Neutral Citation Number: [2011] IEHC 127

THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

2010 1484 JR

BETWEEN

VIRIDIAN POWER LIMITED

AND

HUNTSTOWN POWER COMPANY LIMITED

APPLICANTS

AND

COMMISSION FOR ENERGY REGULATION

RESPONDENT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 8th day of March, 2011

1. This is an application for discovery brought in judicial review proceedings.

2. By order of Peart J. on 29th November, 2010, the applicants were given leave to apply for judicial review on the grounds set out in the statement of grounds furnished with the application.

3. The applicants are limited liability companies engaged in the business of power generation and they seek the following reliefs:

> (i) An order of *certiorari*, by way of judicial review, quashing the purported decision of the respondent, dated 8th October, 2010, directing the first named applicant to ensure that the price components of all Commercial Offer Data submitted by it in relation to any generation unit for which it is the licensed generator, do not include any amount in respect of the levy paid or to be paid by it to the Commission pursuant to s. 40D of the Electricity Regulation Act 1999 (as amended by the Electricity Regulation (Amendment) (Carbon Levy) Act 2010);
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> (ii) an order of certiorari, by way of judicial review, quashing the purported decision of the respondent, dated 8th October, 2010, directing the second named applicant to ensure that the price components of all Commercial Offer Data submitted by it in relation to any generation unit for which it is the licensed generator, do not include any amount in respect of the levy paid or to be paid by it to the Commission pursuant to s. 40D of the Electricity Regulation Act 1999 (as amended by the Electricity Regulation (Amendment) (Carbon Levy) Act 2010);
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> (iii) If necessary, declaration, by way of judicial review, that the price components of the Commercial Offer Data submitted by the applicants or any of them in relation to a generation unit of which an applicant is the licensed generator may lawfully include the amounts in respect of the levy paid or to be paid by the applicants to the Commission pursuant to s. 40D of the Electricity Regulation Act 1999 (as amended by the Electricity Regulation (Amendment) (Carbon Levy) Act 2010).

The applicants also claim damages and other relief as may be appropriate and costs.

4. The cost of compliance with regulatory obligations connected with emissions of carbon dioxide that necessarily arise from the generation of electricity from fossil fuel is an "opportunity cost" within the meaning of the applicants' Licences and the Bidding Code of Practice. The applicants maintain that they are required to reflect the entire cost of the carbon produced by their generation activities, when bidding to supply electricity to the single electricity market.

5. On 30th September, 2010, the applicants informed the Commission of their intention to include the carbon revenue levy in their offers to sell electricity into the single energy market from the weekend of 8th and 9th October, 2010. By letter dated 8th October, 2010, the Commission issued directions to the applicants, pursuant to paragraph 7 of Condition 15 of their licences, to ensure that the price components of all Commercial Offer Data submitted by each of them in relation to any generation unit for which it is the licensed generator, do not include any amount in respect of the levy paid, or to be paid by it to the Commission, pursuant to s. 40D of the Electricity 1999 Act (as Amended).

6. The applicants claim that these directions were and are *ultra vires* the Commission.

7. I am satisfied from reading the statement of grounds that the application for judicial review turns upon an allegation that the respondent erred in its interpretation of the applicants' Licenses and the applicable Bidding Code of Practice by the issuing of the directions complained of.

8. The application for judicial review is opposed. The applicants claim that in the course of affidavits sworn in support of the statement of opposition, documents were exhibited which included a selection of internal correspondence with the Commission leading up to the Commission's decision. Most of these documents had not been known to the applicants before Mr. Dermot Nolan swore his affidavit on 21st January, 2011. The applicants claim that that they require discovery of the documents in question in this application because it is likely that they will show in further detail what were the considerations to which the Commission had regard, and the

weight given to those considerations. They say that discovery is likely to confer a litigious advantage to the applicants, for example, by:

> (a) confirming the applicants' case that the Commission did not have proper regard to the terms of the Licenses and/or the Bidding Code of Practice, and had regard to and/or gave improper weight to policy matters; or
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> (b) demonstrating that after a certain stage in its analysis, the Commission ceased to attach any or sufficient weight to the actual terms of the Licence or the Bidding Code of Practice.

Counsel for the respondent argues that in order for the discovery sought to be relevant, the applicants would have to apply to amend their grounds for the application, as the entire decision making process is not a matter on which leave was granted by the High Court. In particular, the respondent argues that the alleged "irrelevant considerations" pleaded in the Statement of Grounds, relates to the respondent's interpretation of the term "opportunity cost", as that term is used in the Licenses and the Bidding Code of Practice. The applicants allege that the respondent has purported to have regard to the concept of "real resource costs" that has no basis in either the Licenses of the applicants or the terms of the Bidding Code of Practice.

