Neutral Citation No. [2010] NIQB 105 | *Ref:* **GIR7962**

Judgment: approved by the Court for handing down | *Delivered:* **5/10/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY HOUSE OF FRASER LTD & ORS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

GIRVAN LJ

[1] This application brought by Leeside Investments Limited, House of Fraser (Stores) Limited and Corbo Properties Limited for leave to apply for judicial review has taken an unusual and, so far as I am aware, an unprecedented course. The application was made by the applicants in its original unamended form. They essentially sought to challenge the legal validity of an environmental statement which was relied on by the proposed noticed party Sprucefield Centre Limited ("Sprucefield") in connection with its application for planning permission for development at Sprucefield Park. The applicants have jointly objected to the planning application, which if granted would permit the construction of around 50,000 square metres of additional retail space and associated works. Sprucefield has agreed with John Lewis Partnership that John Lewis would be the anchor store in the proposed development. The proposed development has been the subject of a complex history of litigation and controversy.

[2] On receipt of the planning application the proposed respondent designated the planning application as a major planning application pursuant to Article 31 of the 1991 applying order. The Minister subsequently caused a public local inquiry to be held by the Planning Appeals Commission into the planning application. The Commission will in due course conduct the inquiry which was due to start today but has been postponed in consequence of the present proceedings. The ultimate decision-maker would normally be the Minister following consideration of the report of the Commission.

[3] During the course of a pre-inquiry meeting held at the Commission on 8 September in anticipation of the forthcoming hearing scheduled to commence on 5 October the Department decided that no further environmental information was required. That decision is impugned in the

applicants' application. The applicants had submitted to the Department on 29 July 2010 a report prepared by Corvus Consulting Ecology the thrust of which was that Sprucefield had failed to properly assess the impact of the proposal on protected species namely badgers, bats and newts. The applicants argued that the alleged inadequacy in the Sprucefield environmental statement in relation to the impact of the development on those species resulted in the environmental statement being no such thing in law. The logic of the applicants' case is that in the absence of a proper environmental statement and proper information there is no valid planning application and they argue accordingly that the inquiry would have no jurisdiction to conduct the inquiry which pre-supposed the existence of a planning application of a proper environmental statement.

[4] Shortly before the commencement of the leave application the Minister, presumably at the invitation of the BBC, was asked to make comments on the judicial review proceedings. In the course of that interview the Minister made a number of comments which the applicants say point to apparent bias and predetermination. Before referring to some of these comments it is necessary to point out that there is an important principle in play here. This principle is succinctly stated in Halsbury's Laws Volume 9 paragraph 26:

> "Comment on pending legal proceedings which purports to pre-judge the issues which are to be tried by the court is intrinsically objectionable as being an abuse of the proper function of the court and it seems it may be punished or restrained as contempt irrespective of the effect or likely effect on the particular proceedings."

The position is well put by Lord Reid in The Attorney General v Times Newspapers [1973] 3 All ER at page 64 and I quote:

> "There has long been and there still is in this country a strong and generally held feeling that trial by media should be prevented. I find for example in the report of Lord Salmon's Committee dealing with the law of contempt with regard to tribunals of inquiry a reference to the horror on such a thing. What I think is regarded as most objectionable is that a newspaper or television programme should seek to persuade the public by discussing the issues in evidence in the case before the court whether civil or criminal that one side is right and the other side wrong. If we were to ask the ordinary man or even a lawyer in his leisure moments why he has that feeling I suspect the first reply would be - well, look at what happens in some

> countries where it is permitted. As in so many other matters strong feelings are based on one's general experience rather than on specific reasons and it often requires an effort to marshal one's reasons but public policy is generally the result of strong feelings commonly held rather than a cold argument……..
>
> There is ample authority for the proposition that issues must not be pre-judged in a manner likely to affect the mind of those who may later be witnesses or jurors. But very little has been said about the wider proposition that trial by newspapers is intrinsically objectionable. That may be because if one can find more limited and familiar grounds adequate for the decision of a case it is rash to venture on uncharted seas. "

He goes on:

> "I think that anything in the nature of pre-judgment of a case or of specific issues in it is objectionable not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible mass media will do their best to be fair but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth disrespect for the processes of the law could follow and, if the mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of press would suffer, and I think that the law would be clearer and easier to apply in practice if it were made a general rule that it is not permissible to prejudge issues in pending cases."

