

## THE HIGH COURT

[2017 No. 374 C.A.]

## IN THE MATTER OF SECTION 7(1) OF THE OMBUDSMAN ACT 1980

BETWEEN

THE OMBUDSMAN

APPLICANT/APPELLANT

AND

PROPERTY SERVICES APPEALS BOARD

RESPONDENT

**JUDGMENT of Mr. Justice Binchy delivered on the 9th day of May, 2019**

1. This judgment is a decision on an appeal brought by the applicant/appellant against a decision of the Circuit Court (His Honour Judge O'Sullivan) of 19th December, 2017, whereby he refused an application brought by the applicant pursuant to s. 7(1) of the Ombudsman Act 1980 (as amended) (hereinafter the "Act of 1980"). By that application, the applicant sought an order from the Circuit Court requiring the respondent to comply with the terms of a notice served by the applicant on the respondent dated 9th August, 2016 (the "Notice"). The Notice required the delivery of certain documentation by the respondent to the applicant.

2. The facts of the matter are not in dispute, and the net issue of law to be decided concerns the extent of the jurisdiction of the applicant to undertake an investigation of the exercise by the respondent of certain of its statutory functions pursuant to s. 74 and Schedule 5 of the Property Services (Regulation) Act 2011 (the "Act of 2011"). Whether or not the respondent may be required to comply with the terms of the Notice, depends upon whether or not the applicant has the jurisdiction to undertake the investigation concerned.

**Factual Background**

3. In 2013, a Mr. John Forrest applied to the Property Services Regulation Authority (the "PSRA") for a licence to provide property management services. This application was refused, and Mr. Forrest wrote to the PSRA notifying it of his intention to appeal that decision.

4. Initially, the respondent took the view that there was no appeal from the decision of the PSRA to the respondent in relation to the refusal of the PSRA to grant a Mr. Forrest a licence. However, following a complaint by Mr. Forrest to the applicant in this regard, the respondent accepted that it could conduct an appeal from the refusal of the PSRA of Mr. Forrest's application.

5. Mr. Forrest then sought information about the procedures in relation to the appeal, and also requested an oral hearing for the purposes of the appeal. However, the respondent did not reply to this correspondence and nor did it invite Mr. Forrest to make any submissions to it in relation to his appeal. On 19th May, 2014, the respondent upheld the decision of the PSRA.

6. Mr. Forrest then made a further complaint to the applicant in relation to the conduct of the appeal by the respondent. In the course of dealing with this complaint, the applicant, on 15th June, 2015, sought a report from the respondent setting out the reasons for its dismissal of Mr. Forrest's complaint, and also requesting the policies and procedures of the respondent as regards requests for oral hearings. The respondent refused to provide the applicant with the information sought on the basis that the appeal of Mr. Forrest to the respondent falls outside the scope of the applicant's jurisdiction in relation to the respondent. There followed a considerable volume of correspondence between the parties, ultimately resulting in the applicant serving the Notice, pursuant to s. 7(1) of the Act of 1980, requiring the respondent to provide the applicant with certain documentation. The respondent declined to comply with the Notice, as a result of which the applicant sought an order from the Circuit Court pursuant to s. 7(1)(d) of the Act of 1980, requiring the respondent to comply with the same.

**Statutory Powers of Respondent**

7. Before considering the powers of the applicant, it is appropriate to consider the statutory powers of the respondent. The respondent was established, pursuant to s. 74(1) of the Act of 2011. The functions of the respondent are set out in s. 13 of the Fifth Schedule to the Act of 2011, in the following manner:-

*"Decisions of Authority subject to appeal"*

13. A person aggrieved by a decision of the Authority—

- (a) refusing under section 31 (3)(g), (h) or (i) to issue a licence,
- (b) declining under section 63 (2) to cause to be carried out an investigation of the matter the subject of a complaint,
- (c) imposing under section 68 (4) (a) a minor sanction,
- (d) dismissing under section 68 (4) (c) a complaint, or
- (e) refusing to make a grant or relating to the amount of the grant made,

may, within 30 days from the date of receipt of notice of the decision, appeal to the Appeal Board against the decision by serving on the Appeal Board a notice of appeal which complies with paragraph 14(1)."

8. The appeal of Mr. Forrest to the respondent was concerned with a decision of the PSRA made pursuant to s. 13(a) of Schedule 5 of the Act of 2011, whereby the PSRA refused to grant to Mr. Forrest, a licence to provide property services, pursuant to s. 31 of the Act of 2011. It is the procedures followed by the respondent in connection with Mr. Forrest's application that the respondent wishes to investigate, and the documentation sought by the applicant from the respondent pursuant to s. 7(1)(d) of the Act of 1980 relates to that refusal.

## **Powers of the Applicant under the Act of 1980**

9. Section 4(2) of the Act of 1980 sets out the actions that come within the remit of the applicant, as follows:-

"Subject to this Act, the Ombudsman may investigate any action taken by or on behalf of a reviewable agency in the performance of administrative functions where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman—

(a) that the action has or may have adversely affected an eligible person, and

(b) that the action was or may have been—

(i) taken without proper authority,

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) based on an undesirable administrative practice, or

(vii) a failure to comply with s. 4A or otherwise contrary to fair or sound administration,

(viii) otherwise contrary to fair or sound administration."

