

**THE HIGH COURT
JUDICIAL REVIEW**

[2005 No 802 JR]

BETWEEN**JOHN JOE FITZPATRICK****PLAINTIFF**

**AND
THE MINISTER FOR COMMUNICATIONS, MARINE AND
NATURAL RESOURCES**

DEFENDANT**Judgment of Mr. Justice Herbert delivered on the 9th day of November 2006**

1. By Order of this Court (Mr. Justice Hanna) made on 25th July 2005, the Applicant was granted leave to seek judicial review in the form of an order of Mandamus, directing the Respondent, by his officials, to deal with the Applicant as the Applicant owner in law (being in fact the charterer, manager and operator) of the M.V. "Galway Bay" on matters concerning the safety of the boat, and, in particular on matters concerning her survey and certification pursuant to the Merchant Shipping Act, 1992. Alternatively, an order of Mandamus directing the Respondent by his officials to deal with the Applicant as the authorised agent of the owners of the M.V. "Galway Bay" on matters concerning the safety of the boat and, in particular on matters concerning her survey and certification pursuant to the provisions of the Merchant Shipping Act 1992. The Applicant was further granted leave to pursue by way of judicial review, a claim for damages at the rate of in or about €4,300 per day, from 21st July 2005, the date of the alleged peremptory cancellation by the Respondent of the completion of the survey of the boat, to 25th July 2005, or such other date thereafter as the survey was actually completed, together with interest pursuant to the provisions of the Courts Act 1981 and, costs.

2. Central to the matters at issue between the parties to this application for Judicial Review is the definition contained in s. 2 of the Merchant Shipping Act, 1992 of the word "owner". It is there defined, in relation to a vessel as meaning:-

"the person registered under the Mercantile Marine Act, 1955, as its owner or, if no person is so registered, the person who owns the vessel, and includes any part-owner, charterer, manager or operator of the vessel."

3. The following facts were admitted or proved by affidavit evidence. The Registered Owner of the passenger vessel "Galway Bay", whose port of registry is Galway, is O'Halloran Shipping Limited of Inisbofin, Co. Galway. The Bill of Sale from Island Ferries Teo., dated 1st March 2001, was Registered on 27th March 2001, at 3.27 pm. On 1st July 2005, the latest Passenger Ship Safety Certificate, in respect of M.V. "Galway Bay" was issued by the Respondent to O'Halloran Shipping Limited following upon a marine survey of the ship conducted on 2nd June 2005. This Certificate was valid until 26th April 2006. This Certificate covered only voyages between Cleggan and Inisbofin Island in weather conditions not exceeding Beaufort Force 8, and voyages between Cleggan and Inisturk, in fine weather only, between the months of April and October.

4. On 2nd June 2005, the Applicant entered into some form of chartering, leasing or hiring agreement in respect of the M.V. "Galway Bay" with O'Halloran Shipping Limited. On 2nd June 2005, an application was made to Captain Neil Forde of the Marine Survey Office of the Respondent at Cork, for a change in the Passenger Ship Certificate to include regular plying between the Aran Islands, Doolin, Rossaveel, Galway, Liscannor and Ballyvaughan. This required a further marine survey to be carried out which the Applicant, Mr. Richard Grant of Lahinch, Co. Clare, a business partner of the Applicant in these proceedings, asked to be carried out as soon as possible at Doolin Pier. This application was made in the name of O'Halloran Shipping Limited, Cleggan, Galway.

5. On 3rd June 2005, Captain Forde and Mr. Kieran Goulding on behalf of the Respondent, duly attended at Doolin pier to carry out the necessary marine survey. The ship was unable to come alongside the pier because of the inclement weather conditions. The inspection was subsequently carried out at Doolin pier on 8th June 2005. Some defects were identified and a further inspection was arranged for 14th July 2005. Captain Forde considered that in addition the crew of the M.V. "Galway Bay" should participate in a day Course in Fire Drill, Man Overboard Procedures and Crowd Control Procedures. This was done on 19th July 2005, and the crew were certified by the Course operator as satisfactory. The Applicant then contacted Captain Forde and asked for a 7 day clearance to operate the ship immediately. The basis of this claim was that he was paying for the charter of the ship, paying crew wages and was suffering considerable financial loss through not being able to operate the ship. Captain Forde refused to sanction either of the person nominated by the Applicant to be Master of the M.V. "Galway Bay" and, told the Applicant to make contact with Mr. Brian Hogan, the Chief Marine Surveyor of the Department in Dublin.

