PERRY

NOTICE PARTIES

JUDGMENT of Mr. Justice Hedigan delivered on the 29th day of January 2014

1. The Application

In these proceedings, the applicants challenge the report of the Commission issued on 16th February, 2012, in respect of alleged contravention by the second named applicant of s. 177(1) of the Local Government Act 2001. They seek the following reliefs:

> "(i) An order of *certiorari* by way of application for judicial review quashing the report, including the findings and/or determinations therein, of the respondent.
>
> (ii) A declaration that the respondent failed to set out its findings and/or determinations and failed to give reasons therefor.
>
> (iii) A declaration that the decision of the respondent was irrational and/or unreasonable.
>
> (iv) A declaration that the respondent erred in law and/or acted *ultra vires*.
>
> (v) A declaration that the obligation to give advice under s. 25 of the Ethics in Public Office Act 1995, applies in respect of a contravention under Part 15 of the Local Government Act 2001.

2.1 The Background

There is no material dispute on the facts which are comprehensively outlined in the statement of facts prepared herein. Certain motions concerning the permissible height of buildings in the city of Dublin were considered by the first named applicant (hereafter DCC). In the course of these considerations, the second named applicant, Mr. Quinn, sought the advice of the manager, senior city planners and the law agent of the Council and other officials as to whether his interest in a office block at 84-93, Lower Mount Street, Dublin 2 constituted a beneficial interest for the purposes of Part 15 of the Local Government Act 2001, which would require him to disclose the said interest, withdraw, and not participate in any of the motions which related to the height of certain buildings in the city of Dublin. Mr. Quinn proposed and voted upon a resolution on 2nd December, 2009, and subsequently spoke in support of and voted for a composite motion to increase the height of permissible office development in the city. Following a number of meetings, DCC adopted the Draft Development Plan on 22nd December, 2010.

2.2 Subsequent to this, the notice parties made complaints to the effect that Mr. Quinn had a conflict of interest in relation to certain of these motions that he had submitted and supported. The complaint before the Commission related to specific, special meetings of the Council held on 2nd December, 2009, and on 28th July, 2010. The complaints were to the effect that Mr. Quinn should have disclosed an interest and withdrawn from any consideration or participation in discussion of the motions dealing with the increased permitted height levels in the city of Dublin. On 15th March, 2011, following initial consideration of the complaint, the respondent (the Commission) appointed an inquiry officer to conduct a preliminary inquiry into the complaint. This officer presented his report to the Commission and it determined, on 10th October, 2011, that it should carry out an investigation to determine if Mr. Quinn had contravened Part 15 of the Local Government Act 2001. In the course of his investigation, the inquiry officer had obtained a report from planning consultants Williams & Grist (the WG Report). This was furnished to Mr. Quinn by the inquiry officer on 22nd July, 2011, during his preliminary investigation. Mr. Quinn was notified in writing of the Commission's decision to hold a full inquiry on 7th November, 2011. In this letter, the Commission noted that it appeared that there was little or no factual dispute. Mr. Quinn's consent to the production of documents without the need of formal proof was sought. In his reply, Mr. Quinn did not take issue with the proposition that there was no factual dispute and he agreed to the admission without formal proof of the documents. Mr. Quinn made no request to compel attendance of any witnesses nor was any issue taken with the investigation conducted by the inquiry officer.

2.3 On 19th December, 2011, the Commission convened a public sitting in order to carry out its investigation into the complaints made. Mr. Quinn was represented by solicitor and Senior Counsel. He called no witnesses and made no objection to the procedure. It was not suggested that there was any body of evidence other than that before the Commission that should be examined. The WG Report, having been admitted, it became part of the evidence. No contrary evidence was produced. Mr. Quinn said only that he had "one little bit of a difficulty" with the WG Report. No reference was made to the WG Report either in the opening or closing statements of Senior Counsel for Mr. Quinn. It was clear that no factual dispute existed to be resolved. All that was required was an

appraisal of agreed facts to determine the complaint. The question for the Commission to resolve was quite clear - was the interest that Mr. Quinn had in one-sixth of the office block in Mount Street, together with the five-sixths interest thereof held by his siblings, an interest that required to be disclosed under s. 177, and that thus required him to withdraw and play no further part in the Council's consideration of the motions in question. Mr. Quinn had declared his own one-sixth interest but had not considered s. 177 applicable because, in his view, owing to the fact that the motions were not "site-specific" they fell within the provisions of s. 176(3)(a). This provides that:

> "(3) A person shall not be regarded as having a beneficial interest which has to be disclosed under this Part where section 167 (3) is applicable or because of—
>
> (a) an interest which is so remote or insignificant that it cannot be reasonably regarded as likely to influence a person in considering or discussing, or in voting on, any question with respect to the matter or in performing any function in relation to that matter."

