THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 236

Record No. 2017/119

Birmingham P.
Irvine J.
Hogan J.

BETWEEN/

EXPRESS BUS LIMITED

PLAINTIFF/APPELLANT

- AND -

NATIONAL TRANSPORT AUTHORITY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 18th day of July 2018

1. Can a plaintiff maintain a claim for damages for breach of statutory duty and a claim for *Francovich* damages (Joined Cases C-6/90 and C-9/90 *Francovich v. Italian Republic* [1991] E.C.R. I-5357) in respect of an alleged breach of EU law in plenary proceedings without having first challenged the validity of the administrative decision which is said to have given rise to the action for damages in the first place? Or, alternatively, do the provisions of Ord. 84 of the Rules of the Superior Courts (including the three month time limit requirements) apply by analogy to such plenary proceedings? These, in essence, are the issues which are presented on this appeal from the decision of the High Court (O'Connor J.) delivered *ex tempore* on the 7th March 2017. These issues arise in the following way.

The background facts
2. The plaintiff, Express Bus Ltd., is a private company carrying out the business of a private bus operator. The National Transport Authority ("the Authority") is a statutory body charged with the provision of public bus services in the Dublin area in accordance with the provisions of Part 3 of the Dublin Transport Authority Act 2008 ("the 2008 Act"). The provisions of Council Regulation (EC) No. 1370/2007 require, moreover, a competitive tendering process as a precursor to the award of such a licence.

3. In December 2009 the Authority entered into a contract with Dublin Bus for the provision of public bus services, including services to Damastown, Dublin 15. On the 10th June 2013 the Authority granted a licence to Express Bus to carry out a public bus passenger service between O'Connell Street and Damastown. The significance of Damastown as a destination lies in the fact that the major multinational company, IBM, has a large facility located there.

4. At the time Express Bus had two morning and two evening services which operated from Dublin City Centre to Damastown. At the end of August 2014 Dublin Bus applied to the Authority to make alterations in respect of its existing 38 and 38b services to Damastown. These alterations were approved by decision dated the 5th September 2014 and these alterations became operational on the 6th October 2014.

5. In February 2015 a representative of Express Bus met with the Authority's Appeals Officer in order to express concern regarding the effect on its business of the alterations which had been made by Dublin Bus to the 38 and 38b services. Nothing further occurred after that meeting until June 2015 when the Authority received a letter from the plaintiff's solicitor complaining about these changes. (It appears that an earlier letter may have been sent on behalf of Express Bus on the 1st May 2015, but the Authority maintains that it never received it. Nothing turns on this because I will, in any event, assume in Express Bus's favour that such a letter was indeed sent.) The Authority replied by letter dated the 6th July 2015 explaining the process which had been followed in approving the alterations to the Dublin Bus service.

6. The present proceedings were commenced on the 9th October 2015, but they were not immediately served on the Authority. A formal letter of complaint followed and the proceedings were formally served on the 10th December 2015. A statement of claim was then delivered on the 17th May 2016. The Authority then issued a motion seeking to have the proceedings dismissed pursuant to the court's inherent jurisdiction. It contended that the present proceedings amounted to a collateral attack on the validity of the Authority's decision of September 2014, given that no proceedings to challenge that decision had been brought within the time limits specified by Ord. 84 and neither had any application to extend time for this purpose been made by Express Bus. It is this motion which has given rise to the decision of the High Court and to the present appeal.

The decision of the High Court
7. In a detailed and careful ex tempore judgment O'Connor J. struck out the proceedings pursuant to the inherent jurisdiction of the High Court on the ground that: "the said claim is governed by Order 84 of the Rules of the Superior Courts and no application for leave to seek judicial review or an extension of time in the prescribed format has been made to date." Express Bus have now appealed to this Court against this decision.

Whether the present proceedings amount to a collateral challenge to the validity of the Authority's decision
8. The essence of the plaintiff's case on this appeal is that it was, and is, entitled to pursue this claim for damages for breach of statutory duty and for damages for breach of EU law within the six year period prescribed by s. 11 of the Statute of Limitations 1957. If the claim for damages were a purely private law action arising from a nominate tort (other than a claim for personal injuries), the plaintiff would, of course, be fully within its rights to do this. But the matter is rather more complicated than that.

9. The plaintiff's claim in these proceedings amounts to a contention that the Authority violated the procurement rules in relation to public transport as contained in Regulation No. 1370/2007 by permitting an amendment to the bus timetables in this manner without inviting a fresh tender process. The plaintiff could not, however, succeed in respect of the *Francovich* damages claim without also

demonstrating that the breach of EU law which it thus alleged was either "grave and manifest" or "inexcusable": see, *e.g.*, the comments of O'Malley J. in *Ogieriakhi v. Minister for Justice* [2017] IESC 52, [2017] 2 I.L.R.M. 340, 366. It is plain that the plaintiff could not hope to do this without also simultaneously challenging what in substance was the validity of the administrative decision of the Authority of September 2014, even if no formal order of *certiorari* quashing that decision had been sought. It can thus be said in the present case that any *Francovich* action for damages such as is now advanced by the plaintiff in these proceedings would amount in substance to a collateral challenge in respect of the validity of that decision of the Authority.

