



COURT OF APPEAL

Neutral Citation Number: [2018] IECA 105

Record No. 2016/076

**Finlay Geoghegan J.
Peart J.
Irvine J.**

Between

Michael P. Fingleton

Applicant/Appellant

and

The Central Bank of Ireland

Respondent/Respondent

Judgment delivered by Ms. Justice Finlay Geoghegan on the 24th day of April 2018

1. The appellant is the former Chief Executive Officer of Irish Nationwide Building Society ("INBS") from which position he retired in April, 2009. This appeal is against the order of the High Court (Noonan J.) made on the 14th January, 2016 refusing relief by way of judicial review seeking an order of *certiorari* of a notice of inquiry served by the Central Bank of Ireland, the respondent, pursuant to part IIIC of the Central Bank Act, 1942 as amended ("the Act"). The order was made for the reasons set out in a written judgment delivered on the 4th January, 2016, IEHC 1.

2. The appellant pursued his appeal on three distinct grounds: (1) the jurisdiction ground; (2) the settlement ground and (3) the delay ground.

3. This judgment is concerned with the jurisdiction ground alone. I have had the opportunity of reading in draft the judgment of Irvine J. on the settlement and delay grounds and I am in agreement with same.

Background Facts

4. The appellant joined INBS in 1971; he became Chief Executive Officer and Managing Director in 1974; he ceased to be Managing Director in January, 2008 when he retired as a director and continued to be Chief Executive Officer until 30th April, 2009.

5. INBS collapsed in the wake of the global economic crisis. On the 24th February, 2011 all deposits of INBS were transferred to Permanent TSB and on the 1st July, 2011 all remaining assets and liabilities of INBS were transferred to the Irish Bank Resolution Corporation ("IBRC"). Since that date, at latest, INBS has not carried on the business of providing financial services.

6. In 2010 the respondent commenced an investigation of INBS and of certain persons concerned in its management. The investigation related to the period from 1st August, 2004 to the 30th September, 2008 ("the review period"). During this period it is not in dispute that INBS was a regulated financial service provider ("RFSP") for the purposes of part IIIC of the Central Bank Act, 1942, as amended. In January, 2012 correspondence commenced between the respondent and the appellant in relation to suspected prescribed contraventions by INBS during the period in question for the purposes of s.33AO of the Act and what were termed "reasonable grounds to suspect that as a person concerned in the management of INBS between the 1st August, 2004 and 30th September, 2008" the appellant may have participated in the commission of the suspected prescribed contraventions within the meaning of s.33AO(2) of the Act. The detail of that correspondence is not relevant to the jurisdiction ground of appeal.

7. On the 9th July, 2015, the respondent issued a notice of inquiry pursuant to part IIIC of the Act concerning INBS, the appellant and a number of other named individuals. In it the respondent stated that it had determined that it had reasonable grounds to suspect that INBS committed certain prescribed contraventions within the meaning of part IIIC of the Act during the review period and that it had reasonable grounds to suspect that the appellant and other named persons, being persons concerned in the management of INBS during the review period, participated in the commission of some or all of the prescribed contraventions by INBS.

8. The notice also stated that the respondent would hold an inquiry to determine whether or not INBS committed prescribed contraventions and whether or not the persons concerned participated in the commission of some or all of the prescribed contraventions. The appellant was invited to attend the inquiry to commence on the 1st February, 2016 and further details were given of the persons appointed to act as members of the inquiry.

9. On the 15th July, 2015 the respondent published the document entitled "Settlement Agreement between the Central Bank of Ireland and Irish Nationwide Building Society". This is primarily relevant to the settlement ground of appeal and referred to in greater detail in the judgment of Irvine J. It is not relevant to the jurisdiction ground of appeal.

10. Leave to seek judicial review was granted by the High Court (White J.) on the 8th September, 2015 to seek the reliefs identified in the statement of grounds upon the grounds set out therein. Affidavits and a notice of opposition were exchanged in the usual way. The facts deposed to are not relevant to the jurisdiction ground of appeal as the essential facts relied upon for that ground are not in dispute and are as set out above.

