Neutral Citation [2013] IEHC 214

THE HIGH COURT

[2012 No. 939 JR]

BETWEEN/

DUNMANUS BAY MUSSELS LIMITED

APPLICANT

AND

ACQUACULTURE LICENCES APPEALS BOARD

RESPONDENT

AND

THE DUNMANUS BAY MARINE ASSOCIATION, FRIENDS OF THE IRISH ENVIRONMENT, VICTOR MORGAN, LYNDA MORGAN, ROBERT PUTZ AND THE ASSOCIATION OF DUNMANUS BAY FISHERMEN

NOTICE PARTIES

JUDGMENT of Mr. Justice Hogan delivered on the 10th May, 2013

1. A statutory requirement that applicants applying for leave to apply for judicial review of certain types of specified administrative decisions must do so on notice to potential respondents and notice parties is one of the striking innovations with which the Oireachtas has experimented with in the last two decades or so. The object of these statutory requirements is plainly to give potential respondents and notice parties advance notice of such applications and to afford them a timely opportunity to put forward their case prior to any decision being taken regarding the grant of leave to apply for judicial review. It was obviously considered that an early *inter partes* hearing would assist the court in isolating at any early stage cases that were unmeritorious and which had no realistic prospect of succeeding or where the grant of leave might prove improvident or otherwise unfairly impact on fair and effective administration.

2. One feature of the new statutory regimes governing applications for judicial review was that they invariably created new jurisdictional pitfalls for potential applicants, not least where (as here) the requirement that the application be moved on notice has actually been overlooked. Where, then, an applicant has failed strictly to comply with these statutory requirements – in this instance, the requirements specified by s. 73(2) of the Fisheries (Amendment) Act 1997 ("the 1997 Act") - what should be the consequences of such failure? That, in essence, is the question posed by this application for judicial review.

3. The present case may be said to commence with the decision of the Minister for Agriculture, Food and Marine to grant the applicant company ("Dunmanus Bay Mussels") an acquaculture licence to cultivate mussels using longlines in a certain part of the foreshore in Dunmanus Bay. The notice parties all appealed this decision and on 24th September 2012 the Acquaculture Licences Appeals Board ("the Board") made a decision to refuse to grant Dunmanus Bay Mussels the relevant licence.

4. The applicant company sought to commence judicial review proceedings with a view to having this decision quashed. To that end an application was made *ex parte* to this Court (Peart J.) on 19th November, 2012, and leave to apply for judicial review was duly granted. In accordance with the usual practice, Dunmanus Bay Mussels then arranged to have an originating notice of motion *issued pursuant to that leave* served on the Board and the other relevant notice parties. This service was effected on all relevant parties by 27th November, 2012, at the latest. The motion claimed the reliefs which would be sought at the main hearing, but it made no reference to the requirement to *seek leave* on notice to the Board and the notice parties.

5. Section 73(2) of the 1997 Act requires, however, that any such application for leave should be on notice to the Board and to the relevant notice parties. The sub-section provides:

> "(2) An application for leave to apply for judicial review under the Order in respect of a decision or determination referred to in subsection (1)—
>
> (a) shall be made within the period of three months commencing on the date on which the decision or determination was made, and
>
> (b) shall be made by notice of motion (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) which shall be served on—
>
> (i) if the application relates to a decision on an application for a licence, the Minister or the officer of the Minister by whom the decision was made, as the case may be, and where the applicant for leave is not the applicant for the licence, it shall also be served on the applicant for the licence,
>
> (ii) if the application relates to a determination referred to in subsection (1) (b), the Board and each party or each other party, as the case may be, to the appeal, or
>
> (iii) any other person specified for that purpose by order of the High Court, and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision or determination is invalid or ought to be quashed."

6. It will be seen, therefore, that what is critical is that the application for leave is actually *made* on notice to the relevant parties within the three month period. It is not, however, essential that the application is *heard* within that period, because the question of whether the initial application for leave on notice had been validly made could not be made to be dependent on the vicissitudes of the

court listing system and whether the matter was actually listed or hearing (or even heard) by a particular day: *cf.* here by analogy the reasoning of Finlay C.J. in *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128, 136.

