THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 213

Record No. 2016 No. 157

Peart J.
Hogan J.
Hanna J.

BETWEEN/

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

PLAINTIFF

- AND -

WEST WOOD CLUB LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 25th day of July 2017

1. Does the Circuit Court have jurisdiction to determine by way of a defence to a claim for unpaid local authority rates that the enforcement and recovery of the rate in question amounts to a form of State aid contrary to the provisions of Article 107(1)TFEU? This is essentially the principal question posed by the High Court in this consultative case stated to this Court by O'Malley J. in her order to that effect dated the 16th March 2016. The matter arises in the following way.

Background to the proceedings

2. The plaintiff, Dún Laoghaire Rathdown County Council ("the Council"), is the rating authority for the Dún Laoghaire Rathdown administrative area. The defendant, West Wood Club Ltd. ("West Wood") is the occupier of premises at the West Wood Club, Leopardstown, Co. Dublin, which premises are within the Council's administrative area. It is accordingly liable to pay rates to the rating authority. West Wood operates a number of leisure and sports and fitness clubs, including the premises at Leopardstown.

3. The Council has brought three sets of proceedings in the Circuit Court for unpaid rates pursuant to the provisions of the Poor Relief Ireland Act 1838 in respect of the years 2011, 212 and 2013. By virtue of the provisions of the Third Schedule to the Courts (Supplemental Provisions) Act 1961 the Circuit Court enjoys an unlimited jurisdiction in rates recovery cases. The Council claims the sums of €176,800 for both 2011 and 2012 and the slightly lesser sum of €173,264 in respect of 2013. It is accepted that no direct challenge – such as by way of judicial review proceedings - has ever been brought by West Wood to the setting of the rate by the Council in respect of the years in question. Accordingly, as I have already indicated, the real question for consideration by this Court is whether the State aid issue can properly be raised by way of defence to the claim for unpaid rates.

4. It is also accepted – and was so found by O'Malley J. in her case stated - that the Council is involved and engaged for reward in the supply of services and the promotion of leisure centres such as fitness centres, tennis courts and swimming pools similar to those operated by and in competition with those of West Wood. The Council does this either directly or indirectly through the mechanism of a limited liability company or companies which are under the control of the Council.

5. At one stage West Wood indicated that it wished to defend these proceedings by adducing evidence and making arguments in relation to the following contentions:

> (a) That the receipt of rates by the Council from West Wood, the receipt of State grants from the Exchequer and the subsequent expenditure of that income on leisure centres owned and operated by the Council in competition with privately owned and non -State subsidised leisure centres operated by West Wood amounts to a form of unlawful State aid.
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> and
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> (b) The Council granted an exemption to its own leisure centres from rates for the years in question, when such leisure centres were in competition with West Wood's leisure centres, and that this amounted to a breach of the competition rules contained in Article 101 and Article 102 TFEU, taken in conjunction with the obligation on the State and State entities under Article 4(3) TFEU not to enact any measure which could jeopardise the achievement of the objectives of the treaties (which include the non-distortion of competition)."

6. At the hearing before this Court, counsel for West Wood, Mr. Michael Collins S.C., stated that he was not pressing the Article 101 and Article 102 point. The sole question, therefore, relates to whether West Wood can properly raise the State aid point by way of defence in the Circuit Court. This judgment addresses this jurisdictional question only and I express no view at all on the underlying merits of the State aid argument.

The judgments of the Circuit Court and the High Court

7. When the matter came before the Circuit Court on the 24th July 2017 on the jurisdictional issue only Her Honour Judge Linnane rejected the contention that the Circuit Court could entertain the State aid defence, saying that this was a matter for the High Court or the European Commission to determine. This jurisdictional ruling was appealed to the High Court and in a comprehensive judgment delivered by O'Malley J. on the 17th December 2005 she held that the Circuit Court had jurisdiction to determine whether the rates amount to State aid: see *Dún Laoghaire-Rathdown County Council v. West Wood Club Ltd.* [2015] IEHC 800.

8. In her judgment O'Malley J. stated:

> "(a) The Circuit Court has jurisdiction to determine whether the rates amount to State aid.

(b) The Circuit Court does not, however, have jurisdiction to determine the compatibility of the aid (if it is found to be such) with the internal market.

(c) As a matter of fact, it seems to be common case that if it is State aid, it has not been notified to the Commission and to that extent a finding of a breach of Article 108(3) of the Treaty would follow.

(d) However, the court must bear in mind that where the issue relates to the payment of a tax, the obligation to notify the Commission can only be relied upon by the taxpayer if their own tax payment forms an integral part of the unlawful aid.

