[2023] IEHC 105

THE HIGH COURT

[2022 No. 4826 P]

PAUL WALSH AND CHRISTINE KIRWAN

PLAINTIFFS

AND

ST. CLARE'S GP3 LIMITED AND BALARK TRADING GP LIMITED

DEFENDANTS

JUDGMENT of Humphreys J. delivered on the 10th day of March, 2023

1. The relatively complicated planning history of this site has involved eight applications for planning permission. The outcomes of two of those have been challenged by the plaintiffs, a process which has given rise to multiple sets of proceedings, of which this is the fourth.

2. The plaintiffs live beside the development site. When the original permission was granted in 2015, the plaintiffs did not object because the privacy of their property was protected by mature trees at the back of the site. In 2017 the trees were removed, a matter which they say has been the cause of significant difficulty since then. The plaintiffs maintain that the removal was unlawful, and say that this has been conceded by the city council.

3. The plaintiffs brought a first set of proceedings challenging a further permission [2018 No. 1083 JR]. On the application of the developer, those proceedings were admitted to the Commercial Court. However, the parties entered into a settlement agreement on 19th April, 2019 (as between the plaintiffs and the particular corporate vehicle that was carrying out that part of the development). The settlement agreement envisaged in para. 5 that "the Applicants' property shall have adequate privacy screening", and for that purpose "the Notice Party shall implement the landscaping arrangements along the boundary of the Applicants' property (as referred to in landscaping plan drawing number 1385/6012 and attached hereto) and shall do so as soon as these are in planting season and can be planted safely and viably and with a chance of survival".

4. Unfortunately, the plaintiffs say that this did not happen.

5. A second set of proceedings were instituted regarding another application on the same site [2020 No. 266 JR]. The board conceded *certiorari.* After that, there was some argument about remittal. In an *ex tempore* ruling of 17th September, 2020, McDonald J. directed remittal to the board.

6. At some point during 2021, the developer allegedly replaced the planting diagram on file with the city council by substituting a new diagram with much smaller trees (2.5 metres high versus 6.5 metres) which, according to the plaintiffs, will not protect their privacy.

7. On 26th July, 2021, the current developer's solicitors wrote stating that the trees would be planted. This was repeated on 19th August, 2021. In December 2021, the city council stated that there had been unlawful removal of trees but that nothing could be done about it at that point.

8. Meanwhile, the board granted permission on foot of the remitted application. The applicants brought a third set of proceedings challenging that [2021 No. 304 JR].

9. In January 2022, following the change in the compliance diagram, some trees were planted by the developer. The plaintiffs say these are inferior and inadequate to protect their privacy.

10. The third set of proceedings then resulted in a judgment quashing the permission with no remittal being sought (*Walsh v. An Bord Pleanála* [2022] IEHC 172, [2022] 4 JIC 0105 (Unreported, High Court, 1st April, 2022)).

11. The impasse regarding the differing views on the need to plant trees led to the institution of a fourth set of proceedings, the present action [2022 No. 4826 P] seeking specific performance of the settlement agreement. These proceedings were issued on 20th September, 2022 and a statement of claim delivered on 21st December, 2022.

12. On 22nd December, 2022, a motion to admit the proceedings to the list was issued by the plaintiffs. This is opposed by the developer, and I am now dealing with that dispute.

Whether this is a planning and environmental case

13. The defendant says that a planning and environmental case for the purposes of High Court Practice Direction HC107 (as amended by PD HC114) means a case raising planning and environmental issues, not merely a case in the planning and environmental area, and that the proceedings are about breach of contract and not planning or the environment.

14. While PD HC107 and PD HC114 were of course instruments of the President, one might normally assume that a judge in charge of any given list would be involved in the drafting process in relation to a practice direction for that list, and that applied here. I can therefore legitimately state my understanding that the intention was to capture planning and environmental litigation by reference to its subject-matter rather than by reference to the issues raised. There is no requirement set out in or implied by the Practice Direction to identify or assess the categorisation of issues prior to admission. An example, which is not altogether hypothetical, might be where a board decision granting or refusing an application is challenged on the basis of fair procedures issues such as

objective bias. An action that raises such a point as a sole ground doesn't in reality raise any issue of planning law but rather one of general administrative law. Yet since the subject-area of the dispute relates to planning, it legitimately falls within the scope of admissibility to the list.