10. As the Supreme Court stressed in its decision in *Ogieriakhi*, the *Francovich* action is a free standing claim for damages for breach of EU law which is itself governed entirely by EU law. In *Ogieriakhi* the plaintiff had sued for *Francovich* damages in respect of a failure by the State to apply the Citizenship Directive (Directive 2004/38/EC) in a correct fashion, which failure had resulted in the plaintiff being removed from his position as an employee of An Post. The Supreme Court held that the plaintiff was not entitled to recover damages for breach of constitutional rights where his *Francovich* claim had also failed on the ground that the State's failure to appreciate the import of the Directive had not been shown to be a grave or manifest error on its part.

11. As O'Malley J. put the matter out in her judgment ([2017] 2 I.L.R.M. 340, 368):

> "What cannot be done is to find a free standing claim to damages under national law where the *Francovich* criteria are not satisfied, if the wrong done is a wrong under EU law. The latter is a separate legal order with autonomous concepts that must be applied uniformly throughout the Union….[EU law] was the sole source of the rights claimed by the appellant. It does not give rise to separate rights under domestic law."

12. The same is broadly true here. Even if, contrary to what is suggested in *Ogieriakhi*, the plaintiff was entitled to maintain a damages action which was governed by purely domestic law (namely, an action for breach of statutory duty) in respect of this alleged breach of the procurement rules, that claim could not be maintained without also directly or indirectly impeaching the validity of the Authority's decision. One way or another, therefore, the plaintiff's claim amounts in substance to a collateral challenge to the validity of the Authority's decision because to succeed in its damages claim the plaintiff would also have, at a minimum, to challenge the validity of that decision, even if only indirectly.

13. In these circumstances, it is clear that the time limits prescribed by Ord. 84 apply, again, if only by analogy: see the comments of Clarke J. in *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 147. In that case the Minister for Communications had made a pipeline consent order pursuant to s. 40 of the Gas Act 1976 and a compulsory acquisition order pursuant to s. 32 of the same Act in respect of plots of land owned by some of the defendants. When the plaintiff company instituted proceedings claiming that the defendants had obstructed its rights of way over the lands in question, the defendants counterclaimed and pleaded that the relevant administrative decisions which had conferred the rights of way were themselves invalid.

14. Clarke J. described these claims as ([2013] 1 I.R. 247, 265): "a challenge to a public law measure designed to underlie a claim for damages rather than a defence to proceedings in which reliance is placed on the measure to maintain a claim against the challenger." He then went on to add ([2013] 1 I.R. 247, 266) that a "party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings."

15. The same can just as readily be said of the present proceedings. The claim in these proceedings just as equally amounts to a challenge – whether directly or collaterally – to a public law measure (namely, the decision of the Authority to sanction the change in the bus timetable on the part of Dublin Bus) which is designed to underlie a claim for damages.

16. It is accordingly clear from the decision in *McGrath* that the requirements of Ord. 84 apply by analogy to the present case. Accordingly, the plaintiff cannot circumvent the time limits specified in Ord. 84 by simply issuing plenary proceedings and claiming that the six year time limit contained in the 1957 Act applies without qualification. This is rather a case where, because the proceedings are also subject to the three month Ord. 84 time limits, they are also by any measure well out of time. Even if it be said that time only began to run for the purposes of Ord. 84 from the date Express Bus learnt of the decision in question, it is clear that it knew of this decision by the date of its meeting with the Authority's representatives in February 2015 at the very latest. (One may also reasonably assume that it learnt through its own observations of any material changes in the timetable of its rival ever before that meeting took place.) It is true that Ord. 84, r. 21 provides for the grant of an extension of time in appropriate cases, but no such has been brought by this plaintiff.

17. One might further add that if these proceedings amount in substance to a challenge to the validity of the decision of the Authority – as I consider that they do - then elementary fairness would require that Dublin Bus should also be a party since it would obviously also be affected by the outcome of the present proceedings. This obligation to put Dublin Bus on notice of what in substance amounts to a challenge to the validity of the Authority's decision sanctioning the bus timetable change cannot by circumvented by issuing plenary proceedings in which the Authority alone are defendant to a claim for *Francovich* damages.

Conclusions

18. In summary, therefore, as these plenary proceedings amount in substance to a collateral challenge to the validity of the decision of September 2014, it is clear from the decision of the Supreme Court in *McGrath* that the provisions of Ord. 84 apply by analogy to any such proceedings.

19. Since the plaintiff is by any measure well out of time to challenge the validity of that decision and as no application for an extension of time pursuant to Ord. 84 has been advanced, I would accordingly hold that the present proceedings are plainly time-barred. It follows, therefore, that as the proceedings have accordingly no reasonable prospect of success, they should be struck out *in limine* on the ground that they are destined to fail.