7. The applicant's counsel, Mr. McDonagh S.C., has candidly admitted that the reason why no prior leave on notice to the respondents and notice parties was sought was because the requirements of s. 73(2) of the 1997 Act were overlooked. This was first brought to their attention in a letter from the Board's solicitors on 21st January, 2013. At that point, having realised its error, the applicant company then immediately applied to Kearns P. to have that original *ex parte* order set aside as having been improvidently granted. Kearns P. made an order to that effect on 22nd January, 2013.

8. At that juncture Dunmanus Bay Mussels then issued the present motion on 21st February, 2013, whereby it sought to amend its originating notice of motion – which, we may again recall, was issued on 19th November, 2012, pursuant to the original grant of leave – in order now to seek leave from this Court on notice to the Board and the notice parties and thus satisfy the requirements of s. 73(2) of the 1997 Act. In effect, the change sought would, if allowed, permit the applicant now to *seek leave to apply for judicial review on notice* as distinct from seeking actual orders of certiorari quashing the decision of the Board on the premise that leave had already been (validly) granted, which the notice of motion presently assumes.

The effect of the non-compliance with the requirements of s. 73(2) of the 1997 Act

9. If leave to amend were to be granted, it would mean the applicant would then be free to seek leave to apply for judicial review from this Court on notice to the respondent and the other parties in the manner actually contemplated by s. 73(2) of the 1997 Act. This might be a convenient place to observe in passing that nothing whatever in this judgment addresses the underlying merits of the application or should be taken to express any view whatever on whether, assuming leave to amend were to be permitted, leave to apply for judicial review should also be granted at the subsequent hearing.

10. This application to amend the notice of motion accordingly raises in stark form the status of proceedings of this kind which have been commenced irregularly and in a manner which did not comply with the requirements of statute. Counsel for the respondent, Mr. Quinn SC and counsel for the notice parties, Ms. Hill, have both powerfully submitted that this irregularity is so profound and grievous that it lies beyond the capacity of the courts to amend and that the proceedings are, accordingly, a nullity.

11. Here it is necessary to seek to ascertain the underlying objects of the legislation, as viewed through the prism of certain key constitutional fundamentals, as an aid to the resolution of this conundrum. The chief objects of s. 73(2) of the 1997 Act may be said to be (i) to ensure that the respondent and the notice parties are aware in a timely fashion of the existence of the proceedings and (ii) to give such parties an opportunity to be heard at the first reasonable opportunity prior to any decision of this Court as to the grant of leave and to resist any such application for leave. There can be no doubt but that the first of these requirements was met, in that the respondents and the notice parties became aware of the existence of the proceedings well before the three month time limit expired. The second requirement has also been substantially complied with, albeit that the ultimate hearing of the leave application has been slightly delayed by reason of the present application to amend the original notice of motion. Critically, however, even if leave to amend the notice of motion is granted, the respondent and the notice parties will then have an opportunity to be fully heard prior to any grant of leave.

12. Viewed in this fashion, the case really presents itself as one where there has been non-compliance with a statutory requirement regarding the commencement of litigation. Does the failure in the present case render the proceedings so manifestly irregular that the proceedings can be regarded as an entire nullity such that they lie beyond the capacity of the courts to amend? As it happens, subject to one case with rather special facts, *Goonery v. Meath County Council*, High Court, 15th July, 1999, the entire issue is largely *res integra.*

13. Approaching the problem, therefore, from the point of view of principle, it seems to me that there are several overlapping reasons why such leave to amend should be granted. First, the classic test articulated by the Supreme Court regarding the effect of non-compliance with a statutory obligation is that articulated by Henchy J. in *Monaghan UDC v. Alf-A-Bet Promotions Ltd.* [1980] I.L.R.M. 64, at 68-9, where he held as follows:-

