[2017] IEHC 315

THE HIGH COURT

2015 No. 324JR

Between:

SEAN (OTHERWISE SEANIE) MURPHY

Applicant

– and –

MINISTER FOR TRANSPORT, TOURISM AND SPORT

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 19th May, 2017.

I. Background

1. This is an application for discovery, and for an order for the cross-examination of the person who has sworn such affidavits as have hitherto been sworn on behalf of the Minister for Transport, *etc*. in the context of a judicial review application which has been commenced by Mr Murphy against the Minister. In the substantive application, Mr Murphy seeks to quash the decision of the Minister for Transport, *etc*. to make it a condition of Mr Murphy's passenger boat licence that he refrain, during certain times of the year, from landing passengers at Skellig Michael, the larger of the two iconic Skellig Islands that sit to the west of the Iveragh Peninsula. The net effect of this decision, Mr Murphy claims, has been to reduce by one-third the length of the traditional season during which he has historically transported paying passengers to Skellig Michael.

2. The impugned decision was notified to Mr Murphy, allegedly without warning, by a letter dated 30th March, 2015, from the Department of Transport, etc., which date, Mr Murphy claims, was the day before the traditional season began. The relevant segment of the letter reads as follows:

> *"…Your vessel is currently licensed as a P5 passenger boat by the MSO* [the Marine Surveyors' Office], *and is used by an approved OPW* [Office of Public Works] *permit holder to land passengers onto the Skellig Michael National Monument.*
>
> *The MSO has recently received notification from the Commissioner of Public Works, National Monuments Service, advising they are the appointed agents of the owner of the Island (the Department of Arts, Heritage and the Gaelteacht) including the landing pier and access road. They are responsible for the protection and maintenance of the site, and have overall responsibility for Health & Safety matters on the island.*
>
> *As such they have informed our office, that for Health and Safety reasons the site, including the pier is closed to the public between October to May, and the landing pier may not be used other than for their own maintenance and inspection purposes.*
>
> *They have instructed us as the owner's agents that licensed passenger boats may not land at their pier for the duration of the closed season unless prior permission has been obtained from the National Monuments Service.*
>
> *Licensed passenger boats are only permitted to use the pier for landing passengers on the island between May 15th and September 30th, while the National Monument Service have a staff presence on Skellig Michael.*
>
> *Consequently we have amended the plying limits for your boat to reflect the instructions of the Commissioners.*
>
> *An amended passenger boat licence has therefore been issued to reflect the above and is enclosed with this letter. All previously issued passenger boat licences for your vessel are hereby revoked."*

3. The principal grounds on which the decision aforesaid is challenged include the following: (i) the fact (as purportedly evidenced in the above-quoted letter) that the Minister for Transport, etc. was acting on the instruction of the OPW, as distinct from making a decision pursuant to s.15 of the Merchant Shipping Act 1992; (ii) the decision was purportedly *ultra vires* the Minister on the grounds that s.15 is concerned with the safety of vessels and does not entitle the Minister to select the length of season during which Mr Murphy can land at a particular place of public resort; (iii) the decision was purportedly taken without any consultation with, or notice to, Mr Murphy or his representatives, and without giving him any opportunity to address whatever factors bore upon the decision; and (iv) the decision was purportedly made in reliance upon irrelevant considerations.

II. Reliefs Sought in Substantive Application

4. Mr Murphy, per his notice of motion in the within proceedings, seeks the following reliefs in his substantive application:

