Neutral Citation Number: [2010] IEHC 105

THE HIGH COURT

2010 852 P

BETWEEN

MICHAEL MEADE

PLAINTIFF

AND

THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 3rd day of March, 2010.

The application

1. On this application the plaintiff seeks interlocutory injunctions in the following terms:

> (1) restraining and/or prohibiting the defendant from implementing interim arrangements for the opening of Polyvalent Spring Mackerel Fishery whereby certain vessels in the over 65 foot category, and in particular the plaintiff's motor fishing vessel "Buddy M", are to be given a quota allocation for vessels in the under 65 foot category;
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> (2) restraining and/or prohibiting the defendant from discriminating against certain owners of vessels within the over 65 foot category, and in particular, the plaintiff with respect to quotas allocated to the "Buddy M"; and
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> (3) if necessary, an order directing the defendant to treat all owners of vessels over 65 foot equally with respect to the allocation of mackerel quotas in the Polyvalent Spring Mackerel Fishery.

The foregoing relief is sought on foot of a notice of motion which issued on 1st February, 2010, the proceedings having been initiated by plenary summons which issued on the same day.

The factual background

2. The "interim arrangements" referred to in the notice of motion arise from a decision made by the defendant pursuant to the powers conferred on him by s. 13 of the Sea-Fisheries and Maritime Jurisdiction Act 2006 (the Act of 2006) on 27th January 2010, which was communicated to the plaintiff by letter dated 28th January, 2010. Sub-section (1) of s. 13 provides that the defendant may, "for the proper and effective management and conservation and rational exploitation of fishing opportunities and fishing effort for Irish sea-fishing boats under the common fisheries policy", at his discretion grant to a person an authorisation in respect of a specific boat, authorising, subject to s. 13, "the utilisation of the boat's fishing effort for the capture and retention on board of a specified fish stock … from the boat in a specified area … and the landing or transhipment of the specified stock … during such period as is specified in the authorisation".

3. The decision in issue on this application relates to the mackerel quota for the year 2010 and, more specifically, for the Spring of 2010. When the defendant made his decision on 27th January 2010, the final national allocation had not been agreed at EU level because bilateral negotiations between the EU and Norway had not been completed. At the December 2009 Fisheries Council an interim national quota for 2010 at 65% of the 2009 quota was set. The decision in issue related to the allocation out of that interim quota of the Spring 2010 quota. While the total allowable catch and the final quota have been subsequently agreed at EU level, following the successful conclusion of negotiations between the EU and Norway, it is important to emphasise that these proceedings and the relief claimed relate to the decision made on 27th January 2010 as to the allocation of the interim national quota.

4. Mackerel quota is allocated between Refrigerated Sea Water (RSW) vessels and polyvalent (*i.e.* multi-purpose) vessels, including hand liners. A set quantity is allocated to hand liners. The balance of the polyvalent allocation is divided between vessels over 65 feet and vessels under 65 feet.

5. In distributing the polyvalent allocation for Spring 2010 between the two categories of vessels, the defendant's decision was to distribute the allocation of 5,505 tonnes as follows:

> (a) 4,486 tonnes was allocated to the over 65 foot vessels, of which there are 17, each vessel receiving an allocation of 263 tonnes; and
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> (b) 1,018 tonnes was allocated to the under 65 foot vessels, distinguishing between –
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> > (i) vessels of over 50 foot, of which there are 16, each of which got an allocation of 32 tonnes; and
> >
> > (ii) vessels under 50 foot, of which there are 32, each of which was allocated 16 tonnes.

I would observe that the distribution does not tally mathematically with the available allocation, but nothing turns on that.

6. The manner in which the defendant's decision affected the plaintiff was that, as he was informed in the letter dated 28th January,

2010 from the defendant's department, a fishing authorisation in respect of the "Buddy M" was issued to him with an allocation of 32 tonnes of mackerel in respect of the period to 28th February, 2010. He was informed that a "re-allocation" of mackerel was planned after 28th February, 2010 for vessels in his mackerel quota allocation category (under 65 foot) for the period to run to 7th April, 2010. What was meant by "re-allocation" in that context is explained in the replying affidavit sworn on 18th February, 2010 by Josephine Kelly, a principal officer in the defendant's department. Ms. Kelly averred that it is planned to have two fishing periods for the Spring season in respect of the under 65 foot category. Vessels which have not landed a minimum of 10% of the mackerel allocation in the first period, *i.e.* up to 28th February, 2010, will not be eligible for an allocation in the second period. As I understand it, the unfished quota will be "re-allocated", which, in reality, means re-distributed between the vessels in the relevant category who have exceeded the threshold and the distribution will be on a pro-rata basis, although that has not been averred to on behalf of the defendant.

