Neutral Citation [2016] IEHC 463

THE HIGH COURT

[2011 No. 895 JR]

BETWEEN

MICHAEL ROWAN

APPLICANT/APPELLANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

AND

TIMOTHY MULVIHILL

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham (ex tempore) delivered on the 28th day of July, 2016

1. The matter before the court sees the applicant/appellant seek a certificate pursuant to s. 50A(7) of the Planning and Development Act 2000, that a decision of mine of the 5th March, 2012, involves a point of law of exceptional public importance and that it is desirable that an appeal should be taken to the Court of Appeal.

2. The suggested formulation of the issue sought to be certified is as follows:-

> *"Does the question as to whether proceedings fall within the scope of ss. 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, ss. 3 and 4 (sic) fall to be determined on an objective basis or on a subjective basis by reference to the motivation of the party bringing the proceedings."*

3. The background to this request for a certificate is an unusual one and indeed it might fairly be said a lengthy and convoluted one. In February 2012, I delivered judgment in respect of judicial review proceedings that had been instituted by the applicant seeking to challenge the decision of the respondent to confirm the satisfactory re-alignment of a local road at Doolahig, Glenbeigh, Co. Kerry. I refused the reliefs sought and there was then an application for costs by the successful respondent and by the notice party. That application was resisted by the unsuccessful applicant. Essentially, the respondent and notice party contended that it was a case where costs should follow the event in the ordinary way. The applicant however contended that the appropriate order was that each party should bear its own costs and in that regard the applicant places reliance on the terms of the Environment (Miscellaneous Provisions) Act 2011. The respondent and notice party did not accept that this statutory provision had any application.

4. There was no application for a certificate for leave to appeal the decision which was that the ordinary rules applied and that there should be an order for costs in favour of the successful respondent and notice party. Neither was there any request for a certificate for leave to appeal the substantive decision on the merits of the application.

5. The applicant did however proceed or purported to proceed to appeal the costs issue to the Supreme Court.

6. There was a highly relevant development on the 24th March, 2014, when the Supreme Court in an ex tempore decision entitled *Brown v. Kerry County Council* delivered by Murray C.J. stipulated that a certificate for leave to appeal was essential before the Supreme Court could entertain an appeal against a decision in relation to costs in a case to which s. 50A(7) applied. Shortly thereafter the respondent, by letter drew the attention of the applicant to the decision in *Brown v. Kerry County Council.* The respondents invited the applicant to consent to the appeal being withdrawn and indicated that failing that happening a motion would be brought to strike out the appeal. The applicant's solicitors responded to this correspondence by indicating that the present case could be distinguished from that which prevailed in Brown because the proceedings there and the decision of the High Court there preceded the coming into the operation of the Act of 2011. There was no attempt at that stage, to bring the proceeding back before the High Court even on a belt and braces basis.

7. On the 23rd April, 2014, the respondent instituted a motion in the Supreme Court with a view to striking out the notice of appeal on the basis that the Supreme Court did not have jurisdiction to hear the appeal in a situation where the High Court had not certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court as required by s. 50A(7) of the Act of 2000.

8. The applicant responded to that motion by issuing a motion of its own seeking "a direction that the issue as to whether or not a certificate of leave in order to bring the within appeal is required from the learned trial judge be determined as a preliminary issue". The motions were heard by a five judge Supreme Court and judgment was delivered on the 18th December in which the Supreme Court held that it did not have jurisdiction to hear the appeal and proceeded to dismiss the appeal.

9. The applicant was not prepared to let matters rest there and has brought the matter back before this Court seeking a certificate at this stage. There has been some further skirmishing since the judgment of the Supreme Court was delivered primarily addressed to the costs of the proceedings in the Supreme Court, but I do not feel it necessary to refer to these in any detail.

10. Detailed written submissions have been prepared by the applicant and by the respondent on the issue of whether a certificate should issue at this stage and I have also heard oral argument on this point. The notice party has supported the position taken by the respondent. The submissions have addressed the statutory criteria that have to be met if a certificate is to issue, referring to cases such as *Glencré Teoranta v. Mayo County Council* [2006] IEHC 250 and *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC, the applicant as one would expect submits that the decision of March 2012 involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court and now to the Court of Appeal. The applicant is firm in submitting that both statutory criteria have been met.

