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THE HIGH COURT

2008 1319 P

BETWEEN

JAMES KENNY

PLAINTIFF

AND

THE PROVOST FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN, TRINITY COLLEGE

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 28th of January, 2009

1. Introduction

1.1 The issue which I now have to decide arises in the context of long standing litigation between the plaintiff ("Mr. Kenny") and the defendants ("Trinity College") arising out of challenges made by Mr. Kenny to a planning permission obtained by Trinity College in respect of a significant development at Dartry in Dublin. This judgment is, in effect, a follow on from a judgment which I delivered in this matter on the 17th October, 2008 ("the October judgment"). The application which was then (and is now) before the court, is one in which Mr. Kenny seeks an order which would permit him to maintain these proceedings against Trinity College. There is in place a court order preventing Mr. Kenny from bringing such proceedings without the court's leave, and, therefore, in the absence of leave Mr. Kenny cannot maintain these proceedings.

1.2 In the October judgment I set out the relevant principles by reference to which such an application should be considered. I also indicated that I was not, then, persuaded that Mr. Kenny had established that he had a case which was not bound to fail. However, by virtue of the fact that the case which Mr. Kenny said he wished to argue had evolved to a considerable extent in the course of argument, I indicated that I would allow Mr. Kenny an opportunity to file a draft revised plenary summons, together with a draft statement of claim (see para. 6.1 of the October judgment). I also identified a number of difficulties with the claim which Mr. Kenny appeared to wish to bring. Those difficulties were set out, in particular, at paras. 5.6, 5.11, 5.12 and 5.14 of the October judgment. Having drawn Mr. Kenny's attention to those difficulties I indicated (at para. 6.2) that I would expect Mr. Kenny to make clear in the draft statement of claim how it was to be contended that he could obtain whatever reliefs might be claimed, notwithstanding those difficulties. In taking such a course I was following the practice adopted by Ó Caoimh J. in *Riordan v. Ireland (No.5)* [2001] 4 I.R. 463. I now turn to what has happened since the October judgment.

1.3 Mr. Kenny initially filed detailed written submissions which set out his position on the points to which I had drawn attention in the October judgment. Mr. Kenny did not, initially, file a draft statement of claim. At a subsequent procedural hearing I indicated that I would require Mr. Kenny to file a draft statement of claim, for if he were to be given leave to bring these proceedings (or any version of them) it was, in my view, important that there be some precision about the claim which was permitted to be pursued. It would, in my view, be wholly wrong for a court to permit imprecise proceedings to go ahead in circumstances where the person bringing those proceedings is the subject of a so called *Isaac Wunder* order. Such a course of action would, potentially, defeat the purpose of the *Isaac Wunder* order. Subsequently, in any event, Mr. Kenny filed a draft statement of claim

1.4 Thereafter, a further hearing ensued. This judgment is directed to the issues debated at that hearing. It is also of some relevance to note that Mr. Kenny has made a complaint to the European Commission concerning the planning process which is at the heart of this case.

2. <u>The Case now Made</u>

2.1 It is unnecessary to repeat the detail of the matters set out in the October judgement. The focus of the relief then sought (which continues to be the focus of the draft statement of claim), involves orders designed to prevent Trinity College from enforcing a series of cost orders which it already has in its favour against Mr. Kenny. However, it is clear from the draft statement of claim that the basis put forward by Mr. Kenny for suggesting that the relevant costs orders should not be enforced, is his assertion that the original planning permission given to Trinity College was invalid. His original challenge to that planning permission was dismissed by McKechnie J., who made an order for costs against Mr. Kenny on the 2nd March, 2001. The other costs orders sought to be discharged relate to various failed attempts to re-open those proceedings. While the central focus of these proceedings concerns the costs orders to which I have referred there are some additional matters raised in the draft statement of claim. I propose to deal with those additional claims in section 5 of this judgment.

2.2 In the context of the principal claim concerning costs orders, a number of points need to be made. At para. 7 of the draft statement of claim Mr. Kenny asserts that Trinity College "secured its planning permission from An Bord Pleanála...in breach of those directives in a similar manner as was found by the ECJ to have been secured by the developer of the Derrybrien Project, and the plaintiff further claims that this planning permission which was granted to Trinity breached the EU planning requirements for such a development, for which the relevant authorities nonetheless purported to grant a valid planning permission".