(e) If the exemption of the plaintiff's own enterprises is established, and was unlawful, it is not a remedy for that particular illegality to grant exemption to the defendant - that would only compound the breach of the rules.

(f) Separate considerations seem to apply to the counterclaim as framed in these proceedings. EU law does not require that damages be available as against the recipient of unlawful State aid. Therefore the question of damages is governed by national law, including national rules as to the monetary jurisdiction of different courts. It may be that the counterclaim could, at least to some extent, be described as being against the plaintiff in its capacity as collector of the rates rather than as recipient, but the defendant has not particularised its general claim that the rates, combined with other State funding, amount to State aid. The obligation on national courts to provide a remedy for a breach of EU law does not, it seems to me, extend to breaching national procedural rules (here, rules relating to jurisdiction) where that is not necessary under the principles of equivalence and effectiveness.

(g) The defendant's claim exceeds the jurisdiction of the Circuit Court in relation to damages. While an argument may be open that under national rules the monetary limit does not apply to a counterclaim, this issue was not addressed before me and I am proceeding on the basis that, in the normal course of events, the limit does apply. My view, therefore, would be that the Circuit Court does not have jurisdiction to entertain the counterclaim."

9. O'Malley J. indicated that while her present disposition was to allow the appeal and to remit the matter to the Circuit Court, she was also prepared to state a case for the opinion of this Court if the parties so requested. The parties subsequently did request such a case stated and the judge accordingly stated the following questions for the opinion of this Court:

"1. Does the Circuit Court have jurisdiction, in proceedings issued for the purpose of the recovery of rates, to determine whether the collection of rates and expenditure of the proceed thereof amounts to State Aid which should have been notified to the European Commission pursuant to Articles 107 - 109 of the Treaty of the Functioning of the European Union?

2. Is the issue raised by the defendant, as a matter of law, a challenge to the validity of the rate itself and thus a matter to be dealt with by way of judicial review only?

3. If the Circuit Court has jurisdiction in such proceedings, and were to hold that the plaintiff is entitled to judgment for the amount of the rates unpaid but also that the collection of the rates in the circumstances amounts to a State Aid which has not been notified to the European Commission, would it have jurisdiction to award to the defendant damages in an amount equal to the amount of the judgment granted to the plaintiff or in any amount in order to ameliorate the effect of the (*ex hypothesi*) unlawful actions of the plaintiff?"

Does the Circuit Court have a jurisdiction to entertain the State aid question by way of defence?

10. A fundamental objection raised by counsel for the Council, Mr. Butler S.C., to the proposed line of defence on the part of West Wood was that it would amount to a collateral challenge to the validity of any rate made by the Council. He stressed that any such challenge would have to be made directly by way of judicial review proceedings (or, perhaps, by way of plenary proceedings to which the judicial review rules applied by analogy) and in a timely fashion. This was not some technical, fastidious objection to the form of the defence, but it was rather based upon a concern for legal certainty. The Council's finances were largely dependent on the validity of an annual rate and if the Circuit Court were to be given what amounted to a jurisdiction to make a finding of invalidity of the rate based on State aid concerns many years later, Mr. Butler S.C. submitted that this would have serious consequences for the organisation of the Council's finances.

11. One thing is immediately clear: the Circuit Court does not have a jurisdiction to pronounce, whether directly or indirectly, *on the validity* of the rate struck by the Council as such, as that Court does not enjoy a judicial review jurisdiction. The Circuit Court can, at most and to a limited degree, pronounce indirectly on this issue if it is raised by way of defence, but even then such a ruling would be personal to the defendant and it would not have general erga omnes effect in the same way as if the rate had been quashed by certiorari or a declaration to that effect were to be granted by the High Court.

12. This point is illustrated by the judgment of the Supreme Court in *Dublin City Council v. Williams* [2010] IESC 7, [2010] 1 I.R. 801. In that case the Supreme Court held that the legality of a fixed charge for refuse could not be raised in the District Court by way a defence to a civil claim for payment for these charges.

13. The defendants in *Williams* had relied on the earlier Supreme Court's judgment in Athlone Urban District Council v. Gavin [1985] I.R. 434. That was a case in which the relevant County Manager purported to make an order that a particular charge of £60.00 be levied on every domestic dwelling in the Athlone Urban District for water, sewerage and refuse services for the year 1983. There was no breakdown of the figure to indicate how much of the charge was for each of the three services. Because of this the defendant had refused to pay the charge and proceedings were instituted against him in the District Court where a decree for the amount was made against him. He appealed to the Circuit Court and the Circuit Court judge stated a case for the determination of the Supreme Court as to (a) whether the order was invalid because it failed to fix separate amounts in respect of each service and (b) whether the order was invalid by reason of the fact that it purported to fix a charge for the calendar year 1983 although the Act had not come into force until the 12th July, 1983.

