Neutral Citation Number: [2008] IEHC 320

THE HIGH COURT

2008 1319 P

BETWEEN

JAMES KENNY

PLAINTIFF

AND

THE PROVOST FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 17th of October, 2008

1. Introduction

1.1 There has been a long history of litigation between the plaintiff ("Mr. Kenny") and the defendants ("Trinity College") all of which litigation, in one way or another, stems from an assertion on the part of Mr. Kenny that the process whereby Trinity College obtained planning permission for a development at Dartry was flawed. It is unnecessary, for the purposes of this judgment, to go into that history in any great detail.

1.2 Suffice it to say that on the 30th March, 2006, I made an order (often colloquially referred to as an Isaac Wunder order) precluding Mr. Kenny from bringing any further proceedings against Trinity College except with leave of the court. There were a number of minor exceptions and clarifications specified in that order which are no longer of any relevance. That order of March, 2006 remains in force and the position is, therefore, that Mr. Kenny is precluded from bringing any proceedings against Trinity College without court leave.

1.3 Mr. Kenny, in the mistaken belief that these proceedings were not caught by the relevant order, issued a plenary summons. It will be necessary to refer to that summons in more detail in due course. Mr. Kenny had sought an interlocutory injunction which led to the proceedings coming before the court on his application. When the matter was first before the court in July, I ruled that these proceedings were, in fact, caught by the order of March, 2006. Strictly speaking it would have been open to me at that stage to have struck out the proceedings and invited Mr. Kenny, if he wished, to apply for leave to issue fresh proceedings. However, that seemed to me to be an unnecessarily cumbersome way of dealing with the issue. I, therefore, decided to hear the matter as a leave application. In addition, as Trinity College were on notice of the existence of the proceedings and were in court as respondents to the interlocutory application, I invited counsel for Trinity College to take instructions as to whether it was wished by Trinity College to participate in the leave hearing. It was subsequently indicated on behalf of Trinity College that it did so wish to participate. Thereafter, on the 6th October of this year, a hearing took place in which Mr. Kenny sought leave. Trinity College opposed the application. I turn first to the applicable legal principles.

2. The Jurisdiction

2.1 In *Riordan v. Ireland (No.5)* [2001] 4 I.R. 463, Ó Caoimh J. had to consider an application to grant leave to commence proceedings in circumstances where there was already in being an Isaac Wunder order against the plaintiff concerned.

2.2 At p. 468 Ó Caoimh J. said the following:-

> "In the instant case I am asked simply on the basis of a draft plenary summons and without the benefit of any accompanying draft statement of claim to assess whether the intended plaintiff should be given leave to commence these proceedings. In these circumstances I invited oral submissions from the intended plaintiff in support of his claim. It is necessary for this Court to assess the draft plenary summons to see whether the claims sought to be litigated are vexatious or frivolous or otherwise. I have, however, heard the intended plaintiff in regard to the basis upon which he seeks to advance these claims."

2.3 Ó Caoimh J. then went on to analyse the claims sought to be put forward. In respect of some of the claims sought to be advanced, Ó Caoimh J. was, on that occasion, satisfied that same were frivolous and vexatious and refused leave. In respect of others it would appear that Ó Caoimh J. required the service of a draft plenary summons and draft statement of claim so that a further assessment could be carried out. It would appear that as a result of that further assessment leave was refused in respect of the remaining areas sought to be advanced.

2.4 It is clear, of course, that the whole purpose of the jurisdiction of the court to make an Isaac Wunder order is to protect persons from being the subject of frivolous or vexatious litigation. Obviously any proceedings which are frivolous or vexatious can be struck out. However, in the ordinary way there is nothing to prevent a litigant from commencing frivolous and vexatious proceedings and placing a burden on the defendant concerned to consider those proceedings and, if thought appropriate, to bring an application before the court seeking to have the proceedings struck out. However, where a party has abused the process of the court, by means of bringing a number of frivolous or vexatious proceedings, the court has a jurisdiction to make an Isaac Wunder order so as to give the defendant in such circumstances the added protection of precluding the plaintiff from maintaining proceedings against that defendant without court leave. It would, of course, be wholly inappropriate to prevent a party who is the subject of such an order from having an opportunity to persuade the court that whatever may have been the past history of litigation between the parties, new proceedings were contemplated which were not frivolous and vexatious and which should, therefore, proceed.