11. Tellingly, the submissions on behalf of the respondent begin with the Latin maxim interest reipublicae ut sit finis litium. Moreover, the respondent with the support of the notice party contends that the ruling in relation to costs did not involve a point of law of exceptional public importance, but rather involved a determination that on the particular facts of the case the proceedings did not fall

within the scope of ss. 3 and 4 of the Act of 2011. Alternatively they submit that if there is a point of law involved it is not one that can be categorised as of significant still less exceptional public importance and furthermore it is not desirable in the public interest that an appeal should be brought to the Court of Appeal.

12. In my view the focus of attention at this stage given the unusual route that has been followed is on the question of whether it is in the public interest that an appeal should **now** be brought to the Court of Appeal. There is no specific time within which an application for a certificate must be brought. However, the whole thrust of the planning code requires that litigation in relation to planning decisions and related matters should be conducted expeditiously. In the course of argument I raised the question at what point a court becomes *functus*. What would the position be ordinarily if some four and a half years after a decision issued, a certificate was sought for the first time? It was accepted by counsel for the applicant that in such a situation the party moving so late in the day might well find itself in difficulties. I am sure that is so, but the question arises whether the position of a would be appellant, who has embarked on the wrong route is a better one when it comes to initiating a late appeal. It seems to me that there is one respect at least in which an appellant who has followed the wrong route, but wants to change is in a more favourable position than others, in that such an appellant can establish that there was an intention formed at an early and appropriate stage to appeal the issue. However, on the other side of the coin is the fact that the other side has already been vexed once with the issue and it is suggested should now be vexed again. It can sometimes be the case that focusing on the rights of access to the courts of one party does not always pay sufficient attention to the fact that vindicating this will normally as a consequence involve bringing parties to the courts and involving them in litigation when they have no desire to be there whatever.

13. If there is to be a further appeal the position of both the respondent and notice party will be worse and they will be more burdened than ought to be the case because they will be required to respond to and defend the same issue twice. To that extent the situation is clearly distinguishable from that which prevailed in *Waterville Fisheries v. Aquaculture Licences Appeals Board* and *Dunmanus Bay Mussels v. Aquaculture Licences Appeals Board* to which the applicant has drawn attention. Essentially in both those cases there were errors by the applicant when initiating the proceedings and the question was whether because of that error the applicant was to be prevented from litigating their concerns. However, the question of the respondents or notice parties having to meet the same case twice never arose.

14. I do not believe that the interests of justice and therefore the public interest would be served by issuing a certificate now which would permit a further appeal and thus the further prolongation of these proceedings. *Interest reipublicae ut sit finis litium* and for that reason I am not prepared to grant a certificate at this stage. I am fortified in my approach by the fact that I do not believe that in truth my decision of the 5th March, 2012, involves the point of law which it is sought to be certified. Rather it seems to me that my decision arose from a finding of fact that as a matter of reality and substance the proceedings were not designed to ensure compliance with a condition, because of concern that non compliance will result in damage to the environment in the sense of jeopardising the safety of people. That conclusion as to the facts was reached in a situation where the proceedings did not, in themselves, on their face purport to seek to secure compliance with the terms of the condition of a planning permission. Rather, as the judgment of March 2012, and the 17th February, 2012, made clear the proceedings were concerned with challenging the decision of Kerry County Council which concluded that re-alignment had taken place to its satisfaction. The applicant has drawn attention to and emphasised one sentence in my judgment of March 2012, where I said:-

> "They [the proceedings] cannot, in my view, be said to be proceedings instituted for the purpose of securing compliance but were issued to advance the applicant's private agenda to prevent a neighbouring landowner build a house."

15. However, that sentence should not be taken in isolation and must be seen in the context that I was concluding that the proceedings were not, either in form or as a matter of substance, designed to secure compliance with a condition lest non compliance result in damage to the environment. I had not intended to suggest that the issue was to be determined by the motivation of one of the parties. In any litigation different parties may act by reference to different and indeed mixed motives.

16. In all the circumstances of the case in my view it would be neither just nor proper to grant a certificate at this stage and so I must refuse the application.