2.3 On that basis it is suggested that all of the costs orders which followed are invalidated by the fact that they arose from proceedings in which Mr. Kenny was challenging what he asserts to be an invalid planning permission. It follows, in turn, that in the event that the planning permission in this case is valid, Mr. Kenny could have no case on any basis for seeking to overturn the various costs orders with which his proceedings are concerned. These new proceedings amount, therefore, to, at a minimum, an indirect challenge to the planning permission given by An Bord Pleanála to Trinity College in respect of the development concerned. Section 50 of the Planning and Development Act 2000, ("the 2000 Act") requires that a person may not "question the validity" of a variety of decisions of planning authorities (greatly expanded by amendments introduced by the Planning and Development Act 2006), other than by means of a judicial review brought under O. 84 of the Rules of the Superior Courts ("RSC"). Amongst the types of decision covered by the section are planning permissions.

2.4 It seems to me to be clear from Mr. Kenny's draft statement of claim that he seeks to question the validity of Trinity College's planning permission. While he does not formally seek an order declaring it to be invalid, it is only if he is able to persuade a court that it is, in fact, invalid that he could hope to succeed. It seems to me that Mr. Kenny's proceedings are, therefore, squarely caught by s. 50 of the 2000 Act in that he is seeking to question the validity of Trinity College's original planning permission.

2.5 For that reason alone it would not be permissible to allow Mr. Kenny to question the validity of Trinity College's planning permission in these proceedings, for these proceedings are not judicial review proceedings brought under O. 84 of the RSC.

2.6 There are, however, further reasons for coming to the same conclusion. One of the issues which I noted in the October judgment, as being a question which Mr. Kenny would have to deal with, was the issue of how Trinity College, as a private entity, could be made amenable to provisions of the EU directives which are at the heart of his case. In answer, Mr. Kenny places reliance on the fact that both the planning authority and An Bord Pleanála ("the Board") are "emanations of the State" as that term is used in European law and are, as such, potentially fixed with the consequences of directly effective measures. Mr. Kenny argues that the relevant directives are of direct effect. On that basis Mr. Kenny seeks to argue that the planning permission decisions given by those two bodies (and in particular the Board) are open to challenge as a matter of European law

which, he says, is directly effective at least against those two bodies.
2.7 Whatever may be the merits of such an argument (and for proper reason, counsel for Trinity College did not get into the detail of such argument at the hearing before me), the fact that such an argument is made nonetheless makes clear that the challenge is directed to the planning permission given by those bodies (and in particular the Board). If Mr. Kenny's case were not a challenge to the decision of the Board, then it is very hard to see how any case could be made out against Trinity College, that institution not being an emanation of the State. This analysis simply copper fastens the fact that the substance of Mr. Kenny's contentions in this case involve a challenge to the validity of a planning permission.

3. <u>Some Additional Issues</u>
3.1 The next matter that requires some comment concerns the interaction of EU law and Irish law in a matter such as this. Mr. Kenny has placed significant reliance on the decision of the European Court of Justice ("ECJ") in *Commission v. Ireland* case C-215/06. Mr. Kenny seeks to draw parallels between his case and that addressed by the ECJ in *Commission v. Ireland.* As I pointed out in the October judgment, the principal focus of the judgment of the ECJ in *Commission v. Ireland* was concerned with the Irish regime in respect of retention permission which was found to be invalid. It is true to state that the ECJ did go on to consider, on the facts of the case, the extent to which the relevant planning authorities had complied with their obligations in relation to the project at Derrybrien in County Galway for a wind farm. It is fair to note, however, that the principal argument put forward by Ireland (and rejected by the ECJ) was to the effect that an environmental impact assessment was not required by the relevant directives in relation to at least one of the decisions to grant permission for the Derrybrien wind farm project. That argument having failed it was clear that, on any view, there had not been an appropriate environmental impact assessment. It is true to state that the ECJ also went on to consider whether a second decision that was subjected to an environmental impact assessment (in relation to a later phase of the same project) complied with the requirements of the relevant directives. The ECJ held that the assessment concerned did not deal with all of the matters which were mandated by community law. On that basis, also, the ECJ found that Ireland was in breach of its obligations under the relevant Directives.
3.2 It is important, however, to point out that the ECJ, in dealing with the consequences of the finding to the effect that the regime in respect of retention permission in Ireland was in breach of community law, noted the following at para. 59:-

> "The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, <u>subject to the limits resulting from the procedural autonomy of the Member States</u>." (emphasis added)