> "...when the [Local Government (Planning and Development) Act 1963] prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with." (Emphasis added)

14. Applying these principles, it can be said that compliance with the requirements of s. 73(2) of the 1997 Act has been stipulated by the Oireachtas as being necessary so far as the timeliness and notice requirements are concerned. Yet, in my view, these requirements have been substantially complied with so far as the present case is concerned. The respondent and the notice parties have all been served with the proceedings within the relevant three month period. It is true that this service was strictly irregular in that it was founded on an originating notice of motion which in turn had been issued pursuant to the purported grant of leave in a manner which was at odds with an express statutory requirement. It is nevertheless clear that one key objective of the sub-section – namely, the timely notification of the nature of the intended claim – has already been satisfied. Moreover, were the notice of motion seeking the relief to be itself amended, the respondent and the notice parties would then have the opportunity to oppose the grant of leave, so that the other main objective of the sub-section would also have been satisfied in such circumstances.

15. Second, a conclusion that the non-compliance with these statutory requirements rendered the proceedings wholly irregular and thus beyond the capacity of the courts to rescue by means of an appropriate amendment would amount to a manifestly disproportionate interference with the applicant's constitutional right of access to the courts. In *Murphy v. Greene* [1990] 2 I.R. 566 the Supreme Court held that the requirements of the (then) s. 260 of the Mental Treatment Act 1945 (which subjected certain types of civil proceedings to a prior application for leave on notice requirement) amounted to a curtailment of the constitutional right of access to the courts and, as such, it had to be strictly construed. As Finlay C.J. said of the section it constituted ([1990] 2 I.R. 560, 572):

> "*prima facie* a curtailment of the constitutional right of access to the courts to the extent that it requires a precondition

of leave of the court for the bringing by him of a claim for damages for an asserted wrong."

16. The same can be said of s. 73(2) of the 1997 Act, so that the consequences of the non-compliance with this statutory requirement fall to be evaluated by reference to the impact which such non-compliance might otherwise have on an applicant's constitutional right of access to the courts. This was the approach adopted by Finlay Geoghegan J. in *Re MJBCH Ltd. (in liquidation),* High Court, 15th April 2013.

17. In that case the plaintiff claimed damages for personal injuries against the defendant company and issued proceedings without realising that an order had been made by this Court some two months previously providing for the winding-up of the company. When the proceedings were then served on the company, the plaintiff's solicitor received a letter from the official liquidator advising them of this development. The plaintiff's solicitors then applied to this Court for an order pursuant to s. 222 of the Companies Act 1963 ("the 1963 Act") seeking the retrospective leave of the court to the commencement of the proceedings:

18. Such an application was considered necessary in view of the requirements of s.222 of the 1963 Act which provides:

> "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

19. Applying the principles enunciated in *Murphy v. Greene*, Finlay Geoghegan J. concluded that s. 222 should not be construed as prohibiting the retrospective grant of leave:

> "…having regard to the purpose of s.222..and the [relevant] constitutional principles, in the absence of express words which provide that that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event s. 222 should not be so construed."

20. Finlay Geoghegan J. then went on to hold that this was an appropriate case in which to grant leave. The grant of leave would not compromise an essential objective of the section – namely, that all proceedings relating to the company being would up should be placed under court supervision – and nor would it prejudice the orderly wind-up of the defendant company. She noted that failure to grant leave might have serious consequences for the plaintiff, not least because if the plaintiff was required to issue fresh proceedings and then seek leave, it might then transpire to be statute-barred. The plaintiff, moreover, was not to know that the defendant had already been wound up when the first set of proceedings had been issued.