10. Section 4(4) of the Act of 1980 provides:-

"The Ombudsman shall not investigate an action taken by or on behalf of an exempt agency, or an action taken by or on behalf of a reviewable agency excluded from review under this Act."

"Action" is defined in s. 1 of the Act of 1980 as including a decision, failure to act and omission on the part of the party concerned.

11. "Reviewable agencies" for the purposes of the Act of 1980 are set out in the First Schedule thereto. Part II of the First Schedule sets out a list of bodies which are subject only to limited review by the applicant. So far as is relevant to these proceedings, Part II of the First Schedule of the Act of 1980 provides:-

"(q) the Property Services Appeal Board [is excluded from review by the applicant], except as it relates to an action taken in the performance of administrative functions relating to the establishment and maintenance of a register of licensed property service providers under the Property Services (Regulation) Act 2011 and to the specification of qualification and other requirements for property service providers under that Act."

12. The determination of this appeal revolves around the interpretation of para. (q) of Part II of the First Schedule to the Act of 1980 (hereafter "para. (q)") which was inserted by s. 16 and Part I of the Schedule to the Ombudsman (Amendment) Act 2012. It is the contention of the applicant that the decision of the respondent to dismiss the appeal of Mr. Forrest from the decision of the PSRA i.e. to affirm the refusal of the PSRA to grant Mr. Forrest a licence to provide property services, constitutes an action, on the part of the respondent, taken in the performance of administrative functions relating to the establishment and maintenance of a register of licenced property service providers under the Act of 2011. The respondent, while accepting that it is a reviewable agency by virtue of Part I of the First Schedule of the Act of 1980 argues that its functions in conducting the appeal of Mr. Forrest in this case are functions excluded from review by the applicant by reason of para. (q).

## **Decision of the Circuit Court**

13. The Circuit Court held in favour of the respondent on the grounds that the jurisdiction of the applicant to review the functions of the respondent was strictly confined to those functions set out in para. (q) i.e. the establishment and maintenance of a register of licences, and that this did not extend any further than what was clearly set out in that paragraph. It was the view of the Circuit Judge that if the Oireachtas had intended to confer upon the applicant the power to review any other administrative functions of the respondent, it would have done so in clear language.

## **Submissions**

14. It is submitted on behalf of the applicant that the grant and refusal of licences and the maintenance of the register are inextricably bound together. The sections of the Act dealing with each are contained in the same part of the Act of 2011. Licences issued pursuant to s. 30 of the Act of 2011, must bear the registration number assigned to the licensee for the purposes of the register (s. 31).

15. The applicant makes the point that under the Act of 2011, the respondent has no functions in relation to the establishment and maintenance of the register or the specification of qualification and other requirements for property service providers. However, the respondent does exercise an appellate function in relation to refusals on the part of the PSRA to issue a licence pursuant to s. 31(3) (g), (h) or (i) of the Act of 2011. Accordingly, it is submitted that in order to give meaning to the review function conferred upon the applicant by para. (q) it is as necessary to interpret the words "establishment and maintenance of a register" as including the decisions of the respondent on appeals from the PSRA concerning any refusals to issue a licence. Otherwise, it is submitted, the review function of the applicant makes no sense. In this regard, the applicant refers to the principle of statutory interpretation that no words of a statute are enacted without a reason. The applicant relies on the decision of *Cork County Council v. Whillock* [1993] 1 I.R. 231, wherein the Supreme Court (O'Flaherty J.) stated at p. 237:-

"... a construction which would leave without effect any part of the language of a statute will normally be rejected."

16. Reliance in this regard was also placed upon the decision of the Court (Lynch J.) in *Byrne v. Commissioner of Public Works in Ireland* [1994] 1 I.R. 91 wherein he cited with approval the following passage from Halsbury's *Laws of England* (4th Ed.) Vol. 44, para. 860:-

"Statutes must be so construed as to make them operative. If it is possible, the words of a statute must be construed so as to give them a sensible meaning. A statute must if possible be construed in the sense which makes it operative and does not defeat the manifest intentions of the legislature and nothing short of impossibility so to construe it should allow a Court to declare a statute unworkable. Thus where a statute has some meaning, even if it is obscure, or several meanings, even though there is little to choose between them, the Court must decide what meaning the statute is to bear rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty: however if the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning, it must be regarded as meaningless. Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of a draftsman unless such language is intractable."

17. It is further submitted that, insofar as para. (q) refers to "administrative functions", this refers to the manner in which decisions by the respondent are reached and the manner in which they are, or are not, implemented. So, therefore, the term "administrative functions" may also apply even where the decision maker is exercising a quasi-judicial function. Reliance was placed upon the authority of *R. v. Commissioner for Local Administration, ex parte Croydon London Borough Council and another* [1989] 1 ALL ER 1033.