Thus, the question for the Commission was as to whether Mr. Quinn's interests and that of his siblings being "connected persons" in the property was so remote or insignificant that it could not be reasonably regarded as likely to influence him in his consideration, discussion or voting thereon. Mr. Quinn, and those in DCC who had advised him, considered the interest was so remote. The Commission, in its finding, disagreed and determined that such an interest was not so remote as to make s. 177 inapplicable. Thus, it found a violation of s. 177(1) in respect of the contraventions alleged at complaints 1, 2, 8 and 9. These related to failure to disclose and withdraw from participation in voting on motions 1063 and on the "composite" motion.

2.4 Subsequent to this determination, Mr. Quinn had no communication with the Commission. DCC, however, did express grave concern as to whether such a determination was so wide that its application would paralyse the operation of local government by precluding large numbers of members from participating in vital business in relation to local authority planning functions. They subsequently wrote to the Commission on 1st March, 2012, requesting advice as to how to define "remoteness" pursuant to s. 177. The Commission declined to do so on the basis that the Local Government Act 2001 makes no provision for doing so. It said there was, therefore, no obligation on it to provide advice to councillors and it said that it would be very reluctant to do so.

3.1 The question for the court is whether, in making this determination, the Commission procedures were unfair, they erred in law in their interpretation of s. 176(3)(a) and s. 177 of the Local Government Act 2001, their decision was irrational and/or unreasonable, they failed to give reasons and also that their refusal to give advice was contrary to law.

3.2 The court, however, must consider first the preliminary objection of the respondent that the first named applicant has no *locus standi*. It is to be noted that after its determination, the Commission had no further communication with Mr. Quinn. DCC, however, did engage with the Commission, expressing concern over the possible consequences of the Commission's finding. The Commission was informed, in May 2012, by the law agent of DCC that Mr. Quinn had decided to become a co-applicant in this application in order to ensure that significant issues of public interest could be ventilated. Clearly, even the applicants had some doubt over their locus standi. It is not difficult to see why. DCC was not a party to the proceedings before the Commission. It attempts to argue before this court on grounds and upon evidence that were not presented to the Commission. There was no factual dispute with the Commission, only an appraisal of the question as to whether the second named applicant's interest in the Mount Street property was one so remote or insignificant that it could not be reasonably regarded as likely to influence him in considering or discussing or voting on the motions in question. The only basis upon which the DCC can claim *locus standi* in these proceedings is that which they have in fact argued *i.e*. that as a consequence of the determination, so many elected members of local authority bodies will have to disclose and withdraw because of their having a "sufficient interest" that the planning functions of the local authority will become unworkable. Even accepting that the DCC is capable of having *locus standi*, either because of its "connectedness" to the subject matter and/or because the effect of the Commission's determination is upon each of the elected members and the Council as a body, the court must examine the case being made by the applicant to determine whether it can make the only argument which can assist it. See *Cahill v. Sutton* [1980] I.R. 29;

> "[An applicant] must show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering."

3.3 Thus, the question of whether a party actually has *locus standi* must be determined by reference to the circumstances of the individual case (see *John Paul Construction Ltd. v. Minister for the Environment, Heritage and Local Government* [2006] IEHC 255, Kelly J. following *CIF v. Dublin County Council* [2005] 2 I.R. 496, Supreme Court, judgment of McCracken J.). The circumstances here are that the DCC claims that so many councillors will have to disclose and withdraw because of the wide effect of the Commission's determination that the DCC will be unable to perform its functions.

3.4 No evidence has been produced to the court to support this proposition. In fact, the evidence that has been produced to the court supports the opposite conclusion. Only two of the fifty motions proposed by Mr. Quinn in regard to this development plan were challenged on s. 176 grounds. Since the determination of the Commission, five local authorities have adopted development plans. In the affidavit of David Waddell at Exhibit DW3 which is a list of annual declarations, eight councillors declare interests, yet none of them felt compelled, when considering the Draft Development Plan, to disclose and withdraw. No complaint has been made with regard to any of these. Not one single affidavit of a councillor on DCC ir any other local authority has been produced to back the applicant's claim in this regard. The inevitable conclusion is that the factual basis upon which the DCC claims *locus standi* does not exist.

3.5 As to their claim for a declaration that s. 25 of the Ethics in Public Office Act 1995 applies in the context of a complaint and/or matter in respect of a contravention under Part 15 of the Local Government Act 2001, there is no point to an inquiry under this heading because even if the section did apply, it is clear that it imposes no obligation to give advice. The section is permissive only. This is clear from its use of the word "may". It is within the discretion of the Commission to decide whether it will or will not give advice. Consequently, a declaration, as sought, cannot be made.

For the above reasons, the first named applicant has no *locus standi* to maintain these proceedings.