3.3 It is, therefore, clear that the extent to which it may be possible to interfere with existing permissions may be constrained by what is described by the ECJ as the procedural autonomy of Member States. As I pointed out in the October judgment, the jurisprudence of the ECJ recognises a wide measure of discretion to Member States in defining the procedures to be adopted in cases before the courts of such Member States, even where those procedures may have to be used so as to enforce entitlements which derive from community law. There are, of course, limits to the extent to which that procedural autonomy can be relied on, most particularly where the procedures specified are such as to preclude an effective remedy in relation to rights recognised in community law or where the procedural requirements are more stringent than those applied to similar situations deriving from domestic law. Subject, however, to such an overall limitation it is clear that the ECJ recognises that the entitlements of individuals in specific cases may well be limited if they fail to comply with national procedural law, subject only to that law itself not breaching the principles of equivalence and effectiveness.
3.4 It was in that context that I raised, as one of the issues which Mr. Kenny would have to address, as set out in the October judgment, the question of the interaction of EU law and Irish law. His answer, correct so far as it goes, was to point out that the ECJ determined the case of *Commission v. Ireland* as a matter of community law. That that would be so is obvious. The question before the ECJ was as to whether Ireland had complied with its EU obligations which question is, of course, a matter of community law. However, that begs the question as to the extent to which other aspects of Irish law (and specifically procedural law) may not be relevant in determining the extent to which it is, in practice, possible to reverse individual decisions, notwithstanding the fact that Ireland may be in breach of its community law obligations in relation to those decisions. No argument was put forward by Mr. Kenny as to why Irish procedural law ought not apply in a case such as this. In addition, therefore, to the Irish procedural requirement that any collateral challenge to a planning permission must be by way of judicial review, the requirements of s. 50 of the 2000 Act are to the effect that any such challenge must be commenced within eight weeks of the decision sought to be questioned. However
s. 50(8) of the 2000 Act, does give to the High Court power to extend the prescribed period. Section 50(8) provides that the High Court may only extend the relevant period if it is satisfied that:-
A. There is "good and sufficient reason for doing so", and
B. The circumstances that resulted in the failure to make the application for leave within time were "outside the control" of the person seeking the extension.
3.5 It would, therefore, be impermissible for a court to entertain an application for judicial review which questioned the validity of Trinity College's original planning permission at this very significant remove, unless the court were satisfied that the requirements of s. 50(8) had been met.
3.6 In that context it should be noted that, on the morning of the hearing before me, Mr. Kenny indicated that he had prepared a further affidavit which, it would appear, contains allegations to the effect that there may have been some concealment of documents in the past. Because that affidavit had not been served on Trinity College, it did not seem to me to be appropriate to consider it in this application. Whether the matters which Mr. Kenny sought to raise in that affidavit would give rise to the proper exercise by a court of its entitlement to extend time under s. 50(8) is not, therefore, a matter on which I could or should express any view.
3.7 From the above analysis it is, however, clear that any proceedings by which Mr. Kenny might seek, directly or indirectly, to challenge the original grant of planning permission to Trinity College must be taken by judicial review only and could be permitted to proceed only if the court was persuaded that there were proper grounds to extend the time under s. 50(8). Both of those requirements are part of Irish procedural law and do not appear to be in breach of the principles of effectiveness or equivalence. An absolute barrier to bringing any proceedings save in an eight week period might, arguably, have breached the principle of effectiveness. However, the fact that there is a capacity for an extension of time seems to me to provide an effective remedy. The onus is, however, on the party seeking to bring proceedings outside of the relevant time period to persuade the court that it is appropriate to exercise the power of the court under s. 50(8). Likewise the regime that applies to planning matters is also applied in a range of other areas and, within the planning area, applies equally to decisions which are influenced by community law (in practice larger projects) and those which are not.
3.8 In passing it should also be noted that the procedural autonomy given to Member States under community law will give significant respect to the law of this jurisdiction concerning the finality of judgments including the so called rule in *Henderson v. Henderson* (1843) 3 Hare 100.
3.9 It seems to me, therefore, that if Mr. Kenny wishes to pursue any proceedings of the types contemplated he will have to do so in accordance with the relevant statutory framework. The current proceedings are, therefore, in my view, procedurally misconceived and Mr. Kenny should not be given permission to pursue them.

4. Costs of Failed Set Aside Applications

4.1 A further issue should also be the subject of some comment. Apart altogether from the fact that these proceedings are procedurally misconceived, Mr. Kenny has not, in my view, provided any basis for seeking to challenge those subsequent orders of the High Court in relation to costs which were concerned with a failed allegation on the part of Mr. Kenny to the effect that McKechnie J. was falsely misled at the time of the original hearing. While in a very marginal sense, those subsequent challenges mounted by Mr. Kenny stem out of the same set of circumstances as those which gave rise to the original challenge, it can not be said that those further challenges are in any way directly consequential on the original planning permission being valid or otherwise. Whether or not the original planning permission was valid, Mr. Kenny took it on himself to challenge the original decision of the court on the basis of an allegation of fraud. Those successive challenges were not based in any way on community law. Rather they were based on an assertion that, as a matter of Irish law, relevant previous orders of the Irish court should be set aside on the grounds of fraud. Those challenges failed and gave rise to their own costs and expenses. The costs of those applications are entirely, in my view, a matter to be dealt with in accordance with Irish law and practice. Even if, therefore, there was some legal infirmity, from the perspective of community law, in the original planning process, and even if it followed that the planning permission obtained by Trinity College was, therefore, invalid as a matter of EU law and even if, as a further consequence, it remained possible, in the light of the procedural autonomy afforded to Ireland, to challenge that decision at this stage, it would not afford Mr. Kenny any basis for seeking to go behind the subsequent orders of costs which stem from failed set aside applications based on a rejected argument as to fraud.

