Neutral Citation Number: [2013] IEHC 291

THE HIGH COURT

[2013 No.29 J.R.]

COMMERCIAL

JUDICIAL REVIEW

BETWEEN

SANDYMOUNT AND MERRION RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

THE MINISTER FOR ARTS HERITAGE AND THE GAELTACHT

SECOND NAMED RESPONDENT

IRELAND AND THE ATTORNEY GENERAL

THIRD AND FOURTH NAMED RESPONDENTS

AND

DUBLIN CITY COUNCIL

NOTICE PARTY

Judgment of Mr Justice Charleton delivered on the 25th day of March 2013

The applicant is an unincorporated club and its members generally come from the Sandymount area of Dublin. This part of Dublin has a distinctive character. It is partly below sea level and its seashore has a huge sandy beach that extends over a low gradient far out into the Irish Sea. The beach runs up to the Pigeon House power station which has two towering red and white chimneys that are one of the city's landmarks. Adjacent to the power station is a giant sewage works which was designed when the city had many fewer residents. In consequence of action by the European Commission, the works need to be brought up to date to accommodate the waste products of about 1.8 million people. In 2012, there was an enquiry before An Bord Pleanála and on 16th November, 2012, planning permission for an enlargement of the sewage works was granted subject to conditions. Among these is the provision of a pedestrian area which will enable people to walk all the way on to the South Wall, which together with the North Wall extend Dublin eastwards. Part of what is necessary for the new works is a 9 km pipeline that will discharge treated effluent into Dublin Bay and affect, the applicants claim, a special area of conservation. On 3rd December, 2012, the respondent Minister designated an area that includes the outfall pipe as a candidate special area of conservation. On 18th January, 2013, the applicant applied for leave to commence judicial review proceedings and obtained an *ex parte* injunction to stop Dublin City Council proceeding with these works. I have no comment to make on the grounds of challenge that may be advanced in the substantive proceedings. This motion, brought by Dublin City Council and the respondent Minister, seeks that the proceedings be struck out on two grounds:

> 1) that there was a failure by the applicant to make frank disclosure in its grounding affidavit that work had already commenced at the plant; and
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> 2) that the applicant has no capacity in law to bring this or any application before a court.

Disclosure

The grounds for seeking the discontinuance of this action for failing to disclose are exceptionally weak. Photographs taken on behalf of the City Council near the works in the month or so before an application was brought to court, show a crane-type structure that is apparently used for drilling. At full height, this extends upwards to 12 m. It is not always so extended. In addition, it is claimed that anyone from the applicant making reasonable enquiry during December 2012 would have been told that preliminary works were already underway. In consequence of the interim injunction, the City Council have sworn on affidavit that they have already lost €50,000 in consequence of payments to disappointed contractors. While the interim injunction does not now continue, there is a threat of an interlocutory injunction that may be applied for should the City Council proceed with any substantial work. In addition, people walking in the attractive but wild wasteland around the Pigeon House during December would undoubtedly have seen channels being dug in the road and a dumper truck or two. I am mystified as to how this would put anyone on notice that extension works on the sewage plant were already underway. The power station is now being mothballed. The sewage plant needs continuous attention. The nature of the equipment was not such as to draw anyone's attention to it being specifically directed towards the plans that this application seeks to thwart. In addition, members of the applicant have either sworn or signed declarations that they had no knowledge of this work. This part of the application is therefore dismissed.

Unincorporated association

Litigation involves discipline. It is possible, but as will be seen unlikely, that the costs could be awarded against this applicant for judicial review. Were an injunction to be sought, an undertaking as to damages would be necessary. This is a promise to pay to a respondent thwarted by reason of an injunction in plans of development or business that the loss will be paid by the applicant if it is shown that an injunction pending trial should not have been granted. Such a requirement is not mandatory but is discretionary under the Planning and Development Act 2000. There is no way for the applicant to pay either costs or damages. The applicant is not a legal person but is, at best, a club. Were the applicant a limited liability company, then it would have legal personality and, in addition, it would be subject to section 390 of the Companies Act 1963 which provides for a defendant obtaining security as to costs

where a company does not have the resources to pay if it loses an action and the defendant can establish a reasonably arguable defence; *Oltech Systems Ltd v. Olivetti UK Ltd*. [2012] IEHC 512 (Unreported, High Court, Charleton J., 30th November, 2012). This potential response is absent where an unincorporated association brings a claim. Where a company behaves irresponsibly, its directors may be sanctioned under section 150 of the Companies Act 1990. That check is absent here. Recently, however, Cooke J. in *Goode Concrete v. CRH plc and ors* [2012] IEHC 116 (Unreported, High Court, 21st March, 2012), considered what was thought to be the rule that once a plaintiff is a natural person resident in Ireland an order for security for costs can never be made. He held that decisions to that effect have questionable validity and, in any event, litigation must be subject to constitutional principles which include protection against suits that are immune from consequences as to costs. That protection even is absent when an unincorporated association brings a claim.