4.1 As to the second named applicant's case, there must be some doubt over his *locus standi* also. This is because it has been made clear to the court that his joining in these proceedings is solely for the purpose of ensuring that the "significant issues of public interests to which the Commission's decision gives rise can be fully addressed". In *Riordan v. Government of Ireland* [2009] 3 I.R. 745, Murray C.J. observed:

> "70] All citizens have a right of access to the courts which, in other cases, the courts have been sedulous in protecting. But this right of access is for the purpose of resolving justiciable issues and not for the purpose of constituting the courts

> as a sort of debating society or deliberative assembly for the discussion of abstract issues"

I do not doubt Mr. Quinn's *bona fides* in joining in this application but I am concerned that the court should not allow itself to become the kind of debating chamber or deliberative assembly that the Chief Justice warned of in the judgment above. That said, much effort and time has been expended by the applicants in bringing this case in good faith before the courts, the respondent does not challenge his *locus standi*, and thus, I think I should proceed to consider the question he raises.

4.2 It should be noted that the commission exonerated Mr Quinn from any impropriety. It found that his contraventions of s.177(1) were committed inadvertently and were minor in nature. It found that he had acted in good faith in relation to these contraventions. As noted above, the factual background to this application is comprehensively outlined in the statement of facts document contained in the book of core documents filed herein. I do not think it necessary, however, to go through these facts because no material dispute exists in relation thereto, nor did one on the matters before the Commission. The applicant has sought to introduce to the application the evidence of John O'Hara, the Deputy City Planning Officer in charge of forward planning. In his affidavit, he sought to demonstrate that Mr. Quinn was no more likely to benefit from amended building heights in the city of Dublin than he had been before the motions in question were passed. Apart from the doubtful relevance of this evidence, it is not, in my view, open to the court in this case to consider evidence that was not before the Commission in a judicial review of its determination. This new evidence seeks to argue with the WG Report. This report was admitted to evidence without the need for formal proof. Moreover, as noted above, Mr. Quinn, in his evidence to the Commission, indicated that he had little disagreement with it. His Senior Counsel did not even refer to it in either his opening or his closing. Introducing the evidence of Mr. O'Hara at this stage would, I think, transform this judicial review into an appeal. This, I cannot do. I consider it of doubtful relevance because the Commission in this case was charged with making a determination as to whether Mr. Quinn's interest in the Mount Street property was "so remote or insignificant that it cannot be reasonably regarded as likely to influence a person in considering or discussing or in voting or any question with respect to that matter or in performing any function in relation to that matter". "Reasonably be regarded" refers to perception rather than objective reality. It is classically a matter of judgment as to whether a particular situation or interest may be reasonably regarded as too remote. It is not a matter of planning. The essence of the case argued by Mr. Quinn throughout is that the motions in question were not site-specific to the Mount Street property or its immediate area. For this reason, he argues, his beneficial interest, together with that of his siblings, was too remote and insignificant to be reasonably regarded as likely to influence him in consideration of the motions in question. But the motions did refer to the whole city. It was the task of the Commission to determine whether, in that context, there could exist a reasonable perception that his beneficial interest and that of his siblings might influence his consideration thereof.

4.3. The Commission is a body composed for the purposes of discharging certain functions conferred upon it by the Ethics in Public Office Act 1995, and the Standards in Public Office Act 2001. It also has additional functions conferred upon it by Part 15 of the Local Government Act 2001. In the context of these proceedings, which is all this court is concerned with, its role was to determine the fourteen contraventions alleged of the Local Government Act 2001. The Commission that considered these complaints was an expert Tribunal composed of a former High Court judge, the then Ombudsman, the Comptroller and Auditor General, the Clerk of Dail Éireann, the Clerk of Seanad Éireann and a former Cabinet Minister, Michael Smith. In their consideration, the Commission set out what they considered to be the applicable test:

> "the test to be applied by a councillor is not just what he or she might think, but rather what a member of the public, knowing the facts of the situation would reasonably think as to whether the interests concerned might influence the person in the performance of his or her functions. If so, disclosure should follow and a councillor should withdraw from consideration of the matter. In this context, it is important to ensure that as well as the avoidance of actual impropriety, occasions of suspicion and appearance of improper conduct are also avoided in case of private and personal interests."

Parsing of the wording of this or any administrative decision is not appropriate in judicial review proceedings. What should be looked at is the real meaning of the words in their context. Here, "might" or "likely" are essentially interchangeable when a decision of this nature is being described. In determining what might or might not be reasonably regarded as an interest too remote or insignificant, it is hard to imagine a body more qualified than the Commission. It is an ideal composition of experience, both legal, popular and political. It is likely to be a very rare case where this court in judicial review would find its conclusions irrational or unreasonable. I do not think I even need investigate these two concepts because I am in agreement with the determination reached by the Commission here. I consider the Commission's determination to be eminently reasonable and to be a fair and rational appraisal of perception based upon an agreed factual background as presented to it. Thus, the reasons set out are, in my view, perfectly adequate. In the absence of any material dispute on the facts before it, there was nothing more required of the Commission than to state its judgment as to whether the interest was or was not too remote. This it did on the basis of the test outlined by it in the course of its written determination.

In my judgment, these conclusions are dispositive of all the issues raised in this case. The reliefs sought are refused.