THE HIGH COURT

[2011 No. 664 J.R.]

BETWEEN

CARBERY FISHING LIMITED

APPLICANT

AND

MICHAEL VALLELY, REGISTRAR GENERAL OF FISHING BOATS, MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, EMILE DALY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

THE HIGH COURT

[2011 No. 665 J.R.]

BETWEEN

FINTRA TRAWLING COMPANY FISHING LIMITED

APPLICANT

AND

MICHAEL VALLELY, REGISTRAR GENERAL OF FISHING BOATS, MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, EMILE DALY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cross delivered on the 19th day of December, 2011

1. Introduction

1.1 Each of the above cases raise similar points and relate to applications for judicial review seeking various declaratory relief.

1.2 The declarations result from the first named respondent embarking as an Appeals Officer for the purposes of Part 3 of the Fisheries (Amendment) Act 2003 and agreeing to state a case pursuant to the Act and prior to him signing the case stated, being advised by the State that he was not any longer a validly appointed Appeals Officer.

1.3 On 25th July, 2011, leave for judicial review was granted *ex parte* by Peart J.

1.4 The second, third, fourth and fifth named respondents seek an order in these motions setting aside the application for leave.

1.5 The basis of the application is that the provisions of s. 19 of the Fisheries (Amendment) Act 2003, set out a procedure for challenging or questioning decisions of the Appeals Officers and these procedures in effect provide for a three month time limit and that the notice of motion should be served upon the parties and leave should not be granted unless the court is satisfied that there are "substantial grounds for contending that the decision is invalid or ought to be quashed".

1.6 It is contended that this section provides that the exclusive remedy for questioning decisions of the Appeals Officer and that a number of the reliefs sought by the applicant in these proceedings do, in effect, question a decision of the Appeals Officer and accordingly both those and all the other reliefs applied for must fail.

2. Fisheries (Amendment) Act 2003

2.1 Section 19 provides insofar as it is relevant as follows:-

> "(1) A person shall not question a decision of an Appeals Officer on an appeal otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (in this section referred to as 'the Order').
>
> (2) An application for leave to apply for judicial review under the Order in respect of a decision of an Appeals Officer -
>
> (a) shall be made within the period of 3 months commencing on the date on which the decision was made, and
>
> (b) shall be made by notice of motion (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) which shall be served on an Appeals Officer and each party or each other party, as the case may be, to the appeal, or any other person specified for that purpose by order of the High Court, and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed ...."

3. The Facts

3.1 The facts of the substantive matter are not essentially an issue. The first named respondent undertook an oral hearing in relation

to the terms of a license granted to the applicant and this hearing commenced on 31st March, 2011, at which the second named respondent raised a preliminary objection that the first named respondent had no jurisdiction to determine the appeal under the 2003 Act as the matter appeals was not a license issued by the second named respondent but rather an authorisation granted by the third named respondent.

3.2 Having heard submissions by both parties on the definition of "licensing authority" for the purposes of the 2003 Act, the first named respondent exceeded to the applicant's request to refer the matter to the High Court for determination pursuant to s. 18 of the Fisheries (Amendment) Act 2003 by way of case stated and the hearing was then adjourned pending the determination.

3.3 The fourth named respondent on 31st March, 2011, sent both parties draft questions for determination of the High Court with request that any comments be submitted to him by 6th April, 2011. There followed a discussion between the parties as who should have carriage of the case and by email dated 22nd May, 2011, the first named respondent advised the applicant that he was unable to proceed with the case stated as:-

> "It appears that certainly when I made a decision to state a case to the High Court there was no challenge to my jurisdiction. However after April 15th the State have questioned my appointment and certainly it appears that my warrant of appointment had expired.
>
> Therefore as the case stated was not signed by me at this stage, I cannot see how I can now sign and state it where I am on full notice that I do not appear to have capacity at this stage."

