Neutral Citation: [2016] IEHC 328

**THE HIGH COURT**

**[2003 No. 9169 P]**

**BETWEEN**

**RICHARD GRANT, GURTEL LIMITED AND**

**LASTA MARA TEORANTA**

**PLAINTIFFS**

**AND**

**THE MINISTER FOR COMMUNICATIONS MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered on 14th day of June, 2016**

**Introduction**

1. This is an application brought by the plaintiffs for an order pursuant to O. 56A of the Rules of the Superior Courts that, where this Honourable Court considered it appropriate and having regard to all the circumstances of the case, the proceedings or any other issue herein, be adjourned for such time as the Court considers just and convenient and invite the parties to use an ADR process to settle or determine the proceedings and/or for such further and other order as this Honourable Court shall deem fit in the circumstances. In the alternative, the Court is invited to adjourn the matter to facilitate the convening and holding of a mediation conference pursuant to O. 36, r. 34 of the Rules of the Superior Courts.

2. These proceedings have a lengthy history. They commenced by way of a plenary summons dated 1st August, 2003. Fifty reliefs are sought in respect of matters which occurred between 1997 and 2003. A statement of claim running to 32 pages was delivered on 30th July, 2004. A notice for particulars was raised on 19th January, 2005 which was replied to on 22nd May, 2006. No defence was delivered until 12th March, 2007. On 28th March, 2007, the plaintiffs delivered an amended statement of claim which now runs effectively to 42 pages and seeks 71 substantive reliefs.

3. The proceedings arise from the plaintiffs' businesses as boat/ship operators at various locations on the Atlantic coast and specifically relate to applications for licences, surveys, exemptions and other matters governed by various regulations. The plaintiffs challenge these decisions taken by officials of the first named defendant in relation to vessels owned or operated by the plaintiffs. The business of the first named plaintiff was the provision of marine cargo services and the second named plaintiff was engaged in the provision of marine passenger services. The third named plaintiff has discontinued the proceedings. As such, the businesses of the plaintiffs are subject to the requirements of regulations which involve, inter alia, the application of European Union law.

4. It is the plaintiffs' case that each and/or any one of them have been subjected to a series of decisions by the first named defendant, his servants or agents which were made either unlawfully, or unjustly (and/or unfairly), discriminatorily and/or in breach of European law (including the law of the European Union and/or the European Convention on Human Rights and Fundamental Freedoms) and/or for the improper purpose of either damaging the business of the plaintiffs and/or aiding the business of their competitors. It is alleged that the decisions constitute and/or amount to misfeasance in public office and/or a tort and/or a breach of the plaintiffs' rights in law and/or constitutional rights (including, *inter alia*, their right to earn a livelihood and/or Article 40.1) and/or rights in European law. It is alleged that the relevant EU Directive has been inadequately transposed into Irish law and there has been a breach of the plaintiffs' rights under the European Convention on Human Rights. It is said that these wrongful acts have caused damage to the business of each of the plaintiffs and it amounts to an intentional interference with the economic interests of the plaintiffs.

5. Complaint is made in relation to decisions affecting nine vessels and concerning a variety of decisions such as detaining a vessel, requiring that a rescue boat or specialised radio equipment be provided, a decision not to recognise a certificate from another country, a decision in respect of transshipment at Doolin, Co. Clare (a tidal harbour), plying limits and cargo contracts for the Aran Islands and other decisions relating to the operations of the vessels.

6. Notice of intention to proceed was issued on 4th March, 2009, and then a second notice of intention to proceed on 12th November, 2012. The defendants raised a notice for further and better particulars arising out of the amended statement of claim which was undated but apparently was served under cover of a letter dated 21st December, 2012. It was replied to on 24th January, 2013, and the amended defence issued, dated 8th February, 2013. On 10th April, 2013, a notice of change of solicitor on behalf of the plaintiffs was filed. The defendants raised further and better particulars on 17th February, 2015, seeking particulars of the losses claimed in respect of the nine vessels the subject of the proceedings. This was replied to on 13th January 2016, 11 months later after this motion had issued.

7. In addition, the parties have made discovery (at a date unspecified) in the proceedings. During the course of argument, it was submitted, and not disputed, that the action was now ready to be set down for trial to obtain a date for hearing. It is against this background that the current application must be assessed.