6. On 20th July 2005, the Applicant on the suggestion of his solicitor and accompanied by Mr. John Wilde-Crosbie, Barrister, attended at the office of the Chief Marine Surveyor at Leeson Lane, Dublin. Mr. Brian Hogan the Chief Marine Surveyor declined to meet them without a prior appointment. The Applicant avers in his Grounding Affidavit sworn on 25th July 2005, at para. 19, thereof, that Mr. Wilde-Crosbie asked for and was given some note paper and Mr. Wilde-Crosbie wrote out a note requesting such an appointment. This note was exhibited in the Affidavit of the applicant and was admitted into evidence. It is signed, "John Joe Fitzpatrick of Sarafinn Limited owners of Galway Bay".

7. At para. 20 of this Affidavit, the Applicant states that:-

"A little over an hour later Captain Tom O'Callaghan came out and took us into his office. He asked Mr. Wilde-Crosbie if he was my legal representative. Mr. Wilde-Crosbie said no, that he was with me simply to hear what the Respondent's requirements were so that he could and would explain to me anything about the Respondent's requirements which I did not understand. ..."

8. The Applicant then gives an account of what transpired at this meeting with Captain Tom O'Callaghan. He states then at 2.00 pm Captain O'Callaghan, who is a nautical surveyor, informed the party that he would travel to Doolin the following afternoon and inspect the M.V. "Galway Bay" there at 3.00 pm and report back to the Chief Marine Surveyor. At para. 21 of his Affidavit, the Applicant records that he was later very surprised when Captain O'Callaghan telephoned him at 5.10 pm on 20th July 2005, and asked him if he was the Registered Owner of the ship. The Applicant avers that when he responded in the negative and stated that O'Halloran Shipping Limited was the Registered Owner, Captain O'Callaghan had stated that he would only deal with the Registered Owner and cancelled the arrangements for the following day.

9. By Telefax dated, Wednesday 20th July 2005, exhibited in the Affidavit of the Applicant and admitted into evidence, Captain Tom O'Callaghan, wrote to the Applicant as follows:-

"Dear Mr. Fitzpatrick,

In cases such as this, we deal with the registered owner of the vessel in respect of matters relating to the vessel. In our telephone conversation, you confirmed that you are not the registered owner of the vessel."

10. The Applicant avers that he at once contacted Mr. Paul O'Halloran, principal of O'Halloran Shipping Limited who agreed to write immediately and directly to Captain O'Callaghan. A copy of Mr. O'Halloran's letter dated 20th July 2005, to Captain O'Callaghan was exhibited by the Applicant in his Affidavit and was admitted into evidence. Mr. O'Halloran stated that he wished to apply to change the plying limits of the M.V. "Galway Bay" from Cleggan, Inisbofin and Inisturk to Doolin and all the Aran Islands and for back-up plan to Rosaveel.

11. On 21st July 2005, an exchange of correspondence took place between Messrs Patrick F. Moloney & Co., Solicitors, of Ennis, on behalf of the Applicant and, Mr. Brian Hogan and Captain Tom O'Callaghan. I find that it is unnecessary to set out this correspondence in detail, but it included the following letter to Mr. Hogan:-

"Dear Mr. Hogan,

We refer to our above named clients and unless my clients have a satisfactory response from you or your Surveyor, Captain Tom O'Callaghan to the fax to your office this morning, we will apply, without further notice to you, for an Order of Mandamus in the High Court. And in due course, if necessary, an Order for damages for interfering with our client's constitutional rights and that of his crew to pursue his livelihood.

We await hearing from you by return."