15. The defendant argues that the benefit of specialisation of the list is only relevant if the case is dealing with a planning and environmental issue, as opposed to a case merely in the area of planning or the environment, and that it may well be that the case will end up purely as a damages case rather than one requiring any specialist knowledge of planning as such. That is a fair point insofar as it goes, but that objection would only be determinative if admission to the list depended on the identification of specific planning or environmental issues that will have to be decided, which it doesn't. The case may involve such issues or may not but either way it is located in the planning and environmental space, which is a sufficient jurisdictional basis for a motion to seek admission.

16. Specialisation is not the only objective being pursued. A separate goal is that of simplification of, and efficiency in, the process of identifying what does and does not fall within the list. A new requirement to sift the issues at admission stage and to decide firstly what category of legal issues they are, and secondly whether they would benefit from specialised consideration, would significantly complicate the process of deciding what falls within the potential scope of the list. A subject-area-based approach, which is what was adopted in the amended Practice Direction, might be critiqued for an over-broad application of the concept of specialisation, but it more than makes up for that in efficiency, practicability and in simplification of the admission process.

17. Applying that here, the purpose of the settlement agreement is to provide for planting of trees and to make provision for screening, which relates directly to the natural and built environment. This is therefore a planning or environmental case for the purposes of admission to the list.

Whether the proceedings have commercial aspects that make them appropriate for admission

18. The criteria for admission were discussed in *Friends of the Irish Environment CLG v. Galway County Council & Ors* [2023] IEHC 75 (Unreported, High Court, 17th February, 2023), where reliance was placed on the judgment of Kelly J. in *Mulholland v. An Bord Pleanála* [2005] IEHC 188, [2005] 3 I.R. 1, [2005] 2 I.L.R.M. 489. He noted at para. 35 of the unreported judgment (para. 31 of the Irish Reports) that "[i]t would be unwise to set out hard and fast rules as to the business which can qualify for admission to the list under O. 63A, r. 1(g)".

19. Order 63A, r. 1(g) RSC relates to public law proceedings "where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List". A similar logic applies to the relevant paragraph here, which is r. 1(b): "proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List".

20. By analogy with the judgment of Kelly J. in *Mulholland*, it would be unwise to set out any hard and fast rules as to what can qualify under r. 1(b) either. However, the following matters are particularly significant here:

(i). the developer itself originally (in the person of a previous corporate vehicle) applied to have the underlying proceedings entered in the Commercial List;

(ii). the application is closely interconnected with those commercial proceedings;

(iii). the application cannot be taken in isolation, and is part of a sequence of events involving, so far, eight planning applications and four sets of proceedings, as noted above; and

(iv). there is a particular desirability of expedition having regard to the history of the matter, which is more likely to be facilitated in the Commercial Planning and Strategic Infrastructure Development List than in a general list.

21. Even assuming that the value of potential further tree-planting works would not exceed €12,500, that does not detract from the commercial aspects of the proceedings rendering this case appropriate for admission. In all the circumstances, it seems to me that entry into the list is appropriate, subject to what follows regarding delay.

Alleged delay in issuing the motion

22. The developer complains that the trees were planted in January 2022, that the plaintiffs complained about them in February 2022, that they did not issue proceedings until September 2022 and then did not bring the present motion until December 2022. They say that the plaintiffs should be shut out from succeeding in the application by reason of this delay.

23. However, insofar as delay is presented as an obstacle rather than merely as one circumstance to be considered among others, that misunderstands the nature of the admission process. Entry into the list is not a reward for the applying party, to be withheld if she does not behave in some predetermined or appropriate way. Rather it is a pragmatic instrument to assist in

the orderly, efficient and expeditious dispatch of the business of the High Court. The general nature of both the underlying rules of court and the Practice Direction give the admitting judge a degree of a discretion and flexibility; and even accepting the need to consider all circumstances of relevance, including delay, it seems to me a reasonable exercise of that discretion to admit the present set of proceedings to the list in the particular circumstances here. The delay is far from extreme on the facts, but even if it was more significant it would be outweighed in my view by the other factors.

24. Finally, perhaps one might be forgiven for wondering if it is not too much to hope that there might not be an absolute necessity for this matter to have to be determined judicially. Indeed, if there is a reasonable possibility of it being determined in some other way, I would be very much open to taking any approach by way of adjournment, case management or otherwise that might maximise the chances of that, insofar as possible and appropriate. Even simple encouragement occasionally helps.

Order

25. For the reasons set out above:

(i). there will be an order admitting the case to the Commercial Planning and Strategic Infrastructure Development List; and

(ii). the matter will be listed for directions on a date to be notified by the List Registrar, unless directions are agreed by the parties in the meantime.