Neutral Citation Number: [2005] IEHC 188

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

2005 No. 404 J.R.

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED) AND IN THE MATTER OF AN APPLICATION BY WAY OF JUDICIAL REVIEW

BETWEEN

DESMOND MULHOLLAND
AND DONAL KINSELLA

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
COVERFIELD DEVELOPMENTS LIMITED,
THE CARROLL VILLAGE (RETAIL) MANAGEMENT SERVICES LIMITED (OTHERWISE KNOWN AS CARROLL VILLAGE (RETAIL) MANAG EMENT SERVICES), DUNDALK RETAILERS ASSOCIATION
AND DUNDALK TOWN COUNCIL

NOTICE PARTIES

Judgment of Mr. Justice Kelly delivered the 14th day of June, 2005.

Introduction
1. On 27th May, 2005 I heard and determined an application made by the first notice party (Coverfield) to transfer this case into the Commercial List. I granted the application notwithstanding the opposition of the applicants in the proceedings. A neutral stance on that application was taken by the respondent in the proceedings. The other notice parties did not participate in that hearing.

2. I made the order to admit the case to the list pursuant to the provisions of O.63A, r. 1(g) of the Rules of the Superior Courts.

3. In deference to the submissions which were made on that occasion and the possible relevance of the decision for others cases seeking admission to the list, I indicated that I would give my reasons in writing for holding in favour of Coverfield. This I now do.

The Proceedings
4. These are judicial review proceedings. The applicants (if granted leave to apply) will seek *certiorari* to quash a decision of the respondent given on 25th February, 2005, to grant planning permission for a very substantial development at Dowdallshill, Dundalk, County Louth.

5. The permission is for a factory outlet centre containing 81 retail units with associated mall, snack bars, playground, crèche and parking for 1,120 cars and 20 coaches.

6. No fewer than 28 grounds are relied upon by the applicants in support of their entitlement to *certiorari*. Indeed, some of those grounds are particularised with up to as many as twelve detailed particulars being furnished in respect of some of them.

7. The judicial review application is made pursuant to the provisions of s. 50 of the Planning and Development Act, 2000, as amended. The application for leave must be on notice to the prescribed parties. The notice of motion in that regard was dated 19th April, 2005 and was returnable in the ordinary way before the court on 30th May, 2005.

8. By motion dated 9th May, 2005 Coverfield sought the transfer of the case to the Commercial List. That motion was first listed on 12th May but on the application of the applicants in the proceedings was adjourned for hearing to 27th May, 2005.

Commercial Proceedings
9. Order 63A of the Rules of the Superior Courts (S.I. No. 2 of 2004) created the Commercial List of the High Court. It was created on foot of recommendations which had been made by numerous committees, the most relevant being the Committee on Court Practice and Procedure. In its 27th interim report that committee recommended the establishment of a court which would enable the speedy resolution of commercial disputes and facilitate the conduct of court business through the use of up to date technology.

10. Order 63A seeks to create such a regime and appears to have done so successfully. The Commercial List came into operation on 12th January, 2004. By direction of the President of the High Court only cases which commenced after that date were admitted into the Commercial List. By 27th April, 2005, 77 such cases had been admitted to the list. As of that date 50 of them had been completed. The average time period from entry to the list until the date of the final order was nine weeks.

11. The term "commercial proceedings" is defined in O.63A, r. 1. The type of case which is described under sub-heading (a) of that definition is precisely the type of business which one would expect in any commercial court. It certainly reflects the type of business one finds transacted in the Commercial Court in London, Edinburgh and Belfast. Such cases involve private law disputes of a commercial nature.

12. Sub-paragraph (b) of the definition confers a wide discretion upon the judge in charge to enter into the list cases which do not fall within what is described in any other part of the definition but which may nonetheless have commercial or other aspects which in the discretion of that judge make them suitable for entry into the list.

13. The arbitration matters described in sub-heading (c) of the definition again involve private law disputes of a type which one typically finds in the commercial courts of the other three jurisdictions which I have mentioned.

14. Paragraphs (d), (e) and (f) deal with intellectual property matters. They are somewhat atypical of the type of business which falls to be dealt with in commercial courts in other jurisdictions. Nonetheless they are capable of being admitted to the commercial list.

15. Paragraph (g) of the definition of commercial business deals with a species of business which is primarily one of public law. It involves appeals from or judicial review of decisions given by a person or body authorised by statute to make such decisions where the judge in charge of the commercial list considers it appropriate for entry in the list having regard to the commercial or any other

aspect thereof. This type of proceeding is not typically found in a commercial court. Nonetheless the Rules Committee invested a discretion in the judge in charge of the list to admit such a case in circumstances where he was satisfied that having regard to the commercial or any other aspect thereof it was appropriate for entry into such a list.

