Neutral Citation Number: [2010] IEHC 281

THE HIGH COURT

2007 810 P

Between:

LOUGH SWILLY SHELLFISH GROWERS CO-OPERATIVE SOCIETY LIMITED AND ATLANFISH LIMITED

Plaintiffs

-And-

DANNY BRADLEY AND ROBERT IVERS

Defendants

Judgment of Mr. Justice Eamon de Valera dated the 29th day of June 2010

This matter comes before the Court by way of an application by the defendants for a Declaration that s. 19A(4) of the Fisheries (Amendment) Act, 1997 ("the Act") as inserted by s. 101 of the Maritime Jurisdiction Act, 2006, is unconstitutional. The Attorney General opposes the defendants' application.

At the hearing of the constitutional component of the proceedings, the defendants' position was clarified and it was confirmed that their reliance on the Supreme Court decision in *Moore v. Attorney General* [1934] I.R. 44 was confined to a factual determination made by the Court in that case that the tidal waters of Donegal, including Lough Swilly, constituted a public fishery. The defendants also challenged the failure of the Minister to make a decision on the renewal of the aquaculture licence the subject of the dispute and the resulting continuation of a private fishery in public waters.

Section 19A(4) of the Act provides as follows:

> "A licensee who has applied for renewal or a further renewal of an aquaculture licence shall, notwithstanding the expiration of the period for which the licence was granted or renewed but subject otherwise to the terms and conditions of the licence, be entitled to continue the aquaculture or operations in relation to aquaculture authorised by the licence pending the decision on the said application."

The Foreshore Act, 1933 (as amended) regulates the State's dealing with the foreshore, which is defined as:

> "… the bed and shore, below the line of high water of ordinary or medium tides of the sea and of every title river and title estuary and of ever channel, creak and bay of the sea or of any such river or estuary."

Under s. 3 of the 1933 Act, the State may grant licences in respect of the foreshore subject to conditions. The licence authorises the licensee to

> "… place any material or to place or erect any articles, things, or structure or works in or on such foreshore, to remove any beach material from such foreshore, to get and take any minerals in such foreshore and not more than 30 feet below the surface thereof, or to use or occupy such foreshore for any purpose…"

The Fisheries Act of 1980 created a new type of licence, "an aquaculture licence". The Sea Fisheries (Amendment) Act, 1997 created a new catch-all aquacultural licence and by s. 75 of that Act and s. 3 of the Fisheries and Foreshore (Amendment) Act, 1998, a fish culture licence and a foreshore licence for aquaculture purposes were deemed together to constitute an aquaculture licence under the 1997 Act.

The plaintiff in this action succeeded in its primary action in trespass against the defendants and obtained injunctive relief against them and an award of damages. That claim arose from the trespass by the defendants on an area of foreshore identified in a map attached to the Statement of Claim over which the plaintiffs were exclusively licensed to cultivate shellfish.

The plaintiff's licence expired in 2004. However, it was extended by virtue of the operation of s. 19A(4) of the Fisheries (Amendment) Act, 1997 as inserted by s. 101 of the Maritime Jurisdiction Act, 2006, the impugned section in these proceedings.

The defendants claim that s. 101 of the Maritime Jurisdiction Act, 2006 breaches the right to equality under Article 40 of the Constitution, that it breaches the obligation of the State to defend and vindicate the rights of the defendants and has failed to protect their good name, property rights and their right to earn a living and that s. 101 is neither rational nor proportional nor does it increase the common good and it should be struck down under Articles 40 and 40(3)(1) and (2) of the Constitution.

The defendants state that they will rely on the facts set out in the Supreme Court judgment in *Moore v. Attorney General*, that Lough Swilly was always a public fishery, that those who had a traditional right to fish based on use would have such right in perpetuity and that the grant of exclusive rights to one private individual constituted a breach of the aforesaid constitutional provisions.

The Defendants' Submissions

The defendants claim that the *Moore* case established that Lough Swilly was a public fishery. They submit that in granting the ten year licence to the plaintiff, the Department of the Marine overlooked the provisions of s. 249 dealing with oysters and oyster licences and awarded a licence without a consideration of what it might mean for customary public rights in Lough Swilly.

The licence continued until 2004 after which time the defendants believed they had a right to fish in Lough Swilly and the plaintiff

sought and obtained an injunction. Not only did the Minister award to the private individual a licence over the public fishery which the defendants say he had no right to do, but they claim he prolonged or extended same in circumstances where he had no right to do so. They claim the failure to properly renew the licence compounded the situation and that s. 19A has developed an unconstitutional life of its own. The defendants submit s. 19A has been used to extend an unlawful licence in a manner that renders any challenge impossible and that the events complained of have interfered with the defendants' rights to equality, to earn a living and to constitutional fairness.