2.5 The test, as identified by Ó Caoimh J. in Riordan, is as to whether, on the basis of the information available at the early stage of an application for leave, it can be said that the proceedings contemplated are frivolous or vexatious. It is also clear, in that context, that it is open to the court to seek to explore, at least to some extent, the basis on which the party would seek to advance their claim with a view to assessing whether any such claim might be regarded as being frivolous or vexatious. That is the test which I intend applying in this case. In that context it is necessary to turn, first, to the claim which Mr. Kenny wishes to put forward.

3. The Claim

3.1 As indicated earlier Mr. Kenny has, in fact, issued a plenary summons. However, the fact that such a summons was, contrary to the order of March, 2006, issued, should not confer on Mr. Kenny any advantage in this application. I, therefore, propose treating the application as one in which Mr. Kenny is seeking leave to issue proceedings which would claim the reliefs set out in the general endorsement of claim in the plenary summons which he has already issued.

3.2 It is important to emphasise that the claims as set out in that plenary summons all relate to the costs previously ordered by this Court to be paid by Mr. Kenny in respect of failed proceedings.

3.3 At para. 2 of the general endorsement of claim, Mr. Kenny indicates that he wishes to set aside a series of four court orders in respect of costs made by, respectively, Mc Kechnie J. on the 2nd March, 2001, Murphy J. on the 28th March, 2004 (as amended by order of the same judge of the 27th June, 2005), a further order of Murphy J. of the 10th October, 2004, and an order of Quirke J. of the 1st July, 2006. In addition the general endorsement of claim indicates that an interlocutory injunction will be sought seeking to restrain Trinity College from enforcing those cost orders until such time as a then pending application of Mr. Kenny, in which he sought a re-hearing of a High Court judicial review leave application, was finally determined or, indeed, until after any re-hearing which might be directed was completed. However, the relevant application for a re-hearing has now been finally refused by the Supreme Court and it is clear that the claim made at para. 1 for an interlocutory injunction is no longer of any relevance. There could, therefore, be no point in permitting Mr. Kenny to pursue such a claim as the relief claimed is, because of subsequent events, now meaningless.

3.4 Paragraph 3 of the general endorsement of claim seeks to set aside costs or expenses arising from the attempted enforcement of the cost orders to which I have referred. Paragraph 4 seeks damages for what are described as "the defendants unlawful acts complained of" which I infer relates, again, to the underlying contention that the cost orders and their potential enforcement should be set aside, and any consequences of their enforcement to date should , in substance, be reversed.

3.5 That analysis makes it clear that the sole focus of the plenary summons is to seek to set aside the series of costs orders which I have cited and to deal with the consequences of those cost orders having been in being.

3.6 The general endorsement of claim does not set out the basis on which it is contended that those cost orders are invalid and should be set aside. There is nothing, of course, wrong with this, in that a general endorsement of claim is only required to set out the relief sought rather than the basis upon which that relief might be claimed. In that context I initially adopted a similar practice to that followed by Ó Caoimh J. in *Riordan* and invited Mr. Kenny to explain the basis on which he wished to pursue these proceedings. I, therefore, turn to the basis put forward for Mr. Kenny's claim.

4. The Basis of the Claim

4.1 Mr. Kenny asserted that his claim was largely based on the recent decision of the European Court of Justice ("ECJ") in *Commission v. Ireland* (Unreported, ECJ, 3rd July, 2008). In that case the ECJ accepted the argument of the Commission to the effect that Ireland had failed to adopt all measures necessary to ensure that projects governed by Directive 85/337/EEC are, before such projects are executed in whole or in part, the subject of an environmental impact assessment. Similarly the ECJ was persuaded that Ireland had failed to adopt measures necessary to ensure that projects which are likely to have a significant effect on the environment by virtue of their nature, size or location, are assessed in accordance with Articles 5 – 10 of Directive 85/337.