18. It is submitted that the Circuit Judge erred firstly in interpreting para. (q) in such a manner as to render it, in effect, meaningless or redundant, and secondly, in his application of the terms "administration" and "maladministration".

19. In summary, the overall thrust of this submission made on behalf of the applicant is that the administrative functions of the respondent, in relation to the establishment and maintenance of a register of licenced property service providers, include the appellate functions of the respondent in relation to refusals on the part of the PSRA to issue a licence (to provide property services) to an applicant, and that such an interpretation of para. (q) is necessary in order to give it meaning and effect; and that the Court is bound by rules of statutory interpretation to so interpret para. (q) in order to give it meaning and effect.

### **Submission of Respondent**

20. The respondent submits that the language employed in para. (q) is deliberately restrictive. The respondent is asking the Court to interpret para. (q) in accordance with its literal meaning, but not to afford it no meaning at all, as asserted by the applicant. The Act of 1980 was amended in 2012 expressly to take account of the Act of 2011. Accordingly, it is clear that the applicant was very deliberately given a very limited role as regards the respondent.

21. The respondent agrees that it has no role or function in maintaining the register or in specifying qualifications or other requirements for property service providers. However, it is submitted on behalf of the respondent that the applicant is asking the Court to confer upon the applicant a role that is not conferred by the Act of 1980, and the respondent relies upon the express terms of s. 4(4) of the Act of 1980 which, the respondent contends, prohibits the applicant from conducting an investigation in relation to a refusal of a licence application, because that activity is excluded from review by Part II of the First Schedule of the Act of 1980 and para. (q).

### **Decision**

22. Part II of the First Schedule to the Act of 1980 expressly excludes the respondent from the jurisdiction of the applicant save in relation to the limited fields of activity described by para. (q). That much is very clear. The difficulty in this case arises from the fact that the respondent itself has no powers, functions or duties in relation to those matters that are described in para. (q), giving rise to a paradox, because obviously if the respondent has no powers or functions of the kind described in para. (q), then it is meaningless to confer upon the applicant powers of review in relation to functions which are not themselves conferred upon the respondent.

23. The applicant invites the Court to resolve this paradox by deeming the action of refusing a licence to be part and parcel of the maintenance of the register of licenced property service providers. If the Court does not do so, then para. (q) is deprived of any meaning, contrary to a central principle of statutory interpretation.

24. While it is a well-established principle of statutory interpretation that statutes should be construed so as to make them operative, this rule does not constitute a carte blanche so as to permit a court to attribute a meaning to a statutory provision that it plainly does not have. This is clear from the concluding part of the passage of Halsbury referred to above.

25. In this case, it must be borne in mind that, first and foremost, the activities of the respondent are excluded from the jurisdiction of the applicant, subject to what was clearly intended to be only a very limited exception. It seems very likely that some error has been made in relation to the description of that exception. Alternatively, an error has been made in relation to the scope of activities conferred upon the respondent by the Act of 2011, or perhaps the error lies elsewhere, but in any case it is not possible from the words of the statute to identify the error and interpret the statute in such a way as to give effect to the true intention of the Oireachtas, because that intention cannot be identified.

26. I cannot accept the argument on the part of the applicant that the establishment and maintenance of the register includes the refusal of licence applications. Apart from anything else, the fact is if a licence application is refused, it never gets to the point of being entered on the register. Moreover, the entry of the grant of a licence on the register is an exercise that is entirely independent of the process leading up to the grant of the same. Section 28 of the Act of 2011, creates the offences, *inter alia*, of providing a property service unless the person is the holder of a licence which is in force in respect of that property service. Once the person obtains a licence, that person has met his or her statutory obligation. The entry of the issue of that licence on the register thereafter is a matter for the PSRA, upon whom is imposed the statutory obligation of keeping the register and ensuring that it is accurate. There is no substantive connection between the two procedures, although the entry of a licence on the register is obviously a consequence of the issue of a licence. It is obviously possible, as was the case up to the Act of 2011, to have a system for the issue of licences without any register. It is also of some significance that in the Act of 2011 itself, the grant and refusal of licence applications and the establishment and maintenance of the register are clearly identified as separate functions, and so therefore, it really makes little sense to argue for the purposes of the interpretation of para. (q) that one must include the other.

27. For all of these reasons, I am of the opinion that it is not possible to interpret para. (q) in such a manner as to deem the functions of the respondent relating appeals from the PSRA in respect of decisions to refuse to grant a licence, as administrative functions relating to the establishment and maintenance of the register of licenced property service providers. While it is true that the effect of this decision may render para. (q) a nullity, it is nonetheless not possible to interpret para. (q) in the manner argued for on behalf of the applicant. To do so would be to go much further than mere statutory interpretation, and would amount to a trespass into the legislative domain. I would, therefore, uphold the decision of the learned Circuit Judge, albeit for a different reason. In light of this decision, it is unnecessary to consider the arguments as to whether or not the functions of the respondent under discussion

constitute administrative functions.