7. The plaintiff fished his entire allocation of 32 tonnes on 3rd February, 2010, so that he has crossed the threshold for a further distribution. His complaint is that, for allocation purposes, the "Buddy M" should have been allocated 263 tonnes as a vessel over 65 feet, because –

> (a) since 11th December, 2009 the "Buddy M" has been registered in the Register of Fishing Boats with a registered length of 19.83 metres, which brings it within the over 65 foot category, and
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> (b) the Sea-fishing Boat Licence in respect of the "Buddy M" has been renewed by the Licensing Authority for Sea-fishing Boats with effect from 1st January, 2010 without pelagic preclusion in relation to mackerel, which means that it can fish for mackerel.

8. It is not disputed by the defendant that the "Buddy M" was registered as an over 65 foot vessel when the defendant made his decision in late January 2010. The basis on which the defendant treated the "Buddy M" as an under 65 foot vessel for the purposes of allocation of quota was that he decided to freeze all quota management arrangements for Spring 2010 as they were in Spring 2009, pending the evaluation and consideration of long-term arrangements as part of a mackerel review which is ongoing. That meant that, in accordance with the defendant's decision, all vessels continue to be treated in 2010 for quota allocation purposes as they were treated in 2009. The "Buddy M" was an under 65 foot vessel for the purposes of the Spring 2009 allocation and, accordingly, it was similarly treated for the purposes of the Spring 2010 allocation.

9. The defendant's position is that he made the decision to freeze all quota at 2009 levels having first notified the industry representatives, including the Producers' Organisation (the Irish South West Producers' Organisation), of which the plaintiff is a member, by letter of 24th July, 2009, that he intended to undertake a review of mackerel management and pelagic licensing policy for the polyvalent segment of the fishing fleet. In that letter, the defendant warned the owners of vessels that the review might change the criteria for determination of mackerel allocation and the allocation of other pelagic stocks within the polyvalent segment of the fleet. He also warned that actions planned or recently taken by owners might not qualify them for an increased share of the stocks. In particular, he warned owners with vessels then in the 65 foot and under category for mackerel and other pelagic stock allocations, who were intending to modify their vessels, that such modification might not secure entry into the over 65 foot mackerel and other pelagic fisheries. Subsequent to that letter, the Minster received representations from some fishing organisations. Later, he invited industry representatives to a meeting in his department on 18th December, 2009. The plaintiff attended that meeting and, as Ms. Kelly's notes of the meeting, which have not been contradicted, disclose, the plaintiff apprised the meeting of his circumstances and, in particular, that he owns a vessel, which had been extended in length to move from the under 65 foot category to the over 65 foot category.

10. The notes of the meeting of 18th December, 2009 illustrate the divergent views within the fishing industry as to how the defendant should allocate the mackerel quota. Before making his decision on the allocation which he made for Spring 2010 on 27th January 2010, the defendant issued a letter on 15th January, 2010 to the representative organisations in which he indicated his intention to introduce a new allocation based on 50% of the over 65 foot allocation for four vessels, including the "Buddy M", which were lengthened to meet the over 65 foot registered length requirement in 2009. However, the response from the industry once again reflected divergent views. There was strong opposition to the defendant's proposal, which was dropped and, instead, the defendant made the decision on 27th January 2010 which is the subject of these proceedings.

11. The plaintiff's case is that he should have been allocated mackerel quota relevant to an over 65 foot boat for Spring 2010 (*i.e.* 263 tonnes) on a number of grounds. First, he asserts that the defendant has retrospectively altered the criteria for the granting of quota to vessels over 65 feet and he contends that the defendant should have put all persons in his position on express notice of his intention so to do within a reasonable period of time. It was submitted on his behalf that the letter of 24th July, 2009 was not addressed to him. However, the plaintiff has not averred that he was not aware of the contents of that letter at the time. Secondly, he asserts that he acted to his detriment in taking measures to secure quota relative to a vessel over 65 feet and, in this regard, he cites the changes he had effected to the "Buddy M" and also the fact that over the course of four years he took the steps necessary to meet the criterion of 100% "active pelagic" history for the purposes of securing the quota allocation. The plaintiff contends that he has expended considerable time and money in those endeavours and that at all material times officers of the defendant's department were engaged in the process and were fully aware of the steps he was taking. In this connection, the plaintiff exhibited correspondence from the defendant's department, including two letters from Adrian Hosford of the Sea Fisheries Administration Division dated respectively 9th March, 2009 and 23rd October, 2009. In the latter letter, Mr. Hosford set out what the plaintiff had to do to comply with the requirement of having 100% "active pelagic" capacity from 1st January, 2010. It is clear that the plaintiff fulfilled the requirement, which involved, *inter alia*, taking steps to have the engine power of the "Buddy M" reduced from 663kW to 368kW, which no doubt involved expense. Mr. Hosford made it clear in his letter of 23rd October, 2009 that the letter concerned the licensing of the vessel only and did not in any way concern the allocation of quota.