14. The Supreme Court held that the order of the County Manager was invalid by reason of its failure to specify the amount assessed in respect of each service as the statutory power of a local authority to make a charge for a service did not apply to the making of a charge for the provision of water, since that service was one for which, apart from that section, the authority could make a charge without statutory limit. The statutory power in question conferred a power to make a charge for a single service and could not be

interpreted as allowing a local authority to fix a single charge for a number of services.

15. The Court accordingly held that the order of the County Manager was invalid by reason of its failure to specify a separate charge for each of the services provided and accordingly, that the defendant was entitled to a dismiss of the entire of the plaintiff's claim. Although it was conceded that the jurisdictional issue had not, as such, been raised in *Gavin*, it is interesting to note that in *Williams* Geoghegan. J. nonetheless saw the two cases quite differently, saying ([2010] 1 I.R. 801, 813-814):

> "I see no reason why, if that case had been brought now, the Supreme Court could not have made the decision which it did make. *There was no power under statute to make the composite charge and sue for it. That was a clear error on the face of the proceedings which, in my view, it would be open to a defendant to raise. To put it another way, there was no uncertainty as to its illegality.* In my opinion, it is not an authority which can be relied on by the defendant in this case. …..Stripped to its essentials the defendant's case has been interpreted as the right by way of defence in the District Court to have carried out by that court an elaborate investigation of the proportionality applied by the Council in achieving a polluter pays principle in their waste collection policy. Bearing in mind particularly that the claim for the charges arises under the general local government code and not under any special provisions relating to waste management, it is obvious in my view that these matters could not possibly be raised by way of defence in the civil claim." (emphasis supplied)

16. Geoghegan J. had previously stated at an earlier point in his judgment in Williams ([2010] 1 I.R. 801, 811):

> "…..In expressing this view, I am not in any way suggesting that these matters cannot be litigated in some other forum nor am I suggesting that they could only be litigated by way of judicial review. I accept that the exclusivity principle laid down by the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 does not apply in this jurisdiction. This is quite clear from the well respected judgment of Costello J. in the High Court in *O'Donnell v. Corporation of Dún Laoghaire* [1991] I.L.R.M. 302. I fully accept that a person with *locus standi* might be entitled to litigate the issue of whether "the polluter pays principle" is not being lawfully implemented, by a declaratory action just as much as by a judicial review. I do not accept, however, that *such an issue may properly be raised in the District Court by way of defence to a claim for a civil debt of a public nature albeit recoverable as a simple contract debt.*" (emphasis supplied)

17. Before proceeding further, it is necessary first to say something about the well known decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 147. In that case the plaintiff prisoners had sought to challenge the validity of a prison disciplinary decision by way of declaratory action in the High Court, *i.e.*, not by means of the judicial review procedure prescribed by Ord. 53 of the (English) Rules of the Superior Courts. The House of Lords held that the use of the declaratory action constituted an abuse of process in that the particular requirements of Ord. 53 (such as the necessity to obtain to leave, setting forth one's case on affidavit, special time limits etc.) could not be by-passed by resorting to an ordinary plenary action.

18. As Geoghegan J. indicated in *Williams*, our courts have never adopted the *O'Reilly v. Mackman* exclusivity principle (save where exclusive methods of challenging the validity of administrative decisions have been prescribed by statute, such as by s. 50B of the Planning and Development Act 2000), since in *O'Donnell v. Corporation of Dún Laoghaire* [1991] I.L.R.M. 302 Costello J. held that plaintiff could challenge the validity of an administrative decision by way of plenary summons, provided the corresponding provisions of the judicial review procedure in Ord. 84 were applied by analogy.

19. As Clarke J. pointed out in *Shell*, the decision in *O'Donnell* has been consistently followed since the judgment in that case was first delivered. It follows, therefore, that West Wood could, for example, have challenged the validity of the rate by means of plenary proceedings in the High Court provided that, for example, the proceedings had been brought in a timely fashion and complied by analogy with the requirements of Ord. 84. In such circumstances, in the light of *O'Donnell*, there would have been no objection to the fact the proceedings had been brought by way of plenary summons rather than by way of an application for judicial review under Ord. 84.