9. It is accepted by both parties to this application that, in judicial review proceedings, discovery orders are only made in exceptional circumstances. The position was outlined by the Supreme Court in *Carlow Kilkenny Radio Ltd. and Others v. Broadcasting Commission of Ireland* [2003] I.R. 528, where Geoghegan J., at p. 531, said:

> "It is trite law that judicial review is not concerned with the correctness of a decision, but rather with the way that the decision is reached. It follows that the categories of documents which a court would consider were necessary to be discovered will be much more confined than if the litigation related to the merits of the case."

At p. 533, he stated:

> "Therefore, insofar as any case is being put forward on the basis of unreasonableness or irrationality, it would be wrong to make an order for discovery as discovery will be nothing more than a fishing exercise. That has always been forbidden by the courts, irrespective of whether the discovery is sought in plenary proceedings or in judicial review proceedings. On the other hand, insofar as procedural misconduct is alleged, that issue can be litigated without discovery of documents. In their written submissions, counsel for the respondent cited in this connection a passage from the judgment of Carswell J. in *Re Glor na Gael's Application* [1991] N.I. 117, which made clear that an order for discovery of documents concerning the issue of unreasonableness in relation to the manner in which a decision had been reached would not be made unless there was material which indicated that the evidence put before the court was inaccurate or false. It is pointed out that the same judge also took the view that discovery was not required to dispose of allegations relating to procedural irregularity and that, furthermore, allegations of breaches of the rules of natural justice went to the matter of procedure and that discovery was not, therefore, necessary."

10. Geoghegan J. referred to a passage from the judgment of Sir Thomas Bingham M.R. in the unreported case of *R. v. Secretary of State for Health ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994) at p. 82:-

> "The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise. The rules themselves provide no guidance as to when discovery should be treated as necessary for disposing fairly of an action or application, but over the years, a practice has developed, the broad principles of which are clearly understood, even if the application of those principles inevitably gives rise to controversy in individual cases. It is undesirable to attempt any precise definition of the existing practice, but I think it broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly, that is, to all parties, without discovery of documents bearing on the issue one way or the other.
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> In the ordinary *inter partes* civil action, the plaintiff usually makes a series of factual averments which may well be challenged, but which are not usually sufficiently plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare, unsubstantiated assertions, and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the prescribed activity usually described as 'fishing': the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

11. In *Shortt v. Dublin County Council* [2003] 2 I.R. 69, Ó Caoimh J. stated at pp. 88-89:-

> " . . . having regard to the nature of judicial review proceedings, and in particular, the onus that lies on an applicant at the leave stage to furnish to the court evidence supporting the grounds advanced, that, in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue, to direct discovery of documents in circumstances where they can only be sought to impugn the integrity of the deponent would, in general, be oppressive."

12. The respondent argues that an applicant is not entitled to go behind an affidavit in order to seek to ascertain whether it is correct or not, unless there is some material available outside that contained in the affidavit to suggest that in some material respect, the affidavit is not accurate.

13. I accept the submission made on behalf of the respondent that the exceptional grounds for discovery in judicial review proceedings are not met in this case and that the nature of the discovery sought goes beyond those documents that could be considered relevant and necessary in order to deal with the matters in issue between the parties as defined in the Statement of Grounds.

14. I also agree with the respondent's submission that the concern of the applicants that the ". . . overriding regard which the Commission appears to have given to Government policy concerning the levy . . ." falls outside the case the applicants made in their application for leave to apply for judicial review and also falls outside the terms of the leave granted. It seems to me, therefore, that the application should be refused on the grounds of lack of relevance and also on the grounds that it has failed to meet the criteria set out in the *Carlow Kilkenny Radio Ltd*. case. There is no cogent evidence to suggest that there are any factual errors or

inaccuracies in the affidavits sworn on behalf of the respondent in this matter. I am not satisfied that the applicants have raised a factual issue of sufficient substance to lead me to conclude that the court will be unable to try the issue arising in the judicial review fairly, without the discovery sought. There is no evidence of a factual dispute. The issue that arises in this judicial review is the manner in which the respondent interpreted the License and the Bidding Code of Practice.

15. In making my decision, I also have regard to the fact that this application has been brought after extensive case management has taken place in the Commercial Court without any reference to discovery, and a date has been fixed for the hearing of the matter in April 2011.

16. I refuse the application.