Neutral Citation [2012] IEHC 77

THE HIGH COURT

Record No.:2009/6638P

BETWEEN

JAMES KENNY

APPLICANT

-and-

TRINITY COLLEGE DUBLIN

-and-

DUBLIN CITY COUNCIL

RESPONDENTS

JUDGMENT of Mr. Justice Ryan delivered the 24th February, 2012

Introduction

Article 10a of Directive 85/337/EEC requires Member States to ensure that persons who have a legitimate interest in decisions affecting the environment have access to a review procedure which is "fair, equitable, timely and not prohibitively expensive". That provision was inserted by Article 3.7 of Directive 2003/35/EC adopting into Community law the Aarhus Convention that was signed on the 25th June 1998.

The applicant invokes Article 10a in this motion, seeking to review the taxation of costs in three cases in which he was the unsuccessful party who was ordered to pay the costs of the successful litigants, Trinity College Dublin and Dublin City Council. He made a submission to the Taxing Master that the provisions of the Convention and the Directive operated to limit the costs that could be awarded against him to amounts that were "not prohibitively expensive". The Taxing Master did not agree and proceeded to make his decisions in the three cases on the traditional basis.

Mr Kenny's challenge is on this one ground only, that the Taxing Master was wrong in law in not applying the proposed criterion. The question for decision therefore is whether that test applied to the costs in the three cases. If the Court is not persuaded by his argument, the applicant seeks a reference to the Court of Justice of the Union.

Mr Kenny represented himself. Mr Cathal Murphy, Barrister, appeared for the respondents.

The Costs Orders

The three cases are parts of Mr Kenny's marathon litigation over planning permission for development at Trinity Hall, Dartry. It is necessary to say something about them. On the 27th May 2008, the Supreme Court ordered him to pay Trinity College's costs in a case alleging fraud which the Court had dismissed *in limine* on the 10th April, 2008 in a written judgment. On the issue of costs, the Court said that it was "not necessary to get involved in questions of the Aarhus Convention. Although raised in argument, the Aarhus Convention has not been given effect in domestic law in any event."

The second order for costs was made on the 18th March, 2009 also by the Supreme Court. The judgment was handed down on the 5th March, 2009. In those proceedings, Mr Kenny unsuccessfully appealed against a High Court refusal to quash a decision made by Dublin City Council as to compliance by Trinity College with planning permission. A letter from the solicitors for Trinity College dated the day after the costs hearing recorded that Counsel for Mr Kenny referred to the Directive but the Court "was satisfied that there was no reason to depart from the usual rule with regard to costs, noting that the Directive could not add to the facts of the case as it had not been implemented ..."

The third costs order was made on the 23rd July, 2009 by Laffoy J in an application by Mr Kenny to be permitted to apply for an order preventing Trinity College from going on with well-charging proceedings. The judge said that all of the costs that the plaintiff sought to have declared well-charged "arose out of proceedings which predated the obligations of the State under that directive."

Having regard to these observations by the Courts that imposed the orders for costs, I cannot see how the Taxing Master could have acceded to Mr Kenny's request that he apply Article 10a to the measurement of costs. The respondents submit, in my view correctly, that the question of the applicability of Article 10a was determined by the Courts and that it was not open to the Taxing Master to decide otherwise.

Taxation of Costs

Order 99 rule 10(2) of the Rules of the Superior Courts applies to party and party costs and provides that "on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

On a review of taxation an applicant must show that the Taxing Master was in error and that there was an injustice: section 27(3) of the Courts and Courts Officers Act, 1995. In this case the applicant relies on the inherent probability that if the costs were to be measured by reference to the suggested test, the outcome would be a greatly reduced bill. Injustice is to be inferred as a matter of probability. The question whether the costs were prohibitively expensive did not arise at the hearing before the Taxing Master. There was no evidence before me that the amounts that were permitted were in fact excessive and it would seem therefore that if I upheld Mr Kenny's objections, it would be necessary to send the matter back to the Master for a new hearing.