As regards the presumption of constitutionality and how this operates in favour of s. 19A, the defendants submit that the Minister was using the section for an unlawful purpose and that such action drained the section of both legitimacy and constitutionality.

They submit there was no possibility of challenging the operation of the section by judicial review. They say that if they had done that, they would have been accepting that the licence was lawful but that the Minister simply had delayed in making a decision. Above all, they submit, judicial review would have legitimised the Minister's power to award private licences over customary public fishery rights.

The Attorney General's Submissions
Section 19A(4) extends the life of a particular licence pending the completion of an application for renewal. The section does not provide for the granting of a licence, rather it provides for a temporary extension of a licence. The Attorney General submits that the enactment of a statutory provision that extends the life of a particular licence pending the completion of an application for the renewal of that licence offends no constitutional principle pleaded by the defendants in these proceedings. It is the temporary extension of the licence and not the granting of the licence that is catered for in the impugned section and the Attorney General submits that it has not been explained how the mere extension of the licence is said to constitute an unjust attack.

The Attorney General submits that it is not clear which aspects of s. 19A(4) give cause for grievance on the part of the defendants. It is further submitted that the constitutional validity of the scheme under which aquaculture licences are granted is not challenged, as the only statutory provision which is sought to be declared unconstitutional is s. 19A(4).

The Attorney General submits that it is significant that the defendants have never sought to impugn the validity of the licence granted by the Minister to the plaintiff in 1994, nor have they ever sought prohibition, *mandamus* or any other relief against the Minister since 1994 in respect of the continuation in force of that licence after 2004 with a view to opening up the area of foreshore to them or to the public at large. This fact, the submit, should deprive the defendants of the reliefs sought.

The Attorney General submits that a legislative provision is presumed to be constitutional unless shown otherwise. It is therefore, it is submitted, not sufficient for the defendants to show that the operation of the section might give rise to an unjust attack on their constitutional rights. In order to succeed in a claim of unconstitutionality, the defendants must be able to show that the subsection in question is incapable of a construction which renders it unconstitutional. *In East Donegal Co-operative Life Stock Mart Limited v. The Attorney General* [1970] I.R. 317, the Supreme Court held that where two possible interpretations of a particular legislative provision are open to a court, one of which renders it constitutional and the other unconstitutional, then the former approach must be taken. Also, the Attorney General drew the Court's attention to *Loftus v. The Attorney General* [1979] I.R. 221, where O'Higgins C.J. held, at pp. 238 – 241, that a statutory provision is entitled to a presumption:

> "… that what is required is allowed to be done, for the purpose of its implementation, will take place without breaching any of the requirements, express or implied of the Constitution… if [the donee of the power] exercised his discretion or his powers capriciously, partially or in a manifestly unfair manner it would be assumed that this could not have been contemplated or intended by the Oireachtas and his action would be restrained and corrected by the courts."

Furthermore, any failure to operate an Act in a manner consistent with the Constitution will leave the relevant State authority subject to the supervisory jurisdiction of the court and an affected person's rights can be vindicated by Order of the court. It is not necessary in those circumstances, however, to strike down the relevant statutory provision for constitutional invalidity. The only way therefore that these defendants can succeed in their challenge is if they establish, clearly, that the subsection in question cannot be applied constitutionally. The Attorney General submits, furthermore, that if there was an issue about or a complaint to be made about the Minister's handing of an application for the renewal of a licence, whether on grounds of delay or otherwise, it would have been open to the defendants or any other affected party to bring judicial review proceedings to seek such relief. The appropriate approach here could have been by way of judicial review and it is not now open to the defendants to claim a breach of their constitutional rights when they could have taken action much sooner to prevent any such breach but did not do so.

As for the defendants' purported reliance on *Moore*, the Attorney General says it is difficult to see what application that case can have here. In *Moore*, the plaintiffs had sought a declaration that they were in ownership of a private fishery in tidal waters in Donegal. Under English law, as a result of Magna Carta, such fisheries could not be created in tidal waters unless they existed prior to the death of Henry II (1189). The plaintiffs relied, ultimately, on certain crown grants of fisheries made on various dates between 1603 and 1639. Crown grants of private fisheries were not lawful, by reference to Magna Carta. However, in *Moore*, statutes had been passed which validated in general terms all crown grants in plantation lands in Ireland.

The essential question in *Moore* was whether the foreshore in question constituted plantation lands or not. If they did, the statutes in question would have validated the otherwise unlawful grant because Magna Carta was capable of repeal by statute. It was found, as a matter of fact, that the foreshore in question did not constitute plantation lands. Consequently, the statutes did not govern the matter and the plaintiff's claim failed. It was implicit in the reasoning in *Moore* that a public statute could exclude the public from tidal waters notwithstanding the Magna Carta.