[5] Interjections of the kind that occurred here are particularly objectionable when they come from one of the parties. They are even more reprehensible when they come not merely from a party but from the very person who is charged with the public law function of ultimately deciding fairly, dispassionately and objectively the very matter which must be decided. I make these as self-evident points which must be apparent to anyone with a proper sense of fairness and propriety, even if he is not a lawyer.

[6] It is necessary to refer briefly to some of the things said by the Minister during the programme. Referring to the applicants he said they are using technicalities of European Directives to try and stall a legitimate process taking place. What these individuals are doing is blocking that process taking place and as a consequence of that they are stopping a whole series of public inquiries and planning appeals being heard. He then goes on to say that in England if one commercial interest took a judicial review against a planning decision on one of these issues it would be dismissed because it would be seen for what it is. It is protectionism and if there is one commercial interest using the courts as a guardian against another commercial interest "I think it is an intolerable situation and will move to amend legislation if this continues to be the case whereby these businesses are simply using the courts to stop another business actually moving ahead with the normal planning process."

He then goes on:

> "If the Friends of the Earth or some other organisation were raising issues about newts and badgers then one might think that is a reasonable case which could be heard. But whenever another business is using it it is quite clear they are using these environmental issues for commercial motives and I don't think that either the courts or the Planning Appeals Commission nor indeed the Department of Environment should be giving considerable weight to those objections. We will certainly assess all of it using the experts within NIEA relating to badgers."

He then goes on to refer to the NIEA assessment and goes on to say:

> "It is purely a delaying exercise but as a consequence of it thousands of jobs potentially are being lost in Northern Ireland. Tens of millions of pounds of investment is being lost to Northern Ireland. So I would encourage some of them who have actually built on bogs themselves and who didn't appear to have an interest in newts on that occasion but would appear to be interested where there is a few puddles had formed that there might be a potential for a newt population to exist there so let us investigate this further it is a purely delaying exercise (sic)."

And then he goes on to state:

> "That very often the taxpayer is paying for it. So all this delaying tactic and NIEA have to carry out more and more assessment and indeed if the applicant wins a judicial review we have to pay the barristers' fees

> and I can assure you those barristers' fees are huge. Ultimately the NI public is losing out to commercial invested interests and I would encourage the courts to recognise that they are here to act in the interest of public and in these instances vested commercial interest are using this against another commercial interest and as a consequence public interest is being denied."

Stephen Nolan then interjected:

> "It is outrageous is it not for you as a Government Minister to be trying to influence a court's decision. Why are you encouraging the court?"
>
> Answer from the Minister – "Why would I not. I am out here."

Nolan then carries on:

> "Because you are supposed to be representing as a Government Minister who is supposed to be representing businessmen on all sides. There are people that are going through due process to ask a judicial review process to decide on the merits of the case and as a Government Minister you are trying to influence the court."

The Minister said:

> "Yes and what is outrageous in my opinion is that courts are allowing applications for judicial review to be heard whenever it is one commercial interest against another commercial interest but it isn't actually dealing with issues relating to those commercial interests. It is dealing with issues which they have no particular interest in. It would not be the case in the rest of the United Kingdom. It appears only to be in Northern Ireland that this is case. I want to see us represented on a level playing field with the rest of the UK and indeed we will take action to ensure that it will be the case if the courts continue to grant judicial reviews at the drop of a hat."

He then goes on:

> "What I am not prepared to tolerate is that some people engage in protectionism and as a consequence the thousands of people in the midst of recession

> aren't getting job opportunities. Millions of pounds of investment amidst the recession have been driven out of Northern Ireland. I would love the companies who are engaged in this to come on and debate the issue with me and tell me what their interest is in newts and badgers and let them make clear why they are stopping and preventing their customers potentially getting another job."

And then he goes on to say:

> "I am going to move ahead with changing things in any event because the actions they have engaged in are despicable and disgraceful and I believe are intolerable."