8. By letter dated 16th February, 2015, the plaintiffs' solicitors wrote to the defendants' solicitors inviting them to agree to refer the matter to mediation. Six weeks later, on 30th March, 2015, they sent a reminder letter. Six weeks later, on 15th May 2015, the defendants' solicitors replied stating:-

> *"this matter has been considered carefully, and thoroughly, by the Attorney General, and by our client Department, and the writer, is instructed directly to advise you, that this is not a case suitable, for mediation."*

Some seven months later the plaintiffs issued the within motion seeking an order pursuant to O. 56A of the Rules. The relief is sought

on the basis that there will be a considerable saving of court time, costs and expenses if a lengthy trial is avoided by a successful mediation. It was submitted that the proceedings could be disposed of in full despite the fact that many declarations were sought including a declaration that EU Directive 98/18/EC has not been properly transposed into national law. This was so because it was inherent in the agreement to submit the entire proceedings to mediation that a resolution of the dispute, if reached by agreement of the parties, would not require such reliefs. The second ground advanced was the fact that of necessity the individuals concerned, the first named plaintiff and the Department officials, have and would continue to have dealings with each other in relation to the plaintiffs' operations into the future. It was preferable for all concerned therefore if matters could be resolved without the need to go to trial with all the possible negative implications for existing and continuing relationships. In the grounding affidavit, Ms. Helen Noble, on behalf of the plaintiffs states:-

> *"I say that for the Plaintiffs to operate their business that they must interact extensively with the Minister given the level of regulation of maritime matters. Accordingly, I say that even when these proceedings are concluded there will still be a business relationship and a need for continuing interaction between the Plaintiffs and the Defendants."*

9. In the replying affidavit sworn on behalf of the defendants, Ms. Rachel Ward, solicitor, set out why it was the view of the defendants that the long running proceedings were not suitable or appropriate for mediation. Firstly, she objected on the basis of the delay in the matter. Secondly, and possibly more importantly, she stated that the claims advanced made very serious allegations against public officials amounting to claims of misfeasance in public office and that therefore the proceedings were not appropriate for mediation or any other ADR process. She also said that proceedings seeking declaratory reliefs were likewise not appropriate to refer to mediation or any other process. She pointed out that the allegations were wide ranging and spread over a number of years involving a number of marine vessels and that therefore the mediation itself would be a lengthy process. She said that in the light of the nature of the claims being made by the plaintiffs it would be more appropriate for a split trial to be held dealing first with liability and leaving over the questions of damages until liability issues have been determined.

10. She also took issue with the plaintiffs' argument that there was an ongoing business relationship between the plaintiffs and the defendant and she objected to mediation when the particulars in relation to the damages claim had not yet been replied to. As of the date of her swearing of her affidavit the replies to particulars had not yet been received. They were since delivered and therefore this is no longer relevant to the issue to be decided on this application.

**Law**

11. Order 56A provides:-

> *"1. In this Order:*
>
> *'an ADR process' means mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration;*
>
> *'party' includes the personal representative of a deceased party.*
>
> *2. (1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—*
>
> *(i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or*
>
> *(ii) where the parties consent, refer the proceedings or issue to such process,*
>
> *and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify.*
>
> *(2) Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process."*

12. In *Atlantic Shellfish Ltd. & Anor. v. The County Council of the County of Cork & Ors*. [2015] IEHC 570 Gilligan J. gave judgment on an application by the plaintiffs in those proceedings seeking an order pursuant to O. 56A, r. 2. At para. 16 of the judgment the Court acknowledged the many benefits of mediation as including:-

> *"[t]he benefits include the ability of the parties to choose the mediator and the venue, that the mediation is conducted in private, the maintenance of confidentiality, the ability to agree or not agree, the savings on costs, expenses and time, the absence of the stress of an actual court case and the benefits to the parties particularly in commercial situations, to continue to do business after a successful conclusion to the mediation process."*

13. Gilligan J. noted that the reality of the situation with regard to mediation is that it is a two way process between willing parties who agree to and participate in the mediation process with a willingness to reach a compromise. It follows that a party ought not to be forced to attend mediation. He noted that the plaintiffs had requested the defendants to agree to mediation and the state defendants had indicated that they were not agreeable for reasons they set out in their correspondence. At para. 25 of his judgment he stated that:-

> *"if a party, having been invited to consider mediation, sets out bona fide reasons why a mediation process envisaged may not be suitable to the particular circumstances of a case, it would be inappropriate for the court to make an order inviting the parties to further consider mediation."*

In reaching this view he was influenced by the cost implications of such an order which could arise by virtue of the amendment to the Rules by the insertion into O. 99 of r. 1(B) which allows a court to have regard to the refusal or failure without good reason of any party to participate in any ADR process referred in O. 56A, r. 1 where an order had been made under r. 2 in the proceedings.