> "1 An order of certiorari by way of application for judicial review quashing the decisions of the Respondent:
>
> *(a) On or about 30 March 2015 to vary the Applicant's Passenger Boat Licence No. 796 for Marine Vessel Sea Quest for the period 10 April 2013 to 10 April 2015…pursuant to section 15(3) of the Merchant Shipping Act 1992 by the addition of a new condition, never previously attached to any such licence issued to the Applicant, purporting to restrain the Applicant from landing on Skellig Michael, the Great Skellig, other than between 15 May and 30 September in each year;*
>
> *(b) On or about May 2015 to impose a condition in identical terms to the Applicant's Passenger Boat Licence No. 796 for the period 11th May 2015 to 10th May 2017 (hereinafter* "the Current Licence*") issued pursuant to section 15(1) of the said Act*.
>
> *2. A declaration that the imposition of the said purported conditions is and was ultra vires the powers of the Respondent under the said legislative provisions.*

3. A stay pursuant to Order 84 Rule 20(8) of the Rules of the Superior Courts on the operation of the said purported condition within the Current Licence pending the determination of these proceedings.

4. An order of mandamus and/or an injunction requiring the Respondent to re-issue the Current Licence without the said condition thereon.

5. If necessary, an order remitting the said decision to the Respondent for reprocessing in accordance with the declaration and/or mandamus and/or injunction aforesaid.

6. Damages pursuant to Order 84 rule 24 of the Rules of the Superior Courts, 1986 and/or section 3 of the European Convention on Human Rights Act 2003 for breach of statutory duty, negligence, misfeasance of public office and/or contravention by the Respondent of the State's obligations under the European Convention on Human Rights.

7. If necessary, discovery of documents recording or evidencing the decision-making process whereby the said licences were issued and/or amended",

and certain ancillary reliefs.

III. The Substance of the Discovery Application

5. Discovery is being sought by Mr Murphy, at this time, of the following categories of documentation:

(1) "[Item 2(c)] *All letters, e-mails, notes and memoranda, records of discussions, and other documents evidencing communications relating to the carrying of passengers to and from Skellig Michael between John Snelgrove and Brian Hogan, Chief Surveyor, in the period from 28 May 2014 to the date of the decision, the subject matter of these proceedings";*

[An affidavit sworn by Mr Murphy's solicitor offers the following reasons for seeking this category of discovery: "*At paragraph 8 of his replying affidavit, Mr Snelgrove* [the Deputy Chief Surveyor at the MSO and the gentleman who has sworn the affidavit evidence for the respondent to this point] – *contrary to what is stated on the face of the letter notifying your Deponent of the decision, the subject matter of these proceedings – that the decision the subject matter of these proceedings was ultimately the product of discussions between himself and Mr Brian Hogan and he identifies a number of factors which he contends were taken into account in reaching that decision. Insofar as this statement runs contrary to the correspondence issued to the Applicant, the Applicant doubts very seriously the accuracy of what is said about these discussions and wishes to test them by means of cross-examination of Mr Snelgrove. This cannot be done without discovery of the documents exchanged between and discussed by those parties in the context of those alleged interactions. Obtaining those documents by issuing a subpoena duces tecum to Mr Hogan would greatly prolong these proceedings and result in unnecessary cost. Accordingly, the documents are relevant and necessary cost. Accordingly, the documents are relevant and will reduce the cost of these proceedings*."]

(2) "[Item 2(d)] *All passenger boat licences issued pursuant to section 15 of the Merchant Shipping Act 1992 for a period of five years prior to the decision the subject matter of these proceedings wherein the Respondent purported to restrict landing at particular locations on any particulars dates or times of year, of a type referred to at Paragraph 8 (first bullet point) of the Replying Affidavit of John Snelgrove";*

[An affidavit sworn by Mr Murphy's solicitor offers the following reasons for seeking this category of discovery: "*In support of the Respondent's position in these proceedings, Mr Snelgrove has suggested to this Honourable Court that licences have had restrictions of the type under challenge here and he purports to give exampled by reference to locations. The Applicant does not accept that any comparable restrictions have ever been imposed or would be imposed without challenge and requires that these* [be] *produced in order that the veracity of Mr Snelgrove's averments may be challenged. Without sight of the licences purported to contain these permissions, Mr Snelgrove's averment cannot be challenged in that regard. In those circumstances, the documents are relevant and necessary and making discovery of them, as distinct from requiring witnesses to attend under subpoena with copies thereof, is a more expeditious and cost efficient means of resolving the issue before the court*."]