3.4 In the main judicial review proceedings the applicants claimed a number of declaratory reliefs:-

> "(i) a declaration that on 31st March, 2011, the first named respondent was a validly appointed Appeals Officer for the purpose of Part 3 of the Fisheries (Amendment) Act 2003;
>
> (ii) a declaration that the applicant had a legitimate expectation that the first named respondent was a validly appointed Appeals Officer for the purpose of Part 3 of the Fisheries (Amendment) Act 2003;
>
> (iii) a declaration that on 31st March, 2011 , the first named respondent was entitled to hear the applicant's appeal against the mackerel authorisation number M/199429288/2010 issued to the applicant's vessel the MYF 'Atlantic Quest' S0985;
>
> (iv) a declaration that on 31st March, 2011, the first named respondent had the power pursuant to s. 18 of the Fisheries (Amendment) Act 2003 to reefer the following questions of law which arose during the course of the applicant's appeal to the High Court for decision;
>
> > 'Q.1 Is the Minister for Agriculture, Fisheries and Food a licensing authority for the purposes of the Fisheries (Amendment) Act 2003?
> >
> > Q.2 If the answer to 1 is yes, then does an Appeals Officer appointed under the Fisheries (Amendment) Act, have they jurisdiction to hear appeals from his authorisations?'
>
> (v) a declaration that the third named respondent was not entitled to request that the first named respondent to return the appeal papers in the applicant's appeal to the second named respondent on the grounds that the first named respondent was not, on 31st March, 2011, validly appointed Appeals Officer for the purpose of Part 3 of the Fisheries (Amendment) Act 2003;
>
> (vi) an order of *certiorari* quashing the decision of the third named respondent to direct the first named respondent to return the appeal papers in the applicant's appeal to the second named respondent'
>
> (vii) an order of *certiorari* quashing the decision of the second named respondent to forward papers in the applicant's appeal to the fourth named respondent for the purpose of the fourth named respondent conducting a full rehearing of the applicant's appeal;
>
> (viii) an order of *mandamus* compelling the first named respondent to refer the following questions of law, which arose during the course of the applicant's appeal to the High Court for decision;
>
> > 'Q.1 Is the Minister for Agriculture, Fisheries and Food a licensing authority for the purposes of the Fisheries (Amendment) Act 2003?
> >
> > Q.2 If the answer to 1 is yes, then does an Appeals Officer appointed under the Fisheries (Amendment) Act, have they jurisdiction to hear appeals from his authorisations?'
>
> (ix) an order of prohibition prohibiting the fourth named respondent from conducting a full rehearing of the applicant's appeal;
>
> (x) damages;
>
> (xi) further and/or relief; and ,
>
> (xii) costs."

4. The Respondent's Arguments

4.1 It is submitted by Mr. Paul McGarry, S.C., on behalf of the State respondents that the position is identical to that as decided by Kelly J. in *Goonery v. Meath County Council & Ors* [1991] 177 J .R . *ex tempore* judgment delivered 15th July, 1999.

4.2 The above case concerned similar proceedings in relation to the conduct of judicial review as contained by the provision of s. 19 of the Local Government (Planning and Development) Act 1992 which stated insofar as relevant as follows:-

> "(3) Section 82 of the Principal Act is hereby amended by the substitution for subsection (3A) (inserted by the Act of 1976) of the following subsections:-
>
> '(3A) A person shall not question the validity of -
>
> (a) a decision of a planning authority on an application for a permission or approval under Part IV of this Act, or
>
> (b) a decision of the Board on any appeal or on any reference, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts .(S. l. No. 15 of 1986) (hereafter in this section referred to as 'the Order')."

4.3 The section went on to state that the application for leave under the Planning Acts must be made within two months and on notice and leave should not be granted unless the High Court is satisfied there are substantial grounds for contending the decision is invalid or ought to be quashed.

4.4 In that decision. Kelly J. quoted with approval of a decision of the Supreme Court in *K.S. K. Enterprises Limited v. An Bord Pleanála* [1994] 2 I.R. 128 where Finlay C.J . speaking for the unanimous Supreme Court stated:-

> "The general scheme of the sub-section now inserted by the Act of 1992 is very firmly and strictly to confine the possibility of judicial review in challenging or impugning a planning decision either by a planning authority or by An Bord Pleanála. The time limit which has already been mentioned is indicated as being a very short time limit and it is an absolute prohibition against proceeding outside it with no discretion vested to the court to extend the time. Secondly, there is a provision contained in the sub-section as inserted that leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed ...
>
> From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

4.5 It was contended in *Goonery* that the essence of the application was not to question the validity of the planning permission. Kelly J. disagreed and said that in a number of them, in particular, relief No. 4 which sought a declaration that the County Council did not properly determine the application and relief No. 11 , the Council could not have made a valid decision who were clearly questioning the planning decision. Kelly J. went on to state:-

> "Mr. Collins' [on behalf of the applicants] final point is to the effect that the reliefs sought before Budd J. are severable so that all those except Nos. (4) and (11) are not ones to which the section applies and could have been applied for on an *ex parte* basis. Therefore, it is said, the Order of Budd J. is bad only insofar as it purported to grant relief in respect of the reliefs sought at paragraphs (4) and (11).
>
> Again, I cannot agree with this contention. The Applicant chose the form and nature of the proceedings which she wished to institute. She chose to bring proceedings against the various named parties and to question the validity of the planning permission granted in those proceedings. Now that the procedure followed is under attack, I do not think that she can seek to sever not merely the relief sought but also the Order granted on foot of her application. The Order granting leave is a composite and cannot in my view be subjected to an *ex post facto* analysis and severance as is sought to be achieved. Whatever may be her view now, the fact is that all the reliefs were sought *ex parte* including those which could only be obtained on an *inter partes* application and on the demonstration of a higher degree of proof. To permit what is now sought would be to allow an element of approbation and reprobation on the Applicant's part. It would permit her to treat what she moved as a single application of an integrated case as something different to that. Such an approach could give rise to much undesirable uncertainty. In these circumstances, I am satisfied that the Order of Budd J. cannot stand and must be set aside in its entirety."