4.2 Irrespective, therefore, of the procedural difficulties which I have already noted, I can see no basis for giving Mr. Kenny any permission to bring proceedings which seek to challenge the subsequent orders for costs arising out of the various failed set aside applications. I, therefore, expressly refuse, independent of the procedural problems which I have analysed, Mr. Kenny any leave to bring proceedings which would challenge those orders. It seems to me that any such challenge would be bound to fail.

4.3 I now turn to certain additional claims raised in the draft statement of claim that are separate from the core claims.

5. Additional Claims

5.1 In that context, it is necessary to deal with three other aspects of the draft statement of claim which are not, strictly speaking, within the broad parameters of the central claim in relation to costs which I have already addressed. I propose to deal with these in turn.

5.2 Firstly, there is an extent to which Mr. Kenny new seeks to reopen the claim previously made to the effect that the judgment of McKechnie J. in the original proceedings between the parties was procured by fraud. Such an allegation has already been considered both by this Court on more than one occasion and by the Supreme Court and rejected. It seems to me that any attempt to reopen that issue at this stage would amount to an abuse of process. Even if it were possible to argue that the original decision of McKechnie J. was incorrect having regard to community law, it does not follow that it is possible to set aside that judgment either simply because of that fact or because it is said that McKechnie J. was given wrong information on an issue which, on his view of the law, was not material to his consideration. Independent, therefore, of the findings which I have made on the core issue, I also expressly hold that Mr. Kenny is not entitled, even in procedurally correct proceedings, to seek to reopen the already decided fraud issue and any application in that regard would necessarily have to be separately rejected.

5.3 Secondly, some of the content of the draft statement of claim seeks to suggest that the building as ultimately constructed by Trinity College was not in conformity with the planning permission granted. However, I am informed by counsel on behalf of Trinity College, and accept, that there is already in being separate proceedings in which such a contention is made by Mr. Kenny. In those circumstances it would be wholly inappropriate to give permission to allow a second and unnecessarily duplicating set of proceedings to come into being which raise the same issues as can properly be dealt with in proceedings which are already commenced. Under this heading I would, also, expressly refuse to allow permission to bring proceedings raising those issues independently of the procedural questions which I have already addressed.

5.4 Thirdly, and finally, Mr. Kenny seeks to suggest that it would be unfair that cost orders should be enforced against him at a time when he has made a complaint to the European Commission concerning the planning process relevant to this case. On that basis he seeks permission to bring proceedings which would claim injunctive relief preventing the enforcement of the cost orders which are at the heart of these proceedings until such time as his complaint to the European Commission and any consequential actions taken have come to finality. It seems to me that any such matters are at far too great a remove from any established legal consequences for Trinity College to justify interfering with Trinity College exercising the rights which it ordinarily would have to enforce a final court order made in its favour. There is not, certainly at present, therefore, in my view, any legitimate basis for suggesting that there are good legal grounds for postponing the enforcement of any existing final cost orders pending a consideration by the European Commission of the matter. It is, quite frankly, impossible to predict what view the European Commission will take and even if it should take a view adverse to Ireland whether the Commission will be minded to seek to take any steps which could have direct legal consequences for the position of Trinity College. I, therefore, expressly find that it would be inappropriate to allow Mr. Kenny to raise this issue in proceedings - certainly at this stage. This last finding is, again, independent of the procedural issue which I have already addressed.

6. Conclusions

6.1 So far as a challenge to the original orders for costs is concerned I am, for the reasons which I have already set out, satisfied that the current case sought to be brought by Mr. Kenny in relation to those issues is procedurally misconceived. If Mr. Kenny wishes to seek to bring such proceedings then he will need to invite the court to allow him to commence judicial review proceedings in compliance with s. 50 of the 2000 Act, and will, in that context, need to deal with the question of whether he has, at the least, a stateable case including a case in relation to an extension of time. It seems to me that any such application should be brought in the ordinary way in the judicial review list.

6.2 However, the proceedings with which I am concerned are fundamentally misconceived and I refuse permission to bring them. In addition I hold that, even if it is possible to maintain procedurally correct proceedings questioning the validity of the planning permission given to Trinity College at this remove, no challenge to the costs of the failed set aside applications could be permitted. Likewise no challenge to the matters addressed in s. 5 of this judgment should be permitted.