The applicant claims that this application is different because it is made under public law in order to seek a remedy for the benefit of the entire community. Certainly it is the case that special rules sometimes apply by specific legislative intervention. These are founded on liberal principles of access to justice and standing to bring a challenge related to environmental matters that are founded in the Aarhus Convention of June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, which was ratified by Ireland on 20th of June 2012. The terms of the Convention as to interest sufficient to bring a claim and as to costs are reflected through later European legislation.

Article 2 of the Convention contains these definitions relevant to *locus standi*:

> 4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
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> 5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

And then there is Article 9 which relates to access to justice:

> 1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
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> In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
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> Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.
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> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
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> (a) Having a sufficient interest or, alternatively,
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> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
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> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
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> 3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
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> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
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> 5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

This convention was expressed in Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 which provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amends Council Directives 85/337/EEC and 96/61/EC with regard to public participation and access to justice. Article 3(7) of Directive 2003/35/EC inserted Article 10a into Council Directive 85/337/EEC, which provides as follows:

> Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Definitions of standing are taken from the Aarhus Convention. The relevant variant is set out in Article 2(1) of the Directive:

For the purposes of this Article, 'the public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

In turn, after much threatened litigation as to costs in planning applications that concerned environmental matters, in *Commission v. Ireland* (Case C-427/07) [2009] E.C.R. I-6277 the Court of Justice of the European Union made an adverse finding that the State had not transposed Article 10a of the Directive. Ultimately, the up-to-date version of national law is contained in section 50 of the Planning and Development Act 2000, as amended. Ordinarily, to bring an application for judicial review, an applicant must show a sufficient interest and must also pass a minimum threshold of showing that a case is arguable. That threshold of arguability is very low indeed in non-planning cases. *G v. D.P.P.* [1994] 1 I.R. 374, the definitive Supreme Court decision on the matter, merely requires as to fact, "a stateable ground" and, as to law, "an arguable case", in order to meet the minimum threshold. Under section 50A of the Act of 2000, an applicant is required to show "substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed". As to interest in the decision, an interest is not limited to an interest in land or a financial interest. The sufficiency of interest requirement was inserted by the Environmental (Miscellaneous Provisions) Act 2011, but, unlike other provisions such as that as to costs mirroring Article 10a of the Directive, is not limited to environmental matters. The applicant relies on section 50A(3) to establish that their group has status in law to bring this application. This provides, as to the full text:

The Court shall not grant section 50 leave unless it is satisfied that—

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a sufficient interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant—

(I) is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).

Thus, the interest of an applicant can embrace "a body or organisation" which aims to promote environmental protection. Does that necessarily also mean that such a body, even though unincorporated, has the capacity to bring such a challenge? The anomalies, deliberate though they perhaps are, as between ordinary planning judicial reviews and the same kind of application where environmental protection is concerned are multiplied when section 50B(2) is brought into the picture. That is the national transposition of Article 10a and it applies to any proceeding in judicial review of an environmental kind. It reads:

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings including any notice party shall bear its own costs.

(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

The current state of the law in Ireland does not distinguish between public law challenges and private law remedies in respect of capacity to bring an action. In the neighbouring jurisdiction of England and Wales, that distinction seems to be close to established. This is in part because difficulties in relation to awarding costs are less pressing even though a public law challenge is brought under the auspices of an unincorporated association. Section 51(3) of the Senior Courts Act 1981 (as amended) empowers the courts to decide "by whom and to what extent the costs are to be paid." There is no such provision in Irish law. That means that should, and it seems very unlikely here, costs be awarded against the applicant, no Irish court can pick a person such as the secretary or the treasurer of the applicant to pay the costs. Such a person would, in any event, be a private person of good will who takes a part-time interest in their locality and whose private interests are not bound into this application. Other people, should such costs be awarded, are as likely as in any group to rebel against paying a proportion averaged as to the entire membership. The resources of the applicant, and there is no means for a court order to be enforced against them, amount to €8,000 in a current account.