4.2 In particular, the ECJ was satisfied that Ireland had failed to adopt all measures necessary to ensure that the development consent given for the Derrybrien Windfarm in County Galway was preceded by an appropriate assessment under Directive 85/337 as amended by Directive 97/11.

4.3 On that basis the ECJ declared that Ireland had failed to fulfil its obligations under Articles 2, 4 and 5 – 10 of the relevant Directive.

4.4 Mr. Kenny suggests that it is, therefore, possible (he suggests likely) that the Derrybrien Windfarm is an unlawful development. He suggests that there are similarities between the *Derrybrien* case and his case, in that both are concerned with, amongst other things, the adequacy of the mandated environmental impact assessment in circumstances where the principal focus of the relevant assessment was the consideration, in accordance with Irish legislation, of an environmental impact statement submitted by the developer concerned.

4.5 Against that background Mr. Kenny suggests that there is now a basis for contending that the development which he has, at all times, sought to challenge, is in fact unlawful and that, if that be so, the validity of cost orders made against him as a result of previous unsuccessful challenges, can and should now be set aside.

4.6 As I have pointed out the plenary summons in this case, as is usual, does not set out anything more than the reliefs which Mr. Kenny seeks to pursue. I have sought to analyse those reliefs earlier in this judgment. The plenary summons does not, and this is no criticism, set out the basis upon which it is contended that Mr. Kenny might be entitled to those reliefs. *Prima facie* there is, of course, a difficulty with Mr. Kenny's claim. There are in being final orders of the court in relation to costs. The circumstances in which such a final order can be set aside are, of course, limited. Unless, therefore, there are grounds on which it is at least possible that a court might be persuaded to set aside those orders, then it would follow that proceedings seeking to have such orders set aside would be frivolous and vexatious. If that were to prove to be the case then it would, of course, follow that it would be wholly inappropriate to allow Mr. Kenny to pursue such proceedings.

4.7 With that in mind I sought at the hearing of this application to illicit from Mr. Kenny (who appears in person), as to the basis upon which he contends that he might be able to succeed. I propose to analyse, insofar as I can, the case which he then outlined to me, solely for the purposes of ascertaining whether there may be arguable grounds for the propositions which he seeks to advance. I would emphasise that nothing in this judgment involves a finding of law or fact but rather involves an assessment as to whether it would appear that there is any prospect of success for the case which Mr. Kenny wishes to make.

4.8 In those circumstances I, therefore, turn to Mr. Kenny's case.

5. Mr. Kenny's Case

5.1 The first question concerns the judgment of the ECJ in *Commission v. Ireland* to which I have already referred. It is clear that the central point made in that judgment concerns the Irish regime in respect of retention planning permission. In substance the ECJ determined that, while there could be limited or exceptional circumstances in which a retrospective development consent could be granted, the Irish regime in respect of retention permission was, in reality, over lax and thus failed to adequately meet the requirement that an environmental impact assessment be carried out *before* development commences. There is no question of retention permission arising on the facts of this case so that the principal finding of the ECJ in *Commission v. Ireland* is not relevant to Mr. Kenny's case.

5.2 However, Mr. Kenny suggests that aspects of the judgment in *Commission v. Ireland* support the view that the ECJ determined that the development at Derrybrien was unlawful, not only by reason of the application of what the court found to be an over lax Irish retention permission regime, but also because the environmental impact assessment, carried out as part of the consideration of the retention application concerned, relied on an environmental impact statement submitted by the developer in question which did not, in particular, examine the question of soil stability which the court noted was fundamental when excavation was intended. The ECJ was,

therefore, satisfied that, independent of the issues which arose in respect of retention permission, the environmental impact assessment concerned did not comply with the relevant requirements of Directive 85/337 or, as appropriate, Directive 97/11 (see paras. 103 and 104 of the judgment). On that basis, also, Ireland was found to have failed to have fulfilled its obligations under that Directive.