Statutory Framework

11. The Central Bank and Financial Services Authority of Ireland Act, 2004 inserted a new part IIIC in the 1942 Act. This introduced an Administrative Sanctions Procedure ("ASP") with effect from the 1st August, 2004. Chapter 2 concerns the power of the respondent to hold inquiries. The jurisdiction to do so is set out in s.33AO which provides:

"33AO.—(1) Whenever the Regulatory Authority suspects on reasonable grounds that a regulated financial service

provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.

(2) Whenever the Regulatory Authority suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention. Such an inquiry may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider.

(3) Without prejudice to the exercise of the Bank's powers under subsection (2), an inquiry referred to in that subsection may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider."

12. Section 33AQ sets out the decisions which the Bank may make following an inquiry under section 33AO. Insofar as relevant it provides:

"(1) At the conclusion of an inquiry held under section 33AO, the Regulatory Authority shall make a finding as to whether the financial service provider concerned is committing or has committed the prescribed contravention to which the inquiry relates.

(2) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Regulatory Authority shall make a finding as to whether the person is participating or has participated in the prescribed contravention to which the inquiry relates.

(3) If the Bank makes a finding that a regulated financial provider is committing or has committed a prescribed contravention, it may impose on the financial service provider one or more of the following sanctions:

(a) ...

(f) ...

(4) . . .

(5) If the Regulatory Authority makes a finding that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission by the financial service provider of a prescribed contravention, it may impose on the person one or more of the following sanctions:

(a) a caution or reprimand;

(b) a direction to pay to the Regulatory Authority a monetary penalty not exceeding the prescribed amount;

(c) a direction disqualifying the person from being concerned in the management of a regulated financial service provider for such period as is specified in the order;

(d) if the person is found to be still participating in the commission of the contravention, a direction ordering the person to cease participating in the commission of the contravention;

(e) a direction to pay to the Regulatory Authority all or a specified part of the costs incurred by that Authority in holding the inquiry and in investigating the matter to which the inquiry relates.

(6) For the purpose of subsection (5) (b), the prescribed amount is—

(a) €500,000, or

(b) if the regulations prescribe some other amount of money for paragraph (a), that other amount.

(7) At the conclusion of an inquiry relating to the conduct of a regulated financial service provider, the Bank shall notify its decision to the financial service provider. The decision must set out in writing ..."

13. Section 2(1) of the Act provides that "unless the context otherwise requires:

"financial service provider' means a person who carries on a business of providing one or more financial services;"

"regulated financial service provider' means—

(a) a financial service provider whose business is subject to regulation by the Bank or the Regulatory Authority under this Act or under a designated enactment or a designated statutory instrument..."

(b) ..."

14. Section 2(4) provides:

"For the purposes of this Act, a person is concerned in the management of a body corporate, or a firm, that is a regulated financial service provider if the person is in any way involved in directing, managing or administering the affairs of the body or firm."

15. A further provision inserted into the definition section of the Act by the Central Bank (Supervision and Enforcement) Act, 2013

was relied upon by the appellant. This provides:

"References in this Act to a regulated financial service provider, or a related undertaking, shall, unless the context otherwise requires, be read as including a person who was a regulated financial service provider, or a related undertaking, at the relevant time."

16. It is not in dispute that during the review period, 2004 to 2008, INBS was a regulated financial service provider and the appellant was a person concerned in the management of it. However, it is also not in dispute that at the date of service of the notice of inquiry in 2015 INBS was no longer a financial services provider and the appellant was no longer concerned in its management.

17. In the High Court and again in this Court the principal submission made on behalf of the appellant is that the expression "person concerned in the management of a regulated financial service provider" in s.33AO(2) does not include persons who were formerly concerned in such management (including during any review period) but are no longer concerned and hence the respondent had no jurisdiction to inquire into the applicant in 2015. Mr. Shipsey, S.C. on his behalf submits that s.33AO(2) only applies to persons who are concerned in the management of the regulated financial services provider at the time the Bank reaches its relevant suspicion and decides to hold an inquiry.