Multiple cases might be cited as to sufficiency of interest, but there is no doubt that the applicant has that by virtue of section 50A(3) of the Act of 2000, so locus standi to bring this application is not in doubt. Capacity is in issue, on the other hand. I see little advantage to the citation of multiple cases from various jurisdictions where the issue is the construction of legislation. Generally, in the absence of legislation, an unincorporated association has no capacity to take either a public law challenge or a private action; *R v Darlington Borough Council ex parte Association of Darlington Taxi Owners* [1994] COD 424. In some cases in England and Wales the requirement of capacity seems to be conflated with that of sufficiency of interest: *R v Ministry of Agriculture, Fisheries and Food ex parte British Pig Industry Support Group* [2000] Eu LR 742. In looking to legislation, the amendments of the Planning and Development Act must be taken to speak for themselves and to have effect if provision is made in respect of both sufficiency of interest and of capacity to bring a challenge. Taking the definition in Article 2(1) of Directive 2003/35/EC there is not any doubt that both interest and capacity must be established for access to a judicial review process. Interest comes about by virtue of being a member of the public concerned. That is defined in Article 4(1) as meaning "the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions"; see also Article 3(1). It is further specified that "non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest". To bring a case, however, an applicant under Article 2(1) still has to be a "natural or legal person". That is the fundamental argument of the Minister and of Dublin City Council, that the applicant is not a natural or legal person. That much is correct. In addition, however, under the Directive an applicant can be made up of natural or legal persons through "their associations, organisations or groups" provided this form of "the public" is "in accordance with national legislation or practice".

To commence a judicial review application, unlike any other kind of application apart from some statutory actions in public law, a person, legal or natural, has to come to court and convince a judge that there is, ordinarily, an arguable case. In planning matters, including those concerned with a serious impact on the environment, "substantial grounds" have to be shown. That applies to all planning matters, whether environmental or not. The judge should only grant leave on that basis. Further, the judge may question how the applicant has a sufficient interest. For a leave application, the answer is clearly provided in section 50A of the Act of 2000: the applicant is required to have a "sufficient interest" and that applies in all planning matters. But when the matter is concerned with environmental protection and a with a "development which may have significant effects on the environment", an alternative is offered through the word "or". The judge must be "satisfied" that the applicant "is a body or organisation … the aims or objectives of which relate to the promotion of environmental protection" and is pursuing same for at least the 12 months prior and, quoting now the text of section 37(4), may appeal a planning decision to An Bord Pleanála because the mater requires an environmental impact statement, and in respect of which the Minister for the Environment and Local Government, quoting from the text of sub-paragraph (e) thereof, may "prescribe additional requirements … for the purpose of promoting transparency" in relation to "its membership" and "its aims or objectives" and "in relation to the possession of a specified legal personality…".

I have not been informed of any such requirements and can find none such in the text books at my disposal or on a search of legal sources on the web. Simons, the learned author of *Planning and Development Law* (2nd edition, 2007), does not list any. Until additional criteria are prescribed by the Minister, the fundamental test for whether a non-governmental organisation is entitled to avail of the special *locus standi* rules depends on the aims and objectives of the organisation and whether the organisation has been active in promoting environmental protection for at least 12 months. Capacity is also conflated in the legislation with standing through the words quoted.

This gives rise to an unattractive situation. It is beyond doubt that the applicants were entitled to leave. The clear terms of the Act of 2000 allow for this in the absence of ministerial regulations that prohibit unincorporated associations from seeking to appeal planning decisions to An Bord Pleanála. These do not exist. That step of leave is permission to bring judicial review proceedings granted by the High Court. It would be contrary to common sense for leave, in that context, to mean leave until the proceedings are struck out by reason of an applicant, so empowered by legislation to commence a case, being an unincorporated association with no legal personality. Once there is no requirement made by ministerial regulation that appeals to An Bord Pleanála cannot be taken by an association such as the applicant, leave means an entitlement to argue the merits of the case through to its conclusion. It may be that it might be argued that this subsection deals only with sufficiency of interest. But that is not, in respect of environmental matters, what it says: it establishes capacity, otherwise how is the High Court to give leave under the criteria set out in the legislation? Furthermore, as a matter of statutory construction I am obliged to give the section the meaning which it expresses. Bearing in mind, as I do, the need to avoid an absurd construction, the applicants were clearly entitled to leave to bring these proceedings. That being so, the applicant is entitled to continue with the litigation since to rule otherwise would offend common sense.

I might add that other countries in the European Union have introduced requirements such as those contemplated in section 37 of the Act of 2000. These must not be unduly restrictive and must be proportionate. There is a potential menace of unincorporated associations bringing judicial review applications in environmental matters in particular. My decision, however, has no application to the general law on planning permission as it applies outside environmental decision making. In Sweden, the relevant law provided that such a group have at least 2000 members but this was struck down by the Court of Justice of the European Union as being too

restrictive for the objective of the Directive in *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknömnd* (Case C-263/08) [2009] E.C.R. I-9967. As yet, in the absence of regulations restricting this kind of applicant, the case must proceed since the legislation expressly allows it.

Result
The application to dismiss the review on the grounds of non disclosure by and the lack of capacity of the unincorporated applicant will therefore be dismissed.