20. Yet as *Williams* itself indicated, all of this is a different thing to saying the validity of an administrative decision can be raised by way of defence to debt recovery proceedings in either the District Court or the Circuit Court. It is clear from Williams that such a defence can be maintained only where there is patent illegality in respect of the charge which is sought to be recovered.

21. As Clarke J. subsequently commented in *Shell E & P Ireland v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, 267:

> "It should, of course, be noted that *Dublin City Council v. Williams* concerned a case in the District Court which court does not have a judicial review or general declaratory jurisdiction. It would not have been open to the District Court to entertain proceedings which sought to challenge, whether brought by judicial review or by seeking declarations, the public law measures which were involved in that case. Different considerations apply to proceedings in the High Court which, of course, has a full judicial review jurisdiction and a wide declaratory jurisdiction as well. Where proceedings are brought in the High Court the only issue is one of the form of the proceedings rather than the jurisdiction of the court to entertain proceedings of that type in the first place."

22. In *Shell* the Supreme Court held that the defendants could not raise the validity of the grant of a statutory licence by way of defence and counterclaim, since this would be to by-pass the time limits contained in Ord. 84.

23. Counsel for West Wood, Mr. Michael Collins S.C., sought to rely on the post-*O'Reilly* decisions of the House of Lords such as *Wandsworth L.B.C. v. Winder* [1985] 1 A.C. 461. In that case the defendant tenant was sued for unpaid rent by the Council in the County Court. The defendant in turn sought to raise the defence that the Council's resolutions to invoke their statutory powers to raise the rent were entirely unreasonable and unlawful. The House of Lords held, in effect, that it could not be regarded as an abuse of process for a defendant to litigate this point since he had not selected the forum (he was, after all, being sued by the Council) and that the right of the individual to litigate the legality of an administrative decision by way of defence could only be excluded by statute, which the House found had not been done.

24. This issue was also addressed by Clarke J. in *Shell* where he observed that ([2013] 1 I.R. 247, 265-266):

> "….it seems to me that the wider issues, as to the extent to which the *Wandsworth jurisprudence* applies in this jurisdiction and the extent to which it may be necessary to analyse whether there has been an attempt to take unfair advantage of a particular form of procedure, do not arise on the facts of this case. However it may have arisen, the simple fact remains that all that is left in these proceedings is a claim for damages which has, at its heart, a challenge to the validity of the compulsory acquisition orders and the consent brought long outside the time provided for in the rules in

> that regard and in circumstances where the damages claim requires a finding which renders unlawful actions taken on foot of those measure at a time when they were not subject to timely challenge. In addition it must be noted that, even as the proceedings were originally constituted, the counterclaim went beyond seeking a declaration of invalidity simply as part of a defence but extended to seeking to establish the invalidity of the relevant measures as a basis for pursuing a claim for damages.
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> Whatever may be the application of *Wandsworth* and the cases which follow on from it in this jurisdiction (and for the reasons already given it does not seem to me to be necessary to reach a definitive view on that question, save to note that that jurisprudence stems in part from *O'Reilly v. Mackman* which does not form part of the jurisprudence in this jurisdiction) it seems to me that such jurisprudence can have no application which would defeat the underlying rationale adopted by the courts in this jurisdiction in *O'Donnell*. I am, therefore, satisfied that *O'Donnell* represents the law in this jurisdiction. In those circumstances a party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings.
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> I would leave to another case the question as to what is to happen where a defendant is sued on the basis of a measure which that defendant wishes to challenge. It may be that the proper approach in such cases is to have regard, in the context of whether it would be appropriate to extend time, to the fact that, to the extent that it may be material, the defendant concerned might only have had a real interest or concern with the relevant measure when sued. In addition it is important to emphasise that the essential nature of the litigation with which the House of Lords was concerned in Wandsworth was a private law claim brought by the relevant local authority in its capacity as a landlord. In that capacity the local authority sued for rent. It was the measure fixing the increased rent claimed which the defendant sought to challenge. Whatever may be the appropriate approach to be taken in such a case it seems to me, for the reasons already set out, that such considerations have no application to a case such as this where the challenge to the public law measure concerned is the only matter remaining in the proceedings and, in any event, where that challenge is wider in scope than would be required simply to defend the proceedings originally maintained. For those reasons it seems to me that those aspects of the defendants' case which placed reliance on *Wandsworth* must fail."