In light of the findings in *Moore*, the Attorney General submits that far from assisting the defendants, it is abundantly clear that Magna Carta is capable of repeal by statute and if the modern statute in question in these proceedings is inconsistent with Magna Carta, then the statute prevails. In any event, it is submitted that the Magna Carta was repealed by the Statute Revision (Pre-1922) Act, 2005.

The Attorney General also argues that the defendants' claim is incompatible with Article 10 of the Constitution, which provides as follows:

> "1. All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State, subject to all estates and interests therein for the time being lawfully vested in any person or body.

> 2. All land and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this Constitution, belonged to the State to the same extent as they then belonged to Saorstát Éireann.
>
> 3. Provision may be made by Law for the management of the property which belongs to the State by virtue of this Article and for the control or the alienation, whether temporary or permanent, of that property."

As regards the defendants' claim that their constitutional rights are being infringed, the Attorney General states that nothing was taken away from the defendants by the extension of the licence pursuant to the impugned subsection because there was no evidence before the Court of their having fished the grounds the subject matter of the licence between the years 1994 and 2004. In those circumstances, the position is either that the defendants did not fish those grounds at the relevant time and so have lost nothing by not fishing them now or that the defendants did participate in fishing in that area but did so contrary to statutory provisions which they did not and still do not challenge. In either event, the Attorney General submits that no claim of any loss of constitutional rights has been made out by the defendants in this case. In relation to the defendants' claim of a breach of their right to earn a living, it was submitted that there was no evidence before the Court in either the principal trial or the supplemental hearing, of any impact on the income or assets of the defendants. The Attorney General referred the Court to the judgment of the Supreme Court in *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands* [2004] 1 I.R. 402, where Murray J. (as he then was) held as follows:

> "It seems to me that the appellant has misconceived the nature and ambit of the right to earn a livelihood. To engage in such a lawful business activity for the purpose of earning a livelihood is something which a citizen is entitled to do as a right. It is self-evident that the right to carry on such a business does not entitle the citizen to have access, as a right, to the property of third parties and use it for business purposes. It does not matter whether the property, in this case a national monument, is privately owned or owned by the State. It is true that the respondent is required, pursuant to s. 16(1) of the Act of 1930, subject to the limitations in that section, to permit members of the public to have access to the national monument. That is purely a statutory obligation directed at entitling members of the public, individually or as visitors, to view a national monument. Manifestly it does not confer a right on individuals or business enterprises to land customers for their own business purposes on that property and indeed it must be said that the appellant did not seek to advance such an interpretation of that section."

Overall then, the Attorney General submits the defendants lack *locus standi* to bring this challenge. They submit there is a clear public interest in the control of the exploitation of tidal waters. Such controls are, they submit, commonplace in all Member States of the European Union. It is self-evident that considerable mischief could be caused, if, in the period between the termination of an existing aquaculture licence and the granting of a new one, the bed in question was opened to uncontrolled fishing. The Attorney General submits that the subsection and the power it confers is therefore necessary to protect the interests of the common good.

Decision

As regards the defendants' submission that there was no possibility of challenging the operation of the section by bringing judicial review proceedings, I accept the Attorney General's submission that if there was an issue about the Minister's handing of the licence renewal application, it was at all times open to the defendants to challenge any such matter by way of judicial review and that it is not now open to the defendants to claim a breach of their constitutional rights when they could have taken that approach to prevent any such breach from arising in the first place but failed to do so.

I believe the decision in *Moore* is of no assistance to the defendants in this case and I accept the Attorney General's submission that it was implicit in the reasoning in that case that legislation was capable of excluding the public from tidal waters notwithstanding the Magna Carta. The reason the plaintiff's claim in *Moore* succeeded was because the lands in question were found, as a matter of fact, not to be plantation lands and in those circumstances the relevant statutes did not apply. If the area in question had been found to be plantation lands the outcome would have been entirely different, and the outcome turned on the classification of the lands, not on the effect or superiority of the Magna Carta on subsequent legislation. The facts in the present case are distinguishable from *Moore* and the decision in that case cannot assist the defendants in the challenge they seek to make here.

I do not accept the defendants' argument that their constitutional rights, including their right to earn a living, have been breached by the matters complained of in these proceedings. I agree with the Attorney General's submission that the defendants lack *locus standi* to challenge the relevant section on any such basis given the decision of the Supreme Court in *Casey v. Minister for Arts, Heritage, Gaeltacht and the Islands*, particularly the following section:

> "It seems to me that the appellant has misconceived the nature and ambit of the right to earn a livelihood. To engage in such a lawful business activity for the purpose of earning a livelihood is something which a citizen is entitled to do as a right. It is self-evident that the right to carry on such a business does not entitle the citizen to have access, as a right, to the property of third parties and use it for business purposes." (Emphasis added)

For all of the above reasons, I reject the defendants' application and refuse the reliefs sought.