18. The submission made on behalf of the respondent is that the phrase describes the status of the person concerned at the time of the alleged prescribed contraventions and accordingly s.33AO(2) applies to a person concerned in the management of the regulated financial service provider at the time of the alleged contraventions even if, as in this case, he is no longer so concerned at the date of decision to hold an inquiry.

19. In the High Court as in this Court there was no real dispute about the principles to be applied by the Court in interpreting section 33AO. These together with the more detailed submissions will be referred to below. The trial judge having set out the submissions made in some detail and the applicable interpretive principles concluded at para. 104 of his judgment:

"None of these canons or rules avail the applicant in the absence of ambiguity, uncertainty or obscurity in the words of s. 33 AO (2). In my view, the meaning of the words is clear and does not depend on adding in anything to the section that is not there. The expression "person concerned in the management" is in itself time neutral and is given context and meaning by the words that follow it in the subsection. It is to my mind clear beyond doubt that the time at which the person concerned in the management of a RFSP must be so concerned is the time at which the RFSP commits the prescribed contravention in which the person concerned participated. Any other construction offends common sense and gives rise to absurd results."

Submissions

20. The principal submission of the appellant on this aspect of the appeal is that the trial judge, in error adopted a purposive approach to the interpretation of s.33AO(2) of the Act. It is accepted that the trial judge identified at para. 96 of his judgment that the section, which imposes a sanction, requires to be interpreted in accordance with the principles applicable to one that imposes a penal sanction. That is not in dispute. The appellant relies in particular upon the final sentence in the conclusion of the trial judge at para. 104 cited above to the effect that any other construction "offends common sense and gives rise to absurd results". It is submitted that the trial judge in substance applied s.5 of the Interpretation Act, 2005 which by its terms does not apply to a penal sanction.

21. The respondent disputes that the trial judge applied s.5 of the interpretation Act, 2005 and relies upon para. 109 of his judgment where he stated:-

"Finally on the interpretation and jurisdiction issue, it is not in my opinion necessary to apply any purposive interpretation to arrive at the natural and ordinary meaning of the words of s. 33 AO (2) insofar as that could be said to conflict in any way with s. 5 of the Interpretation Act 2005, which is solely concerned with the construction of provisions that are obscure or ambiguous, or the literal interpretation of which would give rise to absurd results or would fail to reflect the plain intention of the legislature. None of that arises here, as I have already found."

22. The respondent is in agreement that the principles applicable to the interpretation of statutory provisions creating penal sanctions are applicable to s.33AO(2) of the Act. Mr. Paul Gallagher, S.C. on its behalf drew attention to the distinction between what the trial judge concluded at para. 104 of his judgment namely that the interpretation proposed by the appellant would offend common sense and give rise to absurd results and the circumstances in which s.5 of the Interpretation Act applies namely where a literal interpretation of the section in question would be absurd. The respondent submits that the fact that a court rejects an absurd interpretation contended for by a party does not mean that the Court must necessarily be regarded as having engaged in an exercise of purposive interpretation.

23. The respondent also submits that the fact that the trial judge had regard to the context of the Act as a whole is permissible in interpreting a penal statute and is not to be considered as an exercise in a purposive interpretation which is precluded in relation to penal statutes.

Discussion and Conclusions

24. The submissions made on behalf of the respondent appear to me to be correct. The trial judge approached the interpretation of s.33AO of the Act in accordance with the principles applicable to the interpretation of a penal provision. This requires a literal construction to be ascertained by the meaning of the words used in the section in the context of the Act as a whole or the relevant part thereof. The Supreme Court in *the People (D.P.P.) v. Hegarty* [2011] 4 I.R. 635 McKechnie J. (Murray C.J. and O'Donnell J. concurring) put it thus at para. 37:

"There is no doubt but that s. 3(4)(a) of the 1996 Act is a provision creating a criminal offence and, therefore, must be strictly construed. There can be no creation or extension of penal liability by implication by the use of obscure or imprecise language, or by the application of interpretive aids which otherwise would be available in a civil setting. As a result, the provision in question, expressly and in clear and unambiguous language, must have, by literal construction, the meaning contended for by the D.P.P. That provision, however, must be viewed and its true meaning ascertained by reference to its immediate context, properly derived from the scheme of the Act, or more accurately from that part of the Act which criminalised behaviour previously not so declared. It is only, if in accordance with this approach and if the ordinary meaning of the words can be so understood, that the result suggested by the D.P.P. can stand."