The Taxing Master is required to carry out his function in accordance with the above Act and with the Rules of the Superior Courts. That is to decide on questions that are raised by the parties as to the costs a receiving party should recover from a paying party. The successful party is entitled to recover from the paying party the costs that it was reasonable for him to incur in pursuing or defending the action.

In the circumstances, it was not open to the Taxing Master to superimpose the test that the applicant proposed.

The Aarhus Convention
As is normal with such agreements, the Aarhus Convention did not have direct effect. It needed to be brought into force in our national law by an enactment of our legislature. Alternatively, it could come into law in the State by an enactment of the European Union/Community. It would be contrary to our Constitutional arrangements if legislative effect were to be conferred otherwise than by a domestic measure or a Community enactment sanctioned by the Constitution. And if the Aarhus Convention did have effect without local enactment, it would have been wholly unnecessary to embody its terms in a directive.

The Community signed the Convention but it did not become law. Directive 2003/35/EC is dated the 26th May 2003 and it gave Member States until the 25th June 2005 to comply with its obligations. Ireland did not enact measures to implement the Directive with the result that it became part of our law on the last day of the permitted period. The submissions presented by Mr. Murphy cite a number of cases in which it is declared or accepted that the Directive came into effect on the 25th of June 2005. Laffoy J so held in the third of the cases whose costs orders are in issue. Cooke J came to the same conclusion in another case brought by Mr Kenny.

Mr Kenny argued that the Convention was operative from 1998 when it was signed or, alternatively, from a date in 2001. The respondents argued that the correct date is that which was specified in the Directive as the latest date for implementation. The Directive had not at that time been transposed into Irish law by any other measure. Mr Kenny cited an Opinion of Advocate General Sharpston in which she said that the Convention became effective on the 30th October 2001- that is the date when, in accordance with its own provisions, it came into force on achieving the requisite number of ratifying countries. According to its Article 20, the Convention was to enter into force on the 90th day after the date of deposit of the 16th instrument of ratification with the UN Secretary-General. That. however, does not determine the applicability of the Convention or the Directive in Irish law.

In my judgment, neither the Convention nor the Directive was in force before 25th June 2005. The first order for costs was made by the Supreme Court on 27th May 2008 in proceedings with High Court record number 14269/2002 and were commenced by plenary summons dated 7th November 2002. The second set of proceedings began on the 4th July 2002 by way of application for leave to seek judicial review. The last proceedings originated on the 20th July 2009. It follows therefore that the first two cases were instituted before the last date allowed by the Directive for bringing it into domestic law. As to the third case, it concerned the application of Article 10a.

Mr. Murphy for the respondents submitted that even if Mr Kenny was correct in claiming that there was a breach of Community law in failing to implement the Directive, the Taxing Master was not free to apply the suggested Aarhus test in his taxation of the costs. In yet another of Mr Kenny's applications, (Unreported, High Court 23rd July 2010) Mr Justice Cooke said that the failure to implement the Directive gave rise to a possible action against the State, if it was correct, but it did not affect the rights of other parties. It may be that a person who can show that he was put to cost that was prohibitively expensive is in a position to claim against the State to recover any amount which can be shown to be excessive. But that does not affect the entitlement of a successful party to recover his reasonable costs when the court has made an order in his favour.

Application of Article 10a to the three cases
The respondents submit that the Directive giving access to courts for people with a legitimate interest in environmental decisions does not apply to any of these three cases. The fraud case and the compliance proceedings and the case about a stay, although they do trace their origins to planning issues, are actually relatively remote from the principle of public access to the courts to challenge sensitive environmental decisions. That is what the Supreme Court has said and so has Clarke J in this Court in regard to Mr Kenny's proceedings.

When the issues in litigation have been decided and further disputes are raised, there comes a point at which the original legal context segues into other, quite different legal rubrics. That is what has happened in the matter of Mr Kenny's epic struggle over the Trinity Hall development. It follows that these three cases are subject to the same logic. They are not about the environment.

Conclusion
For all of the above reasons, this application for review of taxation must fail and there is no basis for a reference to the Court of Justice of the European Union.

APPROVED: Ryan, J