5.3 It follows that the ECJ was prepared to look, at least to some extent, at the adequacy of the matters addressed in the environmental impact assessment (which in substance were the matters addressed in the environmental impact statement submitted by the developer). On the basis of its consideration the ECJ found that Ireland was in breach of its obligations and, Mr. Kenny argues, by implication it can be said that there is at least a significant possibility that the development at Derrybrien may, therefore, as a matter of EU law, be unlawful.

5.4 I am prepared, for the sake of argument at this stage, to accept that it is possible that *Commission v. Ireland* leads to a conclusion that a development may be unlawful, by reference to the Directive, by virtue of a failure to address appropriate matters in the environmental impact assessment concerned. There are, however, a number of further issues that would need to be established in order that Mr. Kenny could succeed in these proceedings even if he is right in his interpretation of the judgment of the ECJ in *Commission v. Ireland.*

5.5 Firstly, there is the question of the interaction between Ireland's obligations under the relevant Directives and the status of a development carried out in Ireland under Irish law including, where relevant, any directly applicable provisions of EU law.

5.6 It does not necessarily follow that, because Ireland has been in breach of its obligations under the Directives, a development carried out in Ireland by a private developer is rendered unlawful. This is the first issue on which I am unclear as to Mr. Kenny's case. For the purposes of clarity I should state that what needs to be made clear is the basis on which Mr. Kenny asserts that, even if the judgment in Commission v. Ireland represents authority for the proposition that Ireland may have failed in its obligations under the Directive, by failing to ensure that all necessary matters were considered in the environmental assessment concerned, it can be said that this fact affects the lawfulness of the development carried out by Trinity College as a matter of Irish law.

5.7 The second issue that arises is as to the extent to which, even if there is a basis for suggesting that the development carried out by Trinity College was unlawful as a matter of Irish law, it is procedurally possible that that issue can now be raised. There are two aspects to this question.

5.8 The first aspect of the issue concerns a general question as to the extent to which it may be permissible to re-visit issues determined in one set of proceedings in the Irish courts, as a result of a subsequent authoritative determination by the ECJ of the position as a matter of EU law. As this question necessarily raises the possibility that an Irish court may have misinterpreted EU law I feel it appropriate, in seeking to take an example, to refer to a case which I determined myself rather than one involving any of my colleagues.

5.9 In *Sweetman v. An Bord Pleanála* [2007] IEHC, I had to consider a case made by the applicant in those proceedings which largely centred on a contention that Ireland had failed to properly transpose Directive 2003/35/EC concerning public participation in the planning process. For the reasons set out in my judgment in that case I was not satisfied to grant leave. However, one must always recognise the possibility that such a judgment is wrong.

5.10 In passing I should note that, regrettably, due to the wording of two passages in my judgment it is possible to misconstrue the findings in that case. One of the key findings is to be found at para. 7.8 where I express the view that the proper construction of the Directive concerned does not prevent the award of reasonable costs in environmental litigation. So far as that aspect of the case is concerned the finding is to be found in that paragraph. However, elsewhere, on one reading, it might be suggested that I had found that the Directive said nothing about costs at all. See para. 7.6. That paragraph needs to be seen in the context of the fact that the applicant did not seek any preliminary order in relation to costs nor, at the stage which the case had reached, did the applicant seek any order limiting the amount of costs which he should have to pay. Such matters would, of course, only have arisen in the event that the applicant became liable to pay costs in the first place. In the events that happened, and for reasons which I set out in a judgment delivered on the 25th October, 2007 [2007] IEHC 361, the applicant was in fact awarded part of his costs and, therefore, the question of any limitation on the amount of costs which he might have to pay did not arise. The paragraph to which I have referred might better have referred (as para. 7.8 did) to "reasonable court costs" rather than "court costs" and should not be construed as implying that there may not be obligations placed on the court under Directive 2003/35/EC, in an appropriate case, to limit (whether prospectively or at the time when costs are being considered) the amount of costs which might be awarded. Such issue, in my view, remains for decision in an appropriate case. However, because costs are sufficiently discretionary to enable the court to deal with costs orders in any way that is mandated by the Directive, it did not seem to me that any question of a failure to transpose had been established. In substance, therefore, the decision in Sweetman, on this point, amounts to a finding that reasonable costs can be awarded in the manner normally adopted in Ireland, that is to say costs following the event in most cases. (It is to costs following the event rather than the quantum of such costs that the comments made in para. 7.9 are directed although again that paragraph could be better worded).