25. A similar approach was taken by Finnegan J. in the Supreme Court *in the People (D.P.P.) v. Boyce* [2009] 2 I.R. 124 at para. 172 where considering the interpretation of s.2(11) of the Criminal Justice (Forensic Evidence) Act, 1990 he stated:

"Section 2(11) must be considered in the context of s. 2 as a whole and the Act as a whole. "Powers conferred by the Act" in the absence of some indication to the contrary will include the power conferred by the Act to take samples on consent. ... Accepting that the Act is penal I am satisfied that s. 2(11) does not admit of two reasonable constructions so that the more lenient should be preferred. Rather one would expect if the legislature had intended to restrict An Garda Síochána in obtaining forensic samples they would have done so in clear words..."

26. Accordingly I have concluded that the trial judge did not err in principle in his approach to the interpretation of s.33AO(2) of the Act. He interpreted the section giving a literal construction to the words used in the context of the Act and in particular part IIIC thereof. As pointed out by the trial judge the phrase "a person concerned in the management of a regulated financial service provider" is time neutral. It is an adjectival phrase describing the requisite status of a person to come within the ambit of s.33AO(2) of the Act. Where it suspects on reasonable grounds that a person with that status "has participated in the commission of a prescribed contravention by the financial service provider" the respondent is given jurisdiction to hold an inquiry. The literal interpretation or plain and ordinary meaning of the words used is to describe the status of persons whom, having participated in the commission of alleged prescribed contraventions may be the subject of an inquiry. Quite clearly that description relates to the time at which it is alleged the prescribed contravention occurred.

27. The appellant sought to rely on the use of the present tense in the definition in s.2(4) of the Act set out above in support of his alternative interpretation. It was submitted on behalf of the respondent that there is a drafting convention of using the present tense for the purpose of definitions. Irrespective of any such convention, the use of the present tense in the definition simply describes at any relevant moment in time how a person is to be determined as being "concerned in the management of a body corporate ...". It does not assist the appellant's contention regarding the correct interpretation of s.33AO(2). It simply determines the test to be applied in deciding whether at any particular moment in time a person is or is not to be considered as one "concerned in the management of a body corporate...".

28. The appellant also sought to rely upon the sanctions which may be imposed pursuant to s.33AQ(5) of the Act where a finding is made that a person concerned in the management of a regulated financial service provider has participated in the commission of a prescribed contravention. I do not consider that any of the sanctions in that subsection support the construction contended for by the appellant of section 33AO(2). It is true that the sanction in subpara. (d) is only applicable to a person who is still a person concerned in the management of a regulated financial service provider but those in paras. (a), (b), (c) and (e) all potentially apply to a person who was, at the time of the alleged commission of the prescribed contraventions, a person concerned in the management of a regulated financial service provided but is no longer so at the time of the holding of the Inquiry.

29. Accordingly the trial judge was also correct to reject as a reasonable alternative construction one whereby s.33AO(2) only applied to persons who are still concerned in the management of a body which is a financial service provider at the time the bank forms a suspicion or decides to hold an inquiry.

30. Section 33AO is at the core of the administrative sanctions procedure provided for in part IIIC of the Act. In its application to an alleged past prescribed contravention at a given time or review period its plain meaning is to provide for an inquiry as to whether a body with the status of a regulated financial service provider did commit such a prescribed contravention (s.33AO(1)) and whether a person with a status of being concerned in its management participated in same (s.33AO(2)). The section does not permit of a reasonable interpretation that either the regulated financial service provider or the person concerned in the management thereof must continue to have the relevant status at the time the respondent decides to hold an inquiry. The words used interpreted in their ordinary meaning in the context of part IIIC of the Act make clear that each must have the relevant status at the time of the alleged commission of prescribed contraventions and participation therein.

31. Accordingly, I would dismiss this ground of appeal and uphold the trial judge's interpretation of s.33AO of the Act of 1942 (as amended).