12. On the same date, - July 21st 2005, at 2.06 pm, Captain Tom O'Callaghan sent the following E-mail to Messrs Patrick F. Moloney & Company, Solicitors:-

"Thank you for your e-mail and attached letters. We wish to advise that regarding matters such as those raised in your letter, we deal with the registered owner of the vessel. We note that your clients are not registered owners of the mentioned vessel "M.V. Galway Bay".

We wish to advise that we have received an application from the registered owner of this vessel and we are progressing this with him."

13. At para. 20 of his Affidavit, sworn on behalf of the Respondent on 12th December 2005, Mr. Brian Hogan avers that Captain Tom O'Callaghan travelled to Doolin on Monday 25th July 2005, to carry out a survey of M.V. "Galway Bay", following the application by its Registered Owner, O'Halloran Shipping Limited. The result of this survey was communicated to O'Halloran Shipping Limited on 29th July 2005. The ship was found to be unsafe for plying in the requested areas because of the size of the vessel, its handling characteristics and the arrangement of Doolin Harbour, and the required Certificate was refused.

14. The Applicant was clearly aware of this pending survey of the M.V. "Galway Bay", because in the final paragraph of his grounding Affidavit, sworn on 25th July 2005, he states as follows:-

"24. I am hopeful that the present delay and difficulties which have occurred will come to a speedy end once the boat is seen in Doolin on Monday evening by Captain O'Callaghan. However, I say that it will be impossible for me to act as the charterer, manager and operator of the M.V. "Galway Bay" or the authorised agent of her registered owner if the Minister for Communications, Marine and Natural Resources will not deal with me. I say that it is not possible for me to be registered as the owner of the boat under the Mercantile Marine Act, 1955, because of that system of registration *inter alia*, protects mortgagees and I understand that O'Halloran Shipping have the vessel mortgaged to the Bank of Scotland."

15. No appeal was taken by the Applicant or by O'Halloran Shipping Limited to the District Court against the refusal of the Certificate, pursuant to the provisions of s. 21 of the Merchant Shipping Act, 1992.

16. In the circumstances, I find that the Applicant's claim has been rendered moot and merely academic, as the substantial matter at issue has been resolved by the Decision of the Respondent of 29th July 2005, to refuse the Certificate. It was not suggested at the hearing before me that the application raises public law issues of general and exceptional importance divorced from the Applicant's own private interest in the outcome of the application. Having regard to the refusal of the Respondent to authorise additional plying limits in respect of the ship, there are no grounds for considering that compensatory damage, for loss of use of the ship, might have been awarded if sought in a civil action against the Respondent, so there is no basis for a claim to relief pursuant to the provisions of the O. 84, r. 24, or O. 84, r. 26(5) of the Rules of the Superior Courts 1986, (as amended).

17. The Statement of Ground for Application for Judicial Review and the Grounding Affidavit of the Applicant disclose an existing cause of action. The decision of this Court (Hanna J.), to grant leave to the Applicant to seek Judicial Review establishes that the Applicant had at least an arguable case and that his application was not merely frivolous or vexatious. Each party to this application for Judicial Review has at all times actively maintained their own interpretation of the word "owner" as defined in s. 2(1) of the Merchant Shipping Act, 1992. Without the court fully determining that issue, neither party can justly claim that the court should exercise its discretion in awarding costs in their favour under the normal rule that costs, except in special circumstances should follow the event.

18. As there are no public law issues arising in this matter it is essentially a *lis inter partes*. The application for Judicial Review has not been rendered a moot by a decision of the Respondent to complete the marine survey at the behest of the Applicant. On the contrary the Respondent carried out that survey and at all times insisted that it would only carry out that survey solely at the request of the Registered Owner of the ship. Absent a public law point of general and exceptional importance, I cannot see how in justice the Respondent could be fixed with the costs of this application. I find that there was nothing in the conduct of the Respondent before or during the course of this application for Judicial Review which would justify such an award, particularly, in the absence of an adjudication by the court upon the merits of the application.

