THE HIGH COURT

[2012 No. 305 MCA]

IN THE MATTER OF AN INTENDED CHALLENGE TO A DECISION OF THE ENVIRONMENTAL PROTECTION AGENCY DATED THE 25TH JULY 2012

BETWEEN

NO2GM LTD.

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

AND

TEAGASC

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 28th day of August, 2012.

1. On the 25th July, 2012 the Environment Protection Agency (EPA) made a decision in the exercise of the powers conferred on it by the Genetically Modified Organisms (Deliberate Release) Regulations 2003 (S.I. No. 500 of 2003) granted a consent to Teagasc, Oak Park, County Carlow to carry out the deliberate release of certain genetically modified potato lines subject to certain conditions. The applicant is a limited company which seeks to challenge the validity of this order, albeit that no proceedings have yet been commenced by it.

2. In this application the company was represented by Mr. Percy Podger, who - as he freely admitted to me - is neither a solicitor or counsel. As a concession and a courtesy to the applicant, I permitted Mr. Podger to be heard, but I express no view as to whether he was lawfully entitled to represent the company in this manner, whether by virtue of being a *McKenzie* friend or otherwise. Indeed, it would seem that from the decision of the Supreme Court in *Battle v. Irish Art Promotions Ltd*. [1968] I.R. 252 that a limited company cannot be represented in this fashion and that in "seeking incorporation [the subscribers to the company] thereby lose the right of audience which they would have as individuals": see *per* ó Dálaigh C.J., [1968] I.R. 252, 254.

3. It must furthermore be an open question as to whether a limited company would have standing to challenge such a decision of the Agency, at least in the absence of evidence that its commercial interests had been adversely affected. Other than noting this issue it is, perhaps, unnecessary to express any view on it.

4. This judgment otherwise follows the same format and style as the lead judgment delivered in the application brought by Thomas O'Connor [2012, 295MCA].

5. One immediate complication for the company is that s. 87(10) of the Environmental Protection Agency Act 1992 (as inserted by s. 15 of the Protection of the Environment Act 2003) provides that:

> "A person shall not by any application for judicial review or in any other legal proceedings whatsoever question the validity of a decision of the Agency to grant or refuse a licence or revised licence (including a decision of it to grant or not to grant such a licence on foot of a review conducted by it of its own volition) unless the proceedings are instituted within the period of 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made."

6. It would appear therefore that any such legal proceedings would have to be commenced by 18th September, 2012 if the eight week period as defined is to be complied with. I might add that this Court has no jurisdiction to stay the operation of that eight week period contrary to what was urged on behalf of the company. In other words, any person wishing to challenge the decision of the Agency must do so within the eight weeks and this Court has no jurisdiction or power to suspend or extend that time period.

7. This is the general background to the present application which, to say the least, is somewhat unusual. The gist of the application is that this Court should declare on an *ex ante* and *ex parte* basis that the company is entitled to have what is described as a not prohibitively expensive cost order. The background to this application lies in Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 ("the Aarhus Convention"). This is a United Nations Convention which Ireland ratified on the 20th June, 2012.

8. Article 9(4) of the Aarhus Convention requires that the procedures for challenging the validity of certain administrative decisions affecting the environment:

> "shall provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely and not prohibitively expensive."

9. Article 9(2) stipulates that members of the public shall have the right to challenge "the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6." Article 6 provides that each party to the Convention:

> "(a) shall apply the provisions of this article with respect to decision on whether to permit proposed activities listed in annex 1;
>
> (b) shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities

not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions."

10. I should just observe at this point that it would not appear that the grant of a licence for the release of genetically modified plants is directly within the scope of Annex 1, a point to which I shall return.

11. Mr. Podger appeared to think that an act of ratification was sufficient *in itself* to make the Aarhus Convention part of Irish domestic law. This, however, is not the case for two reasons. First, Article 20(3) of the Convention provides that so far as each State which subsequently ratifies the Convention:

> ". . . shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession."

12. This means, therefore, that the Convention will only enter into force so far as Ireland's international law obligations are concerned on 17th October 2012.

13. Second, the Oireachtas has not (yet) elected to make the Convention part of the domestic law of the State in the manner required by Article 29.6 of the Constitution.