4.6 In response to questioning by the court, Mr. McGarry on behalf of the respondent submitted that the reliefs sought at (iv) and (viii) were in effect a challenge to the first named respondent's decision as Appeals Officer decline to state the case once his authority had been impugned by the rest of the respondents.

5. The Applicant's Arguments

5.1 Mr. Eoin McGonigal, S.C., on behalf of the applicant submitted that the issues under our consideration in the Fisheries Act are different from the Planning Acts as the relevant section in the Planning Acts refers to a person not being entitled to question "the validity of" (my emphasis) decisions of the planning authorities whereas s. 19 of the Fisheries (Amendment) Act 2003 refers to questions of "a decision of an Appeals Officer".

5.2 Mr. McGonigal proceeded to state that (presumably accepting the authority of *Goonery* in relation to severance) that his claim for judicial review does not in any way question a decision of an Appeals Officer in the appeal.

5.3 In relation to the reliefs claimed at (iv) and (viii), what was sought was a declaration that the first named respondent had the power pursuant to s. 18 to refer certain questions of law to the High Court and an order compelling the first named defendant to refer the questions of law.

5.4 In particular it is contended on behalf of the applicant that the order is sought at (iv) is not to question a decision of the Appeal s Officer "on an appeal" and that no decision was taken by the Appeals Officer during the course of "the appeal" to the effect that he was not entitled to refer the questions to the High Court rather the Appeals Officer decided at the hearing that he could refer the questions to the High Court and he was stopped by the State saying that he had no jurisdiction and as it is stated by the applicants

in their submissions that the first named respondent was in his own eyes "in effect not so much *functus officio* as having no *functus* at all".

5.5 In relation to the order sought at (viii), Mr. McGonigal submits that the relief is not directed against a decision taken by an Appeals Officer in the appeal since the decision to refer the question had already been taken and the question had been decided on but that the first named respondent did not actually refer the question because he had been informed by the State, wrongly it is submitted that he was not an Appeals Officer validly appointed.

5.6 By way of a further point which was elaborated on by Mr. McGonigal in his oral submissions, it is submitted that if and insofar as the prayers at (iv) and (viii) are in fact questioning the decision of the respondent in an appeal, that the respondents are not entitled to maintain that position as it is their fundamental position that Mr. Vallely was never an Appeals Officer at the time that he was acting and accordingly any decision taken by him were not taken *qua* Appeals Officer in an appeal.

6. Decision
6.1 It is quite clear that as in the planning code, the legislature has taken a policy decision, that decisions of Appeals Officers on appeals can only be challenged by way of application for judicial review on a motion when a court is satisfied that there are substantial grounds and within three months of a decision which is being questioned.

6.2 However, I do believe that this section which is a restrictive one must be strictly construed.

6.3 I fully accept the decision of Kelly J. in *Goonery* that if the portions of the applicant's reliefs sought to question decisions of the Appeals Officer on an appeal and other prayers sought reliefs outside that provision that it would not be appropriate to sever one for the other.

6.4 The real issue in this case is whether some of the prayers sought can be validly described by the respondents as questioning decisions of an Appeals Officer on an appeal.

6.5 In my judgment, the respondents are indeed estopped from making that contention because they contend that the first named respondent was not and never was a validly appointed Appeals Officer on this appeal at any material stage of a decision making.

6.6 It is the respondent who must make the case and if as in this case they are estopped by their own contentions from alleging that the first named respondent was at the time an Appeals Officer, which is an officer established by the terms of s. 6 of the 2003 Act, then a motion must fail

6.7 I also hold that the relief sought at (iv) and (viii) are not in effect questioning the decisions of the Appeals Officers on an appeal even if Mr. Vallely was still acting as an Appeals Officer when he decided not to sign the case stated. Rather, what the applicants seek under these prayers is to force Mr. Vallely to act upon the exact decision that he had decided upon when he was of the view that his jurisdiction was not being questioned and his decision not to proceed further with the matter arose not in the course of the appeal but rather because as he saw it his jurisdiction was being questioned.

7. Order
7.1 The applicant is entitled to proceed in this matter and the motion should be dismissed.