Analysis of the relief claimed against the factual background

12. The defendant has issued authorisations on foot of the decision he made on 27th January 2010 to the owners of vessels in the polyvalent fleet, so that the quota available has been allocated for the first period. Insofar as there is currently quota available for re-distribution following the expiration of the first period on 28th February, 2010, that unused quota will be distributed by the defendant in accordance with that decision. The position, accordingly, is that the decision has been largely implemented.

13. In effect, what the plaintiff is seeking on this application is that the Court should direct the defendant to grant an authorisation to the plaintiff for additional quota amounting to 231 tonnes (*i.e.* the 263 tonnes allocated to vessels which were over 65 feet in 2009 less the 32 tonnes already allocated to the plaintiff and already fished by him) pending the trial of the action. In substance, what the plaintiff is seeking is a mandatory interlocutory injunction. Counsel for the plaintiff properly acknowledged that.

14. It is clear, on the basis of the information given to the Court, although this was not deposed to on behalf of the defendant, that of the total quota for 2010 to which Ireland is entitled under the recent agreement, 8065 tonnes, equivalent to roughly 13% thereof, will be allocated to the polyvalent segment. That means that there will be available to the defendant for allocation to the polyvalent fleet in Autumn 2010, 2,560 tonnes (8,065 tonnes less the Spring 2010 allocation of 5,505 tonnes). Accordingly, the defendant has the capacity to allocate 231 tonnes to the plaintiff and, indeed, to grant a similar allocation to the other three owners of vessels who extended their vessels during 2009 to over 65 feet.

The issues

15. The issues which arise in determining whether the plaintiff is entitled to the injunctive relief he seeks, which, as I have stated, in substance is a mandatory injunction are:

> (a) whether he can show that he has a strong case that he is likely to succeed at the hearing of the action, following the decision of the Supreme Court in *Maha Lingham v. Health Service Executive* [2005] 17 ELR 137;
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> (b) whether damages would be an adequate remedy for the plaintiff if the injunction was refused and ultimately he was successful in the substantive action; and
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> (c) whether the balance of convenience favours the grant or the refusal of an injunction.

Strong case?

16. It was submitted on behalf of the plaintiff that he is entitled to an allocation of quota equivalent to the allocation to the owners of vessels which were in the over 65 foot category in 2009 on two bases.

17. First, it was submitted that the plaintiff had a legitimate expectation, having regard to the time and money he invested in extending the registered length of the "Buddy M" to over 65 feet and his four years of endeavours in building up one hundred per cent "active pelagic" history by 2010. The first essential ingredient of a successful claim based on failure of a public authority to respect legitimate expectations is that the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it would act in respect of an identifiable area of its activity (*per* Fennelly J. in *Glencar Exploration Plc v. Mayo County Council* [2002] 1 I.R. 84 at p. 162). In determining whether that ingredient is present on the facts of this case, the question which must be answered in the affirmative is whether the defendant made a statement or adopted a position amounting to a promise or representation that he would grant mackerel quota in 2010 to the owners of vessels the registered length of which was extended so as to bring them from the under 65 foot category to the over 65 foot category in the year 2009. On the basis of the evidence which is now before the Court it is not possible to conclude that the plaintiff has shown that he has a strong case that his claim based on failure of the defendant to respect legitimate expectations is likely to succeed at the hearing of the substantive action. On the contrary, the evidence suggests that the defendant, and the officers of his department, were at pains not to raise hopes or expectations in owners of vessels who were contemplating modifying their vessels. The evidence indicates that clear and unequivocal caveats were issued to the industry in the defendant's letter of 24th July, 2009. Additionally, I am not satisfied that the plaintiff has made out a strong case that he is likely to succeed in establishing the two other ingredients identified by Fennelly J. as essential elements in establishing a claim based on failure to respect legitimate expectations: the communication of the representation in such a way as to form part of a transaction or a relationship between the plaintiff and the defendant; and that the nature of the representation is such to create an expectation reasonably entertained by the plaintiff that the defendant would abide by the representation and that it would be unjust to permit him to resile from it. The evidence falls very short of indicating that a strong case can be made for establishing either ingredient.