14. The decision was appealed to the Court of Appeal (*Atlantic Shellfish Ltd. & Anor. v. The County Council of the County of Cork & Ors*. [2015] IECA 283) and Irvine J. delivered the judgment of the Court on 7th December, 2015, dismissing the appeal. She pointed out that the Court should only exercise its discretion if it considers it "*appropriate*" to do so "*having regard to all of the circumstances of the case*". She said the court must first be satisfied that the issues in dispute between the parties are amenable to

the type of ADR proposed, and that it is one which is capable of determining the proceedings or issues between the parties. At paras. 35 and 36 of her judgment she held as follows:-

> *"[a]ssuming that the judge answers the first question in favour of the applicant, the court must then move to consider any other relevant circumstances. In my view these may include a consideration as to whether the application is made bona fide in the belief that the issues in dispute can be disposed of and that the applicant is genuinely willing to engage with proposed ADR rather than one made for the sole purpose of improving the applicant's negotiating position given that the effect of the order will be to trigger the cost provisions of r.1B of O.99 and the apprehension that necessarily follows for the party who for good reason may reject the court's invitation.*
>
> *36. It follows, that the court should not make the order sought if satisfied that the application is brought by a party who knows that an invitation from the court will for good reason be refused and/or where satisfied that the applicant has no real interest in the ADR proposed but is motivated to make the application knowing that the refusal will allow them proceed to trial while, so to speak, holding the sword of Damocles over their opponent until the very end of the litigation."*

Are the issues in dispute between the parties readily amenable to mediation?

15. I am not satisfied that the multitude of complex issues comprised in these proceedings is amenable to mediation. The plaintiff has not indicated any areas of contention or parts of the claim which might be resolved or narrowed in the context of the mediation. In truth, the application was not advanced upon this basis. Essentially they say that the claim may be settled in full. This cannot result in declaratory reliefs, as was accepted by counsel. Thus, a successful mediation must include the abandonment of those reliefs by the plaintiffs. Further, the mediation could not determine any of the legal issues raised by the plaintiffs against the defendants and therefore the case could not be resolved unless the defendants were prepared to abandon their defence to issues of liability which they have maintained since the defence delivered on 12th March, 2007. A resolution of the proceedings must be based upon parties abandoning the positions they have maintained in these proceedings for 13 years. While this is not impossible, it is certainly a matter of considerable weight in the exercise of the court's discretion.

16. It was pointed out by counsel for the defendants that the case is very complex both as to the facts and the legal issues. It was submitted on this ground alone that mediation was unlikely to succeed and was likely to be both lengthy and costly. In view of the fact that they anticipated that the mediation would not succeed, they believed that the process would, far from resulting in a saving of costs, lead to a further increase in the overall costs of the litigation.

17. It is also worth noting that the proceedings have progressed over 13 years with all the expense that entails, including the costs of discovery, to the point where the case is ready to be set down for trial. It is the experience of the courts that proceedings are most likely to be resolved by mediation after the pleadings are closed but before the parties have incurred the expense of complying with discovery. They are far less likely to be resolved by a mediation just before the case is ready to proceed a fortiori where one party does not wish to engage in mediation. As was pointed out by Gilligan J. in the High Court in *Atlantic Shellfish,* a court is entitled to bear in mind the poorer chance of success in a mediation which is not undertaken on a voluntary basis.

18. Furthermore, I agree with the opinion of Irvine J. at para. 43 of her judgment where she stated:-

> *"[f]urther, for my part, I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court".*

19. I am satisfied that it is not unreasonable for State defendants to maintain their entitlement to have a claim involving, *inter alia,* allegations of misfeasance of public office against a number of Department officials resolved in court where their actions may be tested and, in the opinion of the defendants, vindicated in public.

20. In my opinion the issues in dispute between the parties are not amenable to being disposed of by the type of ADR proposed. The defendants' opposition to the plaintiffs' application is one which is entirely *bona fide*. I am therefore aware that any invitation issued from this court will be refused for good reason. In those circumstances, following the approach adopted by Gilligan J. in the High Court and that set out in the Court of Appeal in *Atlantic Shellfish,* I exercise my discretion under O. 56A, r.2 to refuse the relief sought in the notice of motion herein.