21. Much the same can be said by analogy so far as the present case is concerned. As I have already indicated, once the applicants were served (even if irregularly) with the proceedings within time, the statutory objectives which s. 73(2) seeks to serve would not be substantially compromised by now granting leave to amend the proceedings. Conversely, the consequences for the applicant would be at least as severe as that presaged by Finlay Geoghegan J. in *Re MJBCH* with regard to the personal injuries litigant in that case. Indeed, whereas in that case there was a risk that the plaintiff's action *might* be statute-barred were leave refused and she was required to commence her personal injuries proceedings afresh, this would certainly be the case here if no such leave to amend were to be granted.

22. Nor can it even be said that the automatic nullification of the proceedings by reason of the non-compliance with the statutory provisions is itself an object of the legislation. No one would credibly suggest that the Oireachtas sought to lay a form of forensic trap for litigants who through some mischance have not perfectly complied with these statutory requirements. On the contrary, the Oireachtas instead merely insisted by the enactment of s. 73(2) that potential respondents receive adequate notice of the claim and have an opportunity to be heard in opposition to the application for leave. Once the objectives are at least substantially safeguarded, then it may be inferred that the Oireachtas had no interest in seeing that applicants were struck out in *limine* merely by reason of a non-compliance with statutory requirements which did not otherwise unfairly prejudice the interests of the respondent and notice parties. This is especially true in a state bound by the rule of law, where, in the words of Denham J. in *White v. Dublin City Council* [2004] 1 I.R. 545, 564, "any person affected by an administrative decision has a constitutionally protected right of access to courts to contest its legality"

23. Such a conclusion is, moreover, in line with the established practice of common law courts since the famous exposition of the relevant principles regarding the amendment of pleadings by Bowen L.J. in *Cropper v. Smith* (1884) 26 Ch.D. 700, 710.:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding maters in controversy, and I do not regard such amendment as a matter of favour or of grace."

24. This exposition of the governing principles is deservedly regarded as canonical and similar principles have been consistently applied by our courts: see, *e.g.*, the comments of Lynch J. in *Director of Public Prosecutions v. Corbett* [1992] I.L.R. 674, 678 ("…the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party…") and those of Geoghegan J. in *Croke v. Waterford Crystal Ltd*. [2005] 2 I.R. 383, 399 ("…the court [has] wide powers of amendment so that the real issues between the parties can be determined. This is always subject to questions of real prejudice to the defendant…").

25. Just as pertinently, in *Keegan v. Garda Siochána Ombudsman Commission* [2012] IESC 29 – a case where the applicant for judicial review belatedly sought to add a new ground to a statement of grounds which his legal team confessed that they had previously overlooked - Fennelly J. stressed that in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 2000* [2000] 2 I.R. 360 the Supreme Court:

> "…had regarded the power to extend time for the bringing of application for judicial review of decisions in that case as being necessary in order to cater for the interests of justice and to protect a constitutional right of access to the court. The same considerations, must, in my view, be relevant in the case of an application to amend grounds as in this case."

26. Fennelly J. concluded that:

> "In the particular circumstances of the present case, it would be unjust to visit on the appellant the consequences of what his legal representatives frankly admit to have been their error. The appellant should not, without good reason, be deprived of the right to argue a very significant point of law."

27. Despite the relative paucity of authority directly on the point, it is clear both from a consideration both of first principles and judicial statements regarding the power to amend, that it would be appropriate to grant the applicant the relief which it seeks. This is, in essence, because I have concluded that (a) the objectives which s. 73(2) of the 1997 Act seeks by ensuring timely notice to the respondent and notice parties and giving them an opportunity to be heard on the leave application will then have been substantially met and (b) striking out the proceedings *in limine* because of the irregular manner in which the original application for leave was made *ex parte* would amount to a disproportionate interference with the applicant company's constitutional right of access to the courts.

The power to amend

28. It is true, of course, that the power to amend is set out in Ord. 28, r. 1 which in the following times:

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purposes of determining the real questions in controversy between the parties."