18. The second legal basis on which counsel for the plaintiff contended that the defendant acted unlawfully in not granting the plaintiff a quota allocation of 263 tonnes was an assertion that he was in breach of the powers conferred on him by s. 13 of the Act of 2006. It was contended that his decision was not designed to promote "conservation and rational exploitation" of the fishing industry. If that were the case, the plaintiff's complaint would more properly be met by a challenge to the validity of the defendant's decision in judicial review proceedings or, alternatively, by an application for a declaration to that effect in these plenary proceedings. There is no such claim in the plenary summons issued in these proceedings. As I understand the factual foundation for the assertion that the defendant acted contrary to his powers under s. 13, it is that, in order to preserve his one hundred per cent "active pelagic" status for 2011, the plaintiff must fish for mackerel or herring or both on at least one occasion each week for sixteen weeks in the year 2010, because to date the defendant has not granted a "moratorium" reducing the requirement to maintain "active pelagic" history from sixteen weeks to eight weeks for the year 2010 or, indeed, for the year 2009, as he did for the years 2002 to 2008 inclusive. In consequence, the plaintiff, in order to maintain the required "active pelagic" history, will have to fish one day per week in each of sixteen weeks in 2010, notwithstanding that his quota was fished out on 3rd February, 2010 and although he is prohibited from landing the catch, which will result, it was submitted, in unnecessary destruction of fishing stock. As I understand it, the moratorium on "active pelagic" requirement was introduced and renewed under policy directives made under s. 3(2)(b) of the Fisheries (Amendment) Act 2003 and is a feature of the licensing regime for sea fishing boats, which is separate and distinct from quota management and allocation. On the basis of the submission made on behalf of the plaintiff, I cannot see that the plaintiff has made out an arguable, let alone a strong case, that he will succeed at the hearing of the action in establishing that the defendant has acted in breach of his powers under s. 13 on the ground alleged.

19. In determining whether a plaintiff has met the first test for the grant of a mandatory interlocutory injunction, the strong case test, the Court must be astute in avoiding resolving, or being seen to resolve, factual controversies. In arriving at a conclusion on the issue as to whether a strong case has been made out against the defendant on either or both of the two legal bases on which it was submitted by the plaintiff that he has, it has not been necessary to rely on any contested fact. That conclusion is that the plaintiff has not met the strong case test and, therefore, falls at the first hurdle.

Adequacy of damages

20. It was urged on behalf of the defendant that, if the Court should find that, as a matter of law or equity, the defendant should have granted the plaintiff an allocation of 263 tonnes, damages would be an adequate remedy for the plaintiff. On this point, counsel for the defendant relied on the decision of the Supreme Court in *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450 and, in particular, the following passage from the judgment of Finlay C.J. (at p. 468):

> "The loss to be incurred by *Curust* if it succeeds in the action and no interlocutory injunction is granted to them, is clearly and exclusively a commercial loss, in what had been, apparently, a stable and well established market. In those circumstances, *prima facie*, it is a loss which should be capable of being assessed in damages both under the heading of loss actually suffered up to the date when such damages would fall to be assessed and also under the heading of probable future loss. The difficulty, as distinct from complete impossibility, in the assessment of such damages, should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy.

21. Counsel for the defendant submitted that the facts set out in the plaintiff's second affidavit sworn on 4th February, 2010 illustrate that the loss which the plaintiff contends he will incur, if he is not granted the additional quota he seeks, is readily quantifiable in damages. Apart from that, counsel for the defendant submitted that the loss would be clearly and exclusively a commercial loss. Counsel for the plaintiff, on the other hand, pointed to an averment contained in that affidavit in which the plaintiff averred that he would be "facing economic ruin". The factor which the plaintiff pointed to as likely to give rise to such a disastrous outcome was if he "were to fish for the remainder of 15½ weeks in order to qualify for the over 65 foot category", which I take to mean in order to maintain his "active pelagic" record, which, as I understand it, is a licensing requirement.