And then he goes on to say that he had spoken to representatives of the applicant companies and then he said:

> "I am a democrat and think that the democratic system should be allowed to make decisions. We would have Government operated by wit and commonsense and following due process instead of the Government being operated by writ where the courts are dictating all of the decisions. I think that the two areas are both very important areas and important pillars of society and the less interference that I do in courts the better and the less interference the courts have in the decision-making process of Government the better."

And Nolan then says:

> "So in other words we are getting close to a stage here where if a citizen wants to challenge a Government Minister the Government Minister will change the law so that he can't."

To which the Minister said:

> "I think that we are a wholly different situation where people have abused the process over and over again to line their own pockets against the wider public interest."

[7] Following that broadcast the applicants have sought to amend their Order 53 statement to include a case of apparent bias and pre-determination. Mr Martin QC on behalf of the Department following the reading of a Ministerial statement submitted that leave to amend should not be granted

and he argued that the Ministerial statement indicated that the Minister is seeking advice on the options available to him to disengage from any decision-making role in relation to the specific planning application. Mr Martin also made clear that the Department did not now oppose the granting of leave to apply for judicial review in respect of the matters raised in the original Order 53 statement before amendment. This latter submission concedes the arguability of the issues raised in the original Order 53 statement. The question is whether the applicant should be allowed to amend the Order 53 statement and if so whether there is an arguable case in relation to the new added grounds of challenge in relation to apparent bias and predetermination.

[8] The Ministerial statement and the Ministerial comment in the BBC programme do not sit easily together. The ex tempore comments made by the Minister on the programme do not on the face of them appear to reflect the distinct roles of the court and the Department. See for example his reference to the courts dictating on decisions. This does not reflect the legal position. Courts decide applications in accordance with the law. They do not decide planning policy and in relation to the review of planning decisions the courts up to the level of the House of Lords and the Supreme Court have made it abundantly clear the courts do not act as appellate courts in relation to planning decisions. They are concerned with questions of the legality, rationality and procedural fairness of planning decisions. Nor do they, in the words of the Minister, "interfere" with the decision-making process. The courts exercise a supervisory jurisdiction. What the Ministerial statement does not do is to recognise that the Minister's comments should not have been made at all while the litigation was pending. The Minister in his statement has failed to recognise that what happened should not have happened. Nor does the Minister say that he will not be involved hereafter since he is taking advice on the options. It would make no sense to refuse leave to amend the Order 53 application since it is inevitable that if the court were to do so it would simply result in a fresh application being made for judicial review and then subsequent consolidation with the matter in respect of which there is now no opposition to leave being granted.

[9] The Minister's comments in the programme self-evidently lay the basis for the applicants' argument that there is an arguable case of apparent bias and pre-determination. They lay the basis for the applicants' argument that there is an arguable case that the Minister has disqualified himself from making any further decisions in relation to this planning application. They lay the basis for there being an arguable case that the decisions which the Minister has made up to this point in this planning application are tainted by apparent bias and predetermination. Accordingly the court must grant leave for the application in this instance. The consequence of all this is that the inquiry will not now proceed until this matter is resolved. The legitimate rights of the planning applicant to have its application properly processed in a timely and fair manner have been frustrated. Those who have opposed the

planning application (as they were legitimately entitled to do) have been held up to vilification by the Minister as have their legal representatives. The whole situation can only be described as lamentable.

[9] The judicial review, as Miss Lieven QC has submitted, should be heard at the earliest possible opportunity so as to bring this matter to the point where the planning inquiry can get on with its business. I have asked the Lord Chief Justice to take steps to assign a particular judge charged with the conduct of this litigation and I have indicated there should be an expedited hearing in relation to it. I shall hear further submissions in relation to programming. I will not be the judge in relation to the substantive application nor will I be a judge in connection with any possible committal proceedings that may flow from the comments made by the Minister. Nor will I be involved in any appeal that might arise from either the judicial review or the contempt proceedings if there are any.

[10] The gravity of what transpired on Friday morning should not be underestimated. This is a case which should be considered by the Attorney General having regard to his public law duty of protecting the rights of parties to litigate in a fair and dispassionate atmosphere of objectivity. The BBC invited the Minister to comment on pending litigation. The BBC should not have done so and the Minister should not have taken the opportunity to do so. The role of each of those parties should be considered by the Attorney General.