(3) "[Item 2(e)] *All documents constituting reports, diary entries, agreements, directions, records (including photographs) arising from visits by the Respondent's personnel to Skellig Michael including that on 27 July 2011*".

[An affidavit sworn by Mr Murphy's solicitor offers the following reasons for seeking this category of discovery: "*At paragraph 8…of his affidavit, Mr Snelgrove seeks to rely on visits to Skellig Michael by representatives of the Respondent in support of the decision…* [that is] *the subject matter of these proceedings, the last such visit taking place in July 2011. The Applicant contests the veracity of the averment that these were taken into account and that any inspections were carried out with a view to detecting, or that they did detect any of the purported issues which the Respondent now says justifies the decision, the subject matter of these proceedings. Such documents are necessary to that task. The Applicant has no way of seeking these documents other than through issuing a subpoena duces tecum, which would result in an unnecessary prolonging of the trial herein. Accordingly the documents are relevant and necessary and will result in a reduction in the costs of these proceedings."]*

6. At hearing, counsel opened various documents to the court, including the statement of opposition and affidavit evidence sworn for the respondent by Mr Snelgrove, who is also the gentleman in respect of whom the application for cross-examination has been made. It would be fair to state, by reference to the pleadings, that, *inter alia*, the following key points of conflict now appear to arise at this time between the parties:

(1) whereas the letter of 30th March, 2015, refers to the Department being "*instructed*" in a certain regard, the respondent now seeks to make the case that in fact an independent decision was arrived at; the independence of the respondent's decision-making process is impugned by Mr Murphy;

(2) the respondent maintains that conditions of the type now impugned have previously been included in other licences, unseen by Mr Murphy and of which Mr Murphy now seeks sight;

(3) as to the visit to Skellig Michael in July, 2011, Mr Murphy disputes that: the purported findings made during that visit

were made; the said purported findings were considered in the process whereby the impugned condition came to be included in Mr Murphy's licence.

IV. Some Applicable Case-Law

i. As regards the discovery application.

7. It does not seem necessary to the court to review the case-law in this area in any great detail. As good a summary as any of the present law relating to discovery in a judicial review application is to be found in Hogan and Morgan's *Administrative Law in Ireland* (4th ed.), para. 16-69, which states as follows:

> "*While the ordinary discovery rules apply in judicial review, there are nevertheless special factors which have operated to limit the scope of discovery in judicial review matters. First, the facts are generally not the subject of controversy in judicial review proceedings. Secondly, as judicial review is normally concerned with procedure rather than substance, this inevitably will narrow the range of documents which are relevant. Indeed, 'discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery'. [Carlow Kilkenny Radio Ltd v. Broadcasting Commission of Ireland* [2003] 3 IR 528, 537] *Thirdly, discovery will generally be refused where the applicant has made out no positive case on a particular ground, but where discovery is simply sought 'in the hope of turning up something out of which he could fashion a possible challenge'. [Re Rooney's Application* [1995] NI 398, 414–5] *Here again if the challenge is based on irrationality or unreasonableness grounds, discovery will 'not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it was arrived at'. [Kilkenny Broadcasting Co Ltd v. Broadcasting Authority of Ireland* [2003] 3 IR 528, 537] *The result of these factors is that discovery in judicial review applications is thus generally confined to cases where information is improperly withheld or where there is a relevant and material conflict of fact on the affidavits."* (Emphasis in original).

8. The points of conflict touched upon in the preceding part of the within judgment go to the heart of the decision-making process engaged in by the respondent. The affidavit evidence sworn on behalf of the respondent to date is arguably inconsistent with the letter as to the decision-making process (though the court makes no observation as to the possible eventual outcome of any argument to be had in this regard). Moreover, the affidavit evidence sworn for the respondent to date does not exhibit corroborative documentation and, in truth, comprises a series of asserted factors said to justify the decision.