22. Where there is a risk that a commercial enterprise, whether conducted by an individual or a company, will be tipped over the edge into insolvency if an interlocutory injunction is not granted, provided there is appropriate evidence to support the existence of that risk, which would normally require up to date and precise financial data averred to by an accountant, in my view, it is open to the Court to conclude that damages would not be an adequate remedy, if the interlocutory injunction were not granted. I have so held in the past. However, in this case, even if the first hurdle had been surmounted, on the evidence now before the Court, one could not conclude that damages would not be an adequate remedy.

23. I have not overlooked the fact that counsel for the plaintiff relied in particular on the judgment of this Court (Kelly J.) in *Mullarkey v. The Irish National Stud Co. Ltd*. [2004] IEHC 116, in which it was held that damages would not be an adequate remedy for the plaintiff, where his family circumstances had been deposed to and were not controverted, and where he had ongoing obligations which would fall to be met and could not await any award of damages which might be ultimately be obtained at the trial. That case involved what has come to be known as an employment injunction and the issue was the payment of pay while on sick leave. The position of the plaintiff in that case, in my view, is distinguishable from the position of the plaintiff here.

Balance of convenience

24. In arguing that the balance of convenience favoured granting, rather than refusing, an interlocutory injunction, counsel for the plaintiff submitted that the defendant will suffer no prejudice, whereas the consequences of refusal will have a great impact on the plaintiff, in that his livelihood will be affected, his responsibilities to his crew will be affected, with repercussions for the community in Castletownbere, the port from which he operates. Counsel referred the Court to the judgment of the Supreme Court in *Mitchelstown Co-operative Society Ltd. v. Societe des Produits Nestlé SA & Ors*. [1989] ILRM 582. In that case, Mitchelstown Co-operative was seeking to restrain an Irish subsidiary of Nestlé from distributing yogurt and desserts in Ireland under the trade name "Chambourcy", on the basis that Mitchelstown had the exclusive right to do so under a licence and trade mark user agreement entered into with Nestlé four years previously. The passage from the judgment from Finlay C.J. on which counsel for the plaintiff relied, which appears at p. 588 in the report, is in very general terms. What carried weight with Finlay C.J. in finding that the balance of convenience lay in favour of the grant of the injunction was that Nestlé had permitted Mitchelstown's failure to commence to manufacture the product to continue for the previous four years, whereas the Irish subsidiary of Nestlé had only commenced its activity in July or August 1988, the decision of the High Court being appealed against being dated 11th October, 1988. I cannot see how that decision, which related to the grant of a prohibitory injunction to restrain an alleged breach of contract, assists the plaintiff's claim in this case for a mandatory interlocutory injunction to compel the defendant to allocate additional quota.

25. I have mentioned the fact that, having regard to the final decision at EU level in relation to the national allocation, the defendant has capacity to meet the plaintiff's claim, although that is not on affidavit, because it was submitted on behalf of the plaintiff that the defendant need not interfere with the quota entitlement in relation to other vessels in the polyvalent fleet, if an interlocutory injunction is granted. Therefore, so the argument goes, the defendant will not suffer any prejudice. Against that, counsel for the defendant submitted that it is the defendant's responsibility under national and EU law to allocate the mackerel quota among Irish fishermen. It was submitted that the task poses severe difficulty for the defendant in circumstances where the fishermen cannot agree among themselves as to what allocation would be fair. That is certainly borne out by the uncontradicted evidence before the Court. If the Court were to grant the reliefs sought by the plaintiff, which amounts to directing the defendant to allocate him an additional 231 tonnes pending the trial of the action, effectively the Court would be ordering the defendant to impose new arrangements in respect of quota allocation across the board, which, as a matter of probability, would expose the defendant to legal action at the suit of other vessel owners, it was submitted.

26. For the reasons advanced on behalf of the defendant, I am of the view that the balance of convenience favours refusing the injunction. The fact that the defendant has capacity to meet the plaintiff's demand is irrelevant. Judicial interference with the scheme which the defendant has put in place for the allocation of national quota would, to use a colloquial phrase, "upset the applecart". In other words, it would disturb the status quo, rather than preserve it, as counsel for the plaintiff contended.

Decision and order

27. Primarily because I am not satisfied the plaintiff has met the strong case test, I have come to the conclusion that it would not be a proper exercise of the Court's jurisdiction to grant the plaintiff what is, in effect, mandatory relief. There are secondary considerations also for reaching that conclusion. The plaintiff has not established that damages would not be an adequate remedy and I am satisfied that the balance of convenience favours refusing injunctive relief. Underlying the decision is the fact that to grant the reliefs sought would disturb the *status quo*, rather than preserve it.

28. There will be an order dismissing the plaintiff's application.