16. The Superior Court Rules Committee conferred a discretion upon the judge in charge of the list. That is evident from the fact that no case is entitled to entry into the list as of right. All cases must be the subject of an application to the judge for entry. It is also clear that by conferring the jurisdiction which is specifically provided for at rule 1(b) very wide scope is given to the judge in charge of the list to admit cases once satisfied that because of the commercial or any other aspect thereof they are appropriate for the list.

17. Public law issues of the type dealt with at rule 1(g) are also admissible as a matter of discretion.

18. By defining "commercial proceedings" as it did the Superior Court Rules Committee appeared to wish to give a wide measure of discretion to the judge in charge so as to enable the speedy resolution of commercial disputes using that term in a broad way. The committee did not attempt to tie the judge down to a technical or narrow view of what might be appropriate to be admitted to the list.

The Present Case
19. Coverfield is the owner of the lands to which the permission in suit attaches. It has an agreement for the sale of those lands conditional upon planning permission being obtained. The sale price will be in the region of €7 million. The construction costs in respect of the development will be in the region of at least €35 million. But for the existence of these judicial review proceedings Coverfield would be in a position to complete the sale of the lands and the purchaser could commence the development.

20. The first named applicant is a shop keeper who carries on business in Dundalk and swore his grounding affidavit on his own behalf and on behalf of the second applicant and with the support of the Dundalk Retailers Association who were observers to the appeal which was dealt with by the respondent. The second named applicant is himself a business man and swore his affidavit on his own behalf and on behalf of the first named applicant and with the support of the Dundalk Retailers Association.

21. The second named applicant is a major commercial rival of the proposed centre. He has applied for permission to build a factory outlet centre of some 6,825 square metres in Dunleer. He has brought five applications for planning permission for his centre, the most recent having been refused by Dundalk Town Council on 18th January, 2005. Indeed, he was the applicant in earlier proceedings which were dealt with in the Commercial Court concerning the development in suit. In those proceedings he sought leave to commence judicial review proceedings for *certiorari* against the decision of the Dundalk Town Council to grant planning permission to Coverfield in respect of this development. That earlier case was admitted into the Commercial List on the 29th of October, 2004. It was heard on the 18th and 23rd November, 2004. Judgment was delivered on 3rd December, 2004, refusing leave. ([2004] I.E.H.C. 373)

Uncontroverted Evidence
22. The following uncontroverted evidence was put before the court. Mr. McKinney, a director of Coverfield, said as follows:-

> *"I believe that the nature of the proposed development is such that any significant delay in the implementation of the planning permission might well result in this particular development not proceeding at all. This is because the catchment area required by a factory outlet centre which is largely tourist based is so large-scale, compared to a regional shopping centre which has a well-defined catchment area, that it is not commercially viable to locate factory outlet centres in proximity to each other. I believe that the commercial reality is that there is only sufficient consumer demand for one factory outlet centre on the Belfast to Dublin transport corridor. This is relevant because, as detailed above, (sic) there are rival developments planned in this area."*

23. Later he said:

> *"There are currently proposals for two rival developments, at Banbridge, County Down and at Dunleer, County Louth, which are detailed below. I say and believe that any delay in the implementation of the planning permission the subject matter of the present proceedings would accrue to the advantage of these rival proposals. It is self-evident that tenants will not sign up to a development unless they can have certainty that the outlet centre will be built and will have the advantage of being first in time to open.*
>
> *The application in Banbridge, County Down, is for a factory outlet centre of a scale similar to this development. This was approved on 20 January, 2005.*
>
> *In relation to the application relative to Dunleer, County Louth, this site belongs to Mr. Kinsella, although it has not been disclosed as part of this judicial review application. I say and believe that Mr. Kinsella is effectively a major commercial rival of the applicant for planning permission herein being Coverfield Developments, as he has applied for permission to build a factory outlet centre comprising 6,825 square metres in Dunleer. Mr. Kinsella has to date brought five such applications, the most recent application having been refused by Dundalk Town Council, the fourth named notice party, on 18 January, 2005. That decision is under appeal to An Bord Pleanála and a decision is expected on or about 23 May, 2005."*

The objections
24. The applicants objected to the transfer of the case into the commercial list on three bases.