14. It follows, therefore, that insofar as the Convention has binding force as part of the domestic law of this State it is only by virtue of the force of and within the proper scope of application of European Union law. While the Union ratified the Convention in February 2005, the preparatory work for the ultimate transposition of the principles of the Convention are found in Directive 2003/35/EC: see recitals 5 to 10 of that Directive. This is further reflected in the recitals 18 to 22 of Directive 2011/92/EU ("the 2011 Directive"), which is the consolidated version of the Environmental Impact Assessment Directive. Article 11(1) provides that Member States shall provide for access:

> "to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."

15. Article 11(4) requires that any such procedure "shall be fair, equitable, timely and not prohibitively expensive."

16. Similar requirements obtain in the case of the consolidated version of the Integrated Pollution Prevention Control Directive, Directive 2008/1/EC ("the 2008 Directive"). Recital 26 refers to the ratification of the Aarhus Convention by the Union and Article 16 is in exactly the same terms as Article 11(1) of the 201 Directive.

17. Some consideration of the meaning of the phrase "not prohibitively expensive" was given by the Court of Justice in its judgment in Case C-427/07 *Commission v. Ireland* [2009] E.C.R. I-6277 in a judgment which concerned the earlier (pre-consolidation) versions of both the 2008 Directive and the 2011 Directive. Here the Court of Justice observed (at para. 92) that:

> "As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement."

18. This judgment confirms that the making of a costs order in environmental cases is not in itself precluded by these provisions, provided that the costs are not prohibitive. This, of course, rather begs the question of what is meant by the phrase "not prohibitively expensive" and how the application of that phrase is to be judicially evaluated. Some guidance may well be given on this question by the Court of Justice following the reference pursuant to Article 267 TFEU on this very question by the UK Supreme Court in Case C-260/11 R. *(Edwards) v. Environmental Agency* [2011] OJ C226/16. In his judgment for that Court making the order for reference ([2010] UKSC 57, [2011] 1 W.L.R. 79), Lord Hope examined the various possible meanings of that phrase, although he suggested that the question of prohibitive cost should be measured by reference to the standards and monetary values of the average members of the public.

19. Pending a final decision by the Court of Justice, I would rather incline to that view. It would not take much persuasion to convince me that the traditional taxed costs associated with a complex challenge of this kind would be likely to be measured at a level which would deter most members of the public from commencing litigation of this kind. It might accordingly be thought that such a level of costs might be said to be prohibitively expensive in that sense.

20. Nevertheless, enough has been said to demonstrate that the meaning of the phrase "not prohibitively expensive" is at present uncertain and requires further clarification from the Court of Justice. Moreover, is not even clear that the requirements of Article 9(4) of the Aarhus Convention (or, more precisely, the corresponding obligations contained in both the 2008 Directive and the 2011 Directive) apply to a challenge to the validity of an administrative decision licensing the release of genetically modified organisms for the purposes of field tests. A further issue is whether the Directives require that the level of costs must be determined *ex ante* and capped at some upper limit. All of these matters are at present uncertain.

21. I appreciate that the applicant maintains that it must secure this assurance regarding costs on an *ex ante* basis before even commencing proceedings against the Agency, as otherwise it could not take the financial risks associated with the commencement of litigation. Enough has been said, however, to show that the applicant's entitlement to the relief sought and the scope of any such order is uncertain. Even assuming that I had a jurisdiction to make such an order on an *ex ante* and *ex parte* basis, it would be grossly unfair to make a final order of this kind without having given the Agency and any other notice parties the opportunity to have been heard on the matter.

22. Fair procedures and the obligation to hear both sides before any final order affecting the parties can properly be made is fundamental to the judicial mandate of administering justice in the manner envisaged by Article 34.1 of the Constitution: see, *e.g., DK v. Crowley* [2002] IESC 66, [2002] 2 I.R. 712. This principle is equally central to the legal order established by both Article 6 of the European Convention of Human Rights and that of the European Union. After all, Article 41(2) of the EU Charter of Fundamental Rights provides that the right to good administration means that every person has the right "to be heard, before any individual measure which would affect him or her adversely is taken."

23. Since the making of a final order of the kind sought without notice to other parties actually or potentially affected by such order would infringe fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the EU Charter of the Fundamental Rights, I consider that I have no jurisdiction to make such an order. For those reasons, I must decline to grant the relief sought.