25. For my part, I find it difficult to see how the principles in *Winder* could properly be applied in this jurisdiction in view of the Supreme Court's decisions in *Williams* and *Shell*. In both *Winder* and *Williams* the defendant wished to resist a claim for debt recovery by challenging (in effect) the proportionality of rent increases and waste collection charges respectively. It is perhaps significant that while such a defence was permitted in *Winder*, it was denied in *Williams.* As, moreover, Clarke J. stressed in *Shell*, the claim in *Winder* involved the exercise of private law powers by the local authority in its capacity as landlord. This was not the case in *Williams* (which involved a challenge to a fixed charge refuse fees) or is it the case here (rates).

26. A further consideration which Clarke J. also stressed in Shell is that it has been clear since *O'Donnell* that a defendant cannot circumvent the time limits prescribed by Ord. 84 by impeaching the validity of the administrative decision by means of a defence or counter-claim.

27. All in all, therefore, it may be said that our administrative law does not, generally speaking at least, recognise the form of plea of illegality which is common to civilian systems of administrative law whereby a defendant can resist the enforcement of an (otherwise valid) administrative decision on the basis *that it is inapplicable to him or her* and *on the same grounds* as if the validity of that decision were to have been directly challenged in appropriate proceedings in the first place. In an EU law context a good example of the this plea of illegality style defence is provided by Article 277 TFEU:

> "Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act."

28. Insofar, therefore, as a form of plea of illegality is recognised by our administrative law, it more limited and circumscribed than, for example, the Article 277 TFEU equivalent. It is clear from decisions such as *Gavin* and *Williams* that in this jurisdiction such a defendant is entitled to set up such a defence only where, in the words of Geoghegan J. in the latter case, there is a clear error on the face of the proceedings or there is no doubt about the illegality of the decision. In addition, as a the series of cases from *O'Donnell* to *Shell* make clear, the time limits prescribed by Ord. 84 cannot be circumscribed or set at naught by setting up the *de facto* invalidity of the decision by way of defence or counter-claim – this in itself is another stark point of contrast with the plea of illegality defence as found in civilian systems of administrative law. Nevertheless, as Clarke J. hinted in *Shell*, it may be that consideration would have to be given to an extension of time if the defendant can establish that it had only a real interest in the matter once the plaintiff's proceedings relying on the validity of the matter actually commenced.

29. By contrast, where the defence involves a complex evaluation of competing considerations – such as, classically, the proportionality of the particular waste charges by reference to the polluter pays principle as was the case in *Williams* – then this issue may not be raised by way of defence.

Application of the Williams principles to the present case

30. Applying these *Williams* principles to the facts of the present case, it can be said that the Circuit Court has a jurisdiction to entertain a defence that the claim for rates involves a form of unlawful State aid contrary to Article 107(1) TFEU if that Court is satisfied that the proceedings involve a clear error on the face of the proceedings or there is no doubt as to the illegality of the decision. In the latter context, this does not mean that the Circuit Court could only exercise this jurisdiction where the illegality had been conceded or where it was manifest to the point of obviousness. The jurisdiction could nonetheless be exercised – as in *Gavin* – where the illegality was established following legal argument upon agreed or otherwise undisputed facts.

31. These exceptions aside, however, it is unlikely that the Circuit Court has jurisdiction to go much further, since if, for example, the defence was to be based on complex expert evidence or upon some proportionality analysis, this would be a clear example of a defence straying well beyond establishing a clear illegality in the Williams sense.

32. These are all matters for the Circuit Court ultimately to assess. In these circumstances, I think it would at present be both premature and unnecessary to consider the third question posed in the case stated.

Conclusions

33. In the light of the foregoing I would therefore answer the questions posed by O'Malley J. as follows:

34. **Question 1**: Yes, but only where the defence raises an issue which involves a clear error on the face of the proceedings or there is no doubt as to the illegality of the decision in the sense explained and described by the Supreme Court in *Dublin City Council v. Williams* [2010] IESC 7, [2010] 1 I.R. 810. The time limits prescribed by Ord. 84 also apply by analogy to any such defence or counter-claim, save that, where necessary, consideration should be given to an extension of time where the defendant establishes that it only had a real interest in the matter from the date the plaintiff commenced the present proceedings.

35. **Question 2:** No. The Circuit Court enjoys no jurisdiction to pronounce upon the general validity of the rate struck by a rating authority. While it may nonetheless entertain a defence in the limited circumstances indicated in the answer to Question 1, any such defence is, even if successfully established, personal to that defendant and does not involve any general ruling as to the validity of the rate.

36. **Question 3:** In view of the answers just given to Question 1 and Question 2, it would be premature and unnecessary to answer this question.