29. Ord. 125, r. 1 provides that a "matter" shall include "every proceeding in the Court not in a cause", although there is no specific definition of a "proceeding." While it is true that there are, as yet, no judicial review proceedings actually in being because, of course, no leave to apply for judicial review has yet been granted, the present application – even if imperfectly and irregularly commenced - must nonetheless be regarded as a "proceeding" within the meaning of Ord. 28, r.1. The present application specifically contemplates an application to this Court for relief which, if granted, would materially affect the legal rights of the parties. It is, accordingly, a "proceeding in the Court" for the purposes of Ord. 125, r.1 and, by extension, Ord. 28, r.1: see generally the judgment of Finlay Geoghegan J. in *KA v. Minister for Justice* [2003] 2 I.R. 93.

30. It follows, therefore, that the Court enjoys an express power to amend by virtue of Ord. 28, r.1. In view of the analysis already advanced, it is appropriate that this power is exercised in view of the *bona fide* nature of the error, the absence of any overreaching on the part of the applicant and the fact that no real prejudice will be caused to either the respondent or notice party if leave to amend is duly granted.

The decision in *Goonery v. Meath County Council*

31. It remains to consider the decision of Kelly J. in *Goonery v. Meath County Council*, High Court, 15th July 1999. In that case a local authority granted planning permission in respect of a major cement and quarry works adjacent to the applicant's home. While the appeal to An Bord Pleanála was pending, the applicant commenced judicial review proceedings seeking to restrain the Board from hearing this appeal. Kelly J. noted that the relief which had been sought in that motion was "manifestly interlocutory in nature" and "could not be the subject of proceedings in its own right." As it was conceded that those particular proceedings were entirely misconceived, Kelly J. struck them out.

32. Even though the Local Government (Planning and Development) Act 1992 had at that time prescribed a mandatory procedure requiring applicants to seek leave on notice to potential respondents and notice parties in respect of any proceedings challenging the validity of a planning permission, the applicant had also quite separately applied for and obtained leave to apply for judicial review *ex parte* from Budd J.. Even more puzzling was the fact that the applicant also issued a further motion in which she sought leave to apply for judicial review from this Court, the earlier order (purportedly) granting leave notwithstanding.

33. The order made by Budd J. *ex parte* referred to a variety of reliefs, many of which might perhaps have been properly applied for in this fashion (such as, for example, claims that the Environmental Impact Directive (Directive 85/337/EEC) had not been properly transposed into national law). They were, however, mixed up with claims which – as Kelly J. found – unarguably challenged the validity of a planning permission and in respect of which any application for leave could only have been moved on notice. It was not for nothing that Kelly J. remarked that the procedures which had followed to date were "incomprehensible" and had created a "procedural tangle of monumental proportions."

34. Faced with these difficulties, counsel for the applicant submitted that the offending order might be severed, so that only that part of the order which referred granted relief *ex parte* instead of on notice might be adjudged to be bad. But Kelly J. would not allow this to be done:

> "To permit what is now sought would be to allow an element of approbation and reprobation on the applicant's part. It would permit her to treat what she moved as a single application of an integrated case as something different to that. Such an approach could give rise to much undesirable uncertainty. In these circumstances, I am satisfied that the order of Budd J. cannot stand and must be set aside in its entirety. It follows, therefore, that the respondents…are entitled to their order. The effect is that there are no valid proceedings before the court."

35. As is clear from the judgment of Kelly J. in *Goonery* itself, this decision must be regarded as one with particularly special facts, not least by reason of the presence of a veritable smorgasbord of inconsistent motions and orders. In essence, therefore, *Goonery* is a really an example of where the procedural confusion was so enormous that it lay outside the judicial capacity to cure. But, critically, however, there was no application to amend in that case and *Goonery* certainly cannot be regarded as an authority for the proposition that proceedings purportedly commenced *ex parte* when required to be on notice cannot themselves be amended by the court to bring them within the appropriate statutory ambit.

Conclusions

36. It follows, therefore, that for the reasons I have just given, I would accordingly accede to the applicant's request to effect an amendment to the originating notice of motion so as to enable it to apply for leave to apply for judicial review in accordance with s. 73(2) of the 1997 Act.