25. First, they contended that there was a misunderstanding on the part of Coverfield as to the nature of the claim being made by them. They argued that this was an inappropriate case to make the order and relied upon the decision of the Supreme Court in *P.J. Carroll & Ors. v. The Minister for Health and Children and Others* (unreported, 3rd May, 2005) in that regard.

26. Secondly, they alleged that the procedures of the court as mandated by the rules of court were inimical to a fair hearing. That assertion was sworn to by the solicitor acting on behalf of the applicants. It is fair to say that counsel entirely resiled from that assertion and that subsequent to the hearing the solicitor swore a supplemental affidavit describing it as being inappropriate and incorrect. He also apologised for the assertion. It follows that that proposition has now disappeared out of the case.

27. The third basis for objection was an argument that O.63A insofar as it entitles the court to make an award of costs and in

particular costs at the conclusion of an interlocutory application was in some way *ultra vires*. Whilst that was mentioned in the written submissions and touched upon by counsel it was not seriously argued.

28. It follows therefore that the only opposition of substance came in respect of the first of the three points made.

O.63A, r. 1(g)
29. The terms of O.63A, r. 1(g) make it quite clear that in appropriate cases public law issues of the type described in the rule can be admitted for adjudication in the commercial list.

30. The first part of the objection which is taken by the applicants contends that Coverfield misunderstands the nature of the challenge in the proceedings. The applicants point out that they are doing no more than vindicating their legal and constitutional right to pursue a challenge to the manner in which the respondent made its decision and are not engaged in a disruption of the planning process in respect of this particular development.

31. They point out that the provisions of the Planning and Development Act, 2000, provide a mechanism for those who participate in the planning process to challenge, by way of judicial review, the manner in which the decision was reached. They say that these proceedings constitute a challenge to the decision of an administrative body and therefore cannot be described as being commercial. It follows that they should not be admitted to the list.

32. There is no doubt but that the proceedings are not commercial in the sense in which that term might be commonly understood as involving a private law dispute between two commercial entities. That is the sort of business that is dealt with at O.63A, r. 1(a).

33. A special definition of commercial proceedings is however to be found in r. 1(g). That clearly envisages public law appeals or applications for judicial review as capable of being regarded as "commercial proceedings" if the judge in charge of the list considers it appropriate having regard to the commercial or any other aspect thereof . The use of the phrase "or any other aspect thereof" suggests to me that the discretion given to the judge is wide. There are of course limits to that discretion and a judge would not be justified in admitting a case into the commercial list unless there was evidence of the matters referred to in the rule.

34. In the present case there is the uncontroverted evidence which I have already reproduced in this judgment which makes it abundantly clear that there are very substantial commercial aspects to the development the subject of the planning permission which is sought to be impugned.

35. It would be unwise to set out hard and fast rules as to the business which can qualify for admission to the list under r. 1(g) particularly since the Rules Committee itself gave such a wide discretion to the judge in charge of the list. It would seem to me however that any case involving a statutory appeal or judicial review of the type described in rule 1(g) should be capable of admission to the list if it can be demonstrated that a commercial development or process or substantial sums of money whether by way of profit, investment, loan or interest are likely to be jeopardised if the case is not given a speedy hearing or is denied the case management procedures which are available in the commercial court. This is so where one or more of the parties to the suit are involved in commerce, giving a broad meaning to that term. Such parties would include entities involved in commercial activities whether they be individuals, corporate bodies, semi-State bodies, State bodies or indeed the State itself in an appropriate case.

The Supreme Court Judgment
36. Heavy reliance was placed by the applicants in the proceedings upon the recent decision of the Supreme Court in *P.J. Carroll & Ors. v. The Minister for Health and Children* [unreported, 3rd May, 2005] in support of their opposition to the case being transferred.

37. The judgment in that case is both curious and puzzling. (Not the least puzzling aspect being that courts description of references under Article 26 of the Constitution as being *sui iuris*!).

38. It is curious because the passage from the judgment of that court relied upon in opposition to the instant case being transferred into the commercial list deals with a question which was neither in issue nor argued before the Supreme Court.

39. *Carroll's* case involves a claim by a number of tobacco companies that legislation restrictive of the marketing and advertising of their products is unconstitutional. This is denied by the State which contends that the restrictions are lawful and a proportionate response to the health hazards created by tobacco.

40. The case was admitted to the commercial list and no appeal was taken in respect of that decision. In an exchange of pleadings many admissions concerning the health hazards posed by tobacco were made. A motion was brought in advance of the trial seeking to rule out the calling of oral evidence in support of those admitted facts. This was done in conformity with the usual approach of the commercial court which seeks to ensure that trials are focused on the matters which are truly in dispute between the parties and that time and costs are not wasted on peripheral questions.