19. Having regard to the fact that the Applicant, at the time the application for leave to seek Judicial Review was made on 25th July 2005, was fully aware that the M.V. "Galway Bay" was to be surveyed by Captain Tom O'Callaghan in Doolin that very evening, it might reasonably be considered that it was unreasonable for the Applicant to have prosecuted this application for Judicial Review. However, the fact that the applicant, was as he claimed, and this claim was not denied or contradicted, paying the charter charges for the ship since 2nd June 2005, was also paying the wages of the crew from that date, and being unable to use the ship on the

proposed extended voyages was suffering a loss of revenue per day, (conditional of course, on their being approved by the Respondents, which they were not), together with the rapidly approaching start of the Summer Vacation in the Courts, could, I find, be regarded as special and exceptional circumstances which justified the Applicant in proceeding with the application for Judicial Review despite his knowledge and awareness of the immediately pending marine survey of the ship.

20. In the special circumstances of this case, I am not prepared to visit on the applicant the serious misrepresentation as to the ownership of the M.V. "Galway Bay" contained in the letter of 20th July 2005, to the Respondent from the Applicant. The facts, to which I have already adverted, demonstrate that the Respondent, though initially misled and inconvenienced by this misrepresentation did not in fact act upon it to his detriment. I am prepared to regard this most unsatisfactory matter as a wholly unauthorised action by Mr. Wilde-Crosbie altogether outside the scope of his retainer. At para. 5 of an Affidavit sworn by Mr. Wilde-Crosbie in this application on 14th January 2006, he states as follows:-

"5. I travelled over to the Department of the Marine in Leeson Lane, with Mr. Fitzpatrick and Mr. Tony Whelan, who works for Mr. Fitzpatrick. Mr. Fitzpatrick asked the porter if he could see Mr. Brian Hogan, the Chief Surveyor and explained that he had been referred to him by Captain Forde in relation to the plying limits of the M.V. "Galway Bay". The porter phoned through to Mr. Hogan's office and then told Mr. Fitzpatrick that Mr. Hogan would not see him. Mr. Fitzpatrick then asked if Mr. Hogan would refer him to somebody else, but this request was refused. Mr. Fitzpatrick then asked if he could make an appointment to see Mr. Hogan at some time convenient to Mr. Hogan. This request was refused and the porter was told to tell Mr. Fitzpatrick that he would have to write in for an appointment. At this stage I intervened and asked if I could have some note paper so that I could request an appointment for Mr. Fitzpatrick. Miss Byrne kindly came out to the foyer and gave me a notepad. She seemed sympathetic to Mr. Fitzpatrick and I explained to her that Mr. Fitzpatrick had been trying to get his boat certified for over six weeks and that the boat represented a very large investment and her owners were at a loss every day she was not working. I then wrote the note requesting an appointment to see Mr. Hogan or his Deputy. Mr. Fitzpatrick has exhibited this note in his Affidavit. Captain O'Callaghan has referred to it in his Affidavit and places considerable emphasis on the fact that I finished the note by referring to Mr. Fitzpatrick of Sarahfenn Limited owners of the m.v. "Galway Bay". I probably used this description to lend formality to the note but in reality I did this without any great thought on the matter. I was writing the note merely to obtain an appointment. It was not the application for plying limits. That application had already been made on the proper form and the proper fee paid. There was no issue – and certainly no issue that I was aware of – between John Joe Fitzpatrick and the Department of Marine over the ownership of the boat. Apart from my casual reference at the end of the note to Sarahfenn Limited as the owners of the boat, Mr. Fitzpatrick appears at all times and insofar as the question ever arose, to have made clear to the Department his interest in the boat and the fact that the registered ownership is in the name of O'Halloran Shipping Limited."

21. While one must deprecate this conduct in the strongest possible terms, I find that in the circumstances, it would be unreasonable and unjust to award the costs of this application against the Applicant on this basis.

22. I find no reason in the circumstances of this application why in justice or equity the Applicant should be awarded the costs of this application for Judicial Review. In my judgment, absent a public law issue of exceptional importance, the fact that the Respondent is a Department of State is no possible justification for this court to award the costs of the application to the Applicant. In all the circumstances, exercising the discretion as to costs vested in this court by the provisions of O. 99, r. 1(1), of Rules of the Superior Courts, 1986 (as amended), judicially and having regard only to the facts of this application for Judicial Review, I find that justice requires that the parties be each ordered to abide their own costs of the entire application for Judicial Review.