5.11 None of the parties sought a reference to the ECJ and the decision remains final. It is, of course, possible that in some separate set of proceedings, whether deriving from this jurisdiction or another Member State, the ECJ may come to a different view as to the interpretation of the Directive concerned and its effect in this jurisdiction. The mere fact that the ECJ authoritatively interprets both the Directive and, to the extent that it may be relevant, its direct effect, in a subsequent case does not necessarily mean that previous cases in which the courts of Member States have taken a different view of the relevant measures can be re-opened. Could, for example, persons who did not raise the question of the applicability of Directive 2003/38/EC now seek to retrospectively interfere with such costs orders already made. It, thus, follows that Mr. Kenny will have to establish that, even if he can point to some way in which the decision of the ECJ in Com*mission v. Ireland* shows that decisions taken in the earlier proceedings between him and Trinity College were wrong, he is enabled to re-open those cases. This is a second aspect of the case on which I am unclear as to Mr. Kenny's case.

5.12 In particular, Irish procedural law places strict time limits on the bringing of challenges to planning permissions. In general terms (and subject to overriding EU requirements such as effectiveness, equivalence and the like) questions concerning the application of time limits and other procedural requirements for bringing proceedings are left to be dealt with under the procedural law of the Member State concerned. Even if, therefore, Mr. Kenny is right in his interpretation of the judgment in *Commission v. Ireland* and, is also right in suggesting that the proper interpretation of that judgment lends support to his argument that the development in this case is unlawful, he will also need to satisfy the court that it is procedurally permissible to re-open any of the issues previously determined. This is a third aspect of Mr. Kenny's case on which I am unclear.

5.13 Finally, there are a number of factual matters which do not seem to be in dispute and which it will be necessary for Mr. Kenny to deal with in order to establish that he has an arguable case.

5.14 Firstly, there is the question of the finding by McKechnie J. (albeit expressed in terms which suggested that the learned judge did not consider it to be a necessary finding) to the effect that there had been an appropriate impact assessment on the facts of this case. Secondly, there is the matter raised by counsel for Trinity College at the hearing before me when he drew attention to the fact that most of the cost orders which Mr. Kenny now seeks to set aside are orders made in applications which were brought seeking to have the original order of McKechnie J., in substance, set aside, on the grounds of fraud. Thus, counsel for Trinity argues, even if there were, contrary to his position, some basis on which Mr. Kenny could now re-open the underlying question of whether the development was lawful, it would not avail him at all in relation to those costs which are attributed to his failed attempts to re-open the proceedings on the grounds of fraud. It was by no means clear to me at the hearing as to how Mr. Kenny suggested that he could deal with these factual issues. This is a fourth matter that requires clarification.

6. Conclusions

6.1 I am mindful of the fact that preventing a party from having access to the courts is a significant step. It follows that I should be careful to afford Mr. Kenny every reasonable opportunity to attempt to persuade me that he wishes to put forward a claim which may be sustainable. On the basis of the current plenary summons (and in the absence of a statement of claim) I cannot see, at the moment, how Mr. Kenny could hope to obtain the relief claimed. However, I should not rule out the possibility that Mr. Kenny may be able to recast his proceedings in a way which makes his claims arguable. In fairness to Mr. Kenny events have moved on with the final rejection of his attempt to re-open the original proceedings and, on one view, the decision in *Commission v. Ireland*. I, therefore, propose to allow Mr. Kenny an opportunity to file a draft revised plenary summons together with a draft statement of claim.

6.2 I would expect Mr. Kenny to make clear in those documents (and in particular in the statement of claim) how it is contended that he be entitled to the reliefs claimed, notwithstanding the difficulties which I have identified in this judgment (and in particular in paras. 5.6, 5.11, 5.12 and 5.14). That is, in substance, the practice adopted by Ó Caoimh J. in *Riordan*. In the light of the contents of those documents I will assess further the question of whether Mr. Kenny has a stateable case so as to permit him to pursue it.