9. Points of fact that, it seems to the court, cannot satisfactorily be proven without regard to such documentation as has been sought by way of discovery include (a) whether the decision was one made on instruction or not, (b) whether the factors now relied on by the respondent were in fact known to him as of 30th March, 2016, and (c) whether such factors as are referred to at (b) were in truth considered in making the impugned decision. This, therefore, is a set of judicial review proceedings where the facts are the subject of controversy and where, having regard to the reasons advanced by Mr Murphy's solicitor in his affidavit evidence and, in particular, to the factors just touched upon by the court, it seems to it that the documentation sought by way of discovery is relevant and necessary and not disproportionate. Indeed it is not clear to the court how the matters in issue at the substantive proceedings could fairly be ruled upon without the making of such discovery as is now sought.

ii. As regards the cross-examination application.

10. As mentioned, Mr Murphy has also made application for an order pursuant to O.40, r.1 of the Rules of the Superior Courts 1986, as amended, for the attendance for cross-examination of the person who has sworn such affidavits as have hitherto been sworn on behalf of the Minister for Transport in the within proceedings. The principal case-law concerning cross-examination in applications that fall typically to be heard and determined on affidavit has been considered in the relatively recent decision in *Dunnes Stores v. Dublin City Council* [2016] IEHC 724; the court does not propose to consider the applicable law in detail again in the within judgment. Having regard to the judgment in *Dunnes*, the court does not consider that the circumstances presenting in the within application are possessed of *Bubb*-style exceptionality (*Bubb v. Wandsworth London Borough Council* [2012] P.T.S.R. 1011), or lesser 'Irish-style' exceptionality to the extent that such may pertain, as would justify its now acceding to the application for cross-examination now before it. It seems to the court that the discovery order that it will now be making ought to suffice to address the difficulties that it has considered previously above in the context of the application for discovery; the applicant remains free to make fresh application in this regard if the need for such application is at some future time considered by him to be necessary.

11. In passing, it seemed to the court at hearing that the application for leave to cross-examine was to some extent being sought in an abundance of prudence, so as to foreclose the potential difficulties that can arise for an applicant's case where, as in *STE v. Minister for Justice and Equality and anor* [2016] IEHC 379, such application is not made. Obviously it is for individual counsel to decide how best to run, inter alia, any set of proceedings. However, it may assist for the court to note that its reading of the judgment in *STE* is that that was a case in which (1) the trial judge considered (see para. 25) that (i) the application for discovery "*was of an eleventh-hour nature"* and (ii) *"the applicants had not demonstrated that they required discovery in order to make any point they wished to make relating to any inference that should be drawn from a ministerial failure to disclose* [a particular]*…policy*" – so whether the application would have been refused for its "*eleventh-hour nature*" alone is unknown, and (2) it seems from para. 34 of the judgment, no application to cross-examine was ever made – so whether such an application would have met with the same criticism as greeted the application for discovery is unknown. Having regard to (1) and (2), the court does not see in *STE* a need for counsel always to make 'belt and braces' applications for leave to cross-examine in the fear that a failure to do so may later be held against their client. Indeed, given that the circumstances in which such leave is granted do not commonly occur, it seems likely to be often the case that there will be no need to make such application at all.

V. Conclusion

12. For the reasons identified above, the court will order discovery of Items 2(c), 2(d) and 2(e) on the terms sought by the applicant. As indicated at hearing, the court is also, of course, satisfied to make an order pursuant to the (uncontested) application made by the applicant pursuant to O.28, r.1 of the Rules of the Superior Courts 1986, as amended, amending the name of the respondent in the within proceedings from "*Minister for Transport*" to "*Minister for Transport, Tourism and Sport*".