41. The plaintiffs contended that the State should not be entitled to call evidence on two bases. The first one was narrow and confined. It was said that the court ought not to permit evidence to be given in respect of facts which were not in dispute.

42. The second argument was much wider. It amounted to a contention that the State should never be entitled to call evidence in support of the proportionality of a legislative measure which is being impugned for unconstitutionality.

43. When the matter was before me I expressly refused to adjudicate on this wide sweeping issue of principle since it was not necessary for me to do so and in any event I would have been reluctant to do so on a purely procedural motion. I took the view that having regard to the admissions in the pleadings it was not open to the State to call evidence on facts that were not in contest.

44. At no time during that hearing before this court was the question of whether or not the case should have been admitted to the commercial list in issue or indeed even discussed.

45. On appeal that was not in issue either. I am informed by counsel in the present case who was also in *Carroll's* case that that question was not argued in the Supreme Court.

46. It follows that the observations of that court touching upon the appropriateness of *Carroll's* case for admission to the commercial list are *obiter dicta par excellence.*

47. A further curious feature of the Supreme Court decision is that it hardly deals at all with the question of the entitlement to call

evidence in respect of facts which are not in dispute on the pleadings. Rather it deals with the much broader issue of the entitlement to call evidence in support of an argument of proportionality. Whilst it holds that such evidence is admissible it leaves open the possible ruling out of such evidence in that case either at future case management hearings or at trial on the basis that the evidence is unnecessary on issues not in dispute. At that stage of course enormous additional costs may well have been incurred given the scope and the length of the evidence which was signalled to this court.

48. The passages from the Supreme Court judgment relied upon read as follows:-

> *"It is not clear from the order whether both sides had consented to the case being dealt with in the commercial list. One can well imagine that it might have suited both sides. It is easy to be wise after the event, but given the subsequent history of the case, it would seem to me to be highly doubtful that it was wise in practice, even if permissible in law, to have allowed this case enter the commercial list. In its essence it is not a commercial case. It is a constitutional action. I am not in any way suggesting that every case which challenges the constitutionality of a statutory provision should be precluded from being entered into the commercial list. Each case must depend on its facts. But I see a difference between a case which is fundamentally a commercial case but where there may be tagged on as a last resort relief a challenge (sic) to the constitutionality of a statutory provision on the one hand and an action which from the beginning is fundamentally a constitutional action. It may be appropriate to enter the former in the commercial list but caution should be exercised in admitting the latter. It would seem to me that this case clearly falls within the latter category.*
>
> *Now that the case is for better or worse in the commercial court, I have come to the conclusion that if I am satisfied (as I am) then on at least one of the grounds of appeal put forward by the appellants, the order of the High Court ought to be set aside, I should not express any views on the other grounds raised."*

49. These observations were relied upon to warn me that I should exercise caution in coming to a decision in the present case.

50. Whether or not I am correct in the view which I have formed as to the *obiter* nature of these comments I of course in any event pay great attention to them and show them all due deference but I am of the view that the two cases are not at all comparable.

51. First, the observations made by the Supreme Court dealt with the discretion given to the court in what was described as a "catchall" category of case which is dealt with under O.63A, rule 1(b). That is not the present case. It falls under rule 1(g).

52. Secondly, the instant case is not a constitutional one. It is precisely the sort of case which is envisaged and described in rule 1(g). It is an application for judicial review in respect of a statutory body's decision.

53. I did of course exercise caution in coming to the conclusion to admit this case to the commercial list. However, having regard to the uncontroverted evidence which I have already reproduced it seemed to me that in the exercise of my discretion the case fell squarely within the parameters of O. 63A, rule 1(g). Accordingly it was admitted to the list.

54. I am of the view that the construction sought to be placed on rule 1(g) by the applicants in the proceedings would render it sterile and ineffective.

A Further Observation

55. It is of interest to note that all parties to the application, including the applicants in the proceedings accepted that this case would benefit from a speedy hearing. Indeed that is what the legislature had in mind when it enacted s. 50 of the Planning and Development Act, 2000.

56. Both the respondent and the notice party indicated that they would be opposing the application for leave but did not intend to file any evidence in support of that opposition.

57. I was therefore able to list the case for trial on 28th June, having given each side their own suggested time within which to exchange legal submissions. Such a speedy hearing could not have been given in the ordinary judicial review list. Given that everybody in the case accepted that a speedy hearing would be desirable it is difficult to see why the applicants objected to the transfer of the case into the commercial list.