THE HIGH COURT

[2012 No. 9729 P.]

BETWEEN

COLUM BROWNE

PLAINTIFF

AND

MINISTER FOR AGRICULTURE, FISHERIES AND FOOD,

IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 13th day of February, 2019

Nature of the Case

1. This judgment involves a ruling on a number of preliminary issues set down for determination prior to the hearing of the substantive case. The substantive proceedings are plenary proceedings in which the plaintiff seeks damages and declaratory reliefs, arising out of certain policy decisions made by the defendant Minister in relation to fishing policy. The preliminary issues which came before me included: (1) whether the plaintiff's alleged cause or causes of action as against the defendants is or are time-barred pursuant to s. 11 (as amended) of the Statute of Limitations Act 1957; and/or (2) whether the plaintiff's claim, in reality, is a challenge to the legitimacy of the exercise of powers and/or discretions in years as far back as 2003 on public law grounds in circumstances where the plaintiff failed to make any such challenge or challenges by way of judicial review within the applicable time limits for judicial review. There was also a preliminary issue concerning delay on the part of the plaintiff but this was not pursued by the defendant at the hearing before me. The overall context is that the plaintiff owns a fishing vessel called the MFV Áine Íde and complains that various decisions and policies on the part of State authorities have removed his ability to fish for herring and mackerel due to the fact that, he contends, his vessel was erroneously re-categorised as an under-65 foot vessel instead of an over-65 foot vessel in 2003.

Relevant Chronology of Facts

2. The MFV Áine Íde was built in 1978 and was registered as having a length of 65.5ft. After 1983, the Irish fishing fleet was divided into vessels over and under 65ft for licensing purposes. The Áine Íde obtained licences and fished in the over-65 ft segment of the fleet for herring and mackerel. In 1993, the plaintiff purchased the Áine Íde. The fishing licences and authorisations issued to him after his purchase of the vessel referred to the vessel being in the over-65ft segment of the fleet.

3. In 2003, the Marine Survey Office of the Department of Transport re-measured the Áine Íde in accordance with Council Regulation (EC) 3529/94 and recorded the vessel's length as 63.97ft.. This was notified to the plaintiff on the 30th December 2003 and the change of registered length was entered on the register on 21st April 2004.

4. From (at the latest) 2006 onwards, the Áine Íde was not granted a quota authorisation in either the mackerel or herring fishery for over-65ft vessels, but was apparently granted authorisation in the under-65 ft category. It appears that, on foot of a complaint by the plaintiff, the Minister referred the matter to the Marine Survey Office and that on the 3rd October, 2006, the latter informed the Minister that the change in registered length was a national change for the calculation of tonnage and there had been no physical change in the actual length of the vessel. Thereafter, the vessel was never granted any licence or entitlement to fish for herring or mackerel in the over-65ft category.

5. In 2010, the Minister introduced a policy which involved categorising vessels into "Tier 1" and "Tier 2 vessels" and allocating quotas in respect of mackerel and herring fisheries on the basis of the vessel's track record of fishing for those species in particular years. This policy was given effect to in the subsequent Policy Directives referred to below.

6. On the 26th January 2011, the Minister issued a Policy Directive under s.3(2) of the Fisheries Amendment Act 2003, as amended, that his Department would determine which vessels would qualify for Tier 1 and Tier 2 for the purpose of *mackerel* fishing; allocations were to be based on track record of the vessel between the years 2007 to 2009. Tier 1 vessels were those which had landed 275 tonnes per year. The Áine Íde did not qualify for Tier 1 or Tier 2.

7. On the 19th September 2012, the Minister issued a Policy Directive under s.3(2) of the Fisheries Amendment Act 2003, as amended, that his Department would determine which vessels would qualify for Tier 1 and Tier 2 for the purpose of *herring* fishing, which involved a ring-fencing of certain vessels, again based on track record. A subsequent Policy Directive dated the 11th October 2012 made minor amendments to the first Policy Directive. The Áine Íde was not placed in the ring-fenced portion of either the North West or Celtic sea herring fisheries.

The Pleadings

8. A plenary summons issued on 28th September, 2012. A statement of claim was delivered on 18th December, 2015. There was an exchange of particulars and a defence was delivered on 8th March, 2016.

9. In his plenary proceedings, the plaintiff including the following among the reliefs sought:

> (a) a declaration that the plaintiff was entitled in the year 2006 to the full renewal of his sea-fishing boat licence for a boat of more than 65ft in length in circumstances where there had been no actual change in the length of the boat and notwithstanding that the method of the Marine Survey Office of measuring length for their purposes had changed;
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> (b) a declaration that the Minister was not entitled to give an inflexible sea fishing policy directive in or about the year 2010 which had or would have the effect of excluding the plaintiff from the mackerel fishery thereafter because he had not held the licence of which he had been deprived in prior years and, therefore, could not meet the history of landings or other requirements of the 2010 Policy Directive;
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> (c) a declaration that the Minister was not entitled to give an inflexible sea fishing policy directive in or about the year 2011which had or would have the effect of excluding the plaintiff from the herring fishery thereafter because he had not held the licence of which he had been deprived in prior years and, therefore, could not meet the history of landings or

other requirements of the 2012 Policy Directive;

(d) damages, reparations or compensation in tort or for interference with the plaintiff's right to earn a livelihood and to own property pursuant to Article 40.3.1 of the Constitution of Ireland and Article 1 of the First Protocol of the European Convention on Human Rights.

Submissions on the preliminary issues

10. It was submitted on behalf of the Minister that the plaintiff's claim, in essence, involved a challenge to the exercise of powers or discretions of a type which would normally fall for review by way of judicial review proceedings, and that the plaintiff was therefore precluded from pursuing the relief sought because he was well outside the time limit applicable for judicial review proceedings. In this regard, the Minister relied on the decisions in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301, *Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food* [2004] 1 I.R. 92, *Shell E&P Ireland Limited v. McGrath & Ors* [2013] 1 I.R. 247 and *Express Bus Limited v. National Transport Authority* [2018] IECA 236. The Minister also sought to argue that any tortious cause of action put forward on behalf of the plaintiff had long since accrued for the purpose of the Statute of Limitations within the meaning of 'accrual' as that term was deployed in the authorities. Particular reliance was placed on the recent decision in *Brandley v. Dean* [2017] IESC 83, where the Supreme Court held that the date of accrual in case of the type before it (negligence in the building of a house leading to economic damage) was when the damage is "manifest". It was submitted on behalf of the Minister that the date of accrual was the date when the Áine Íde was re-measured i.e. the date of the certificate of survey in December 2003, when it was labelled as being under 65ft in length. In the alternative, it was submitted that the damage was manifest when the first decision was made to deny access to the vessel to an over- 65ft segment of a fishery because of this re-measurement, which was 2006 at the latest.

11. In the course of submissions on behalf of the plaintiff, it was emphasised that under the complex regime provided for by Irish and EU law, a person does not have an automatic right to fish and that each new season brings a fresh decision of the Minister with regard to the allocation of quotas/fishing opportunities. It was submitted that because of this, time did not start to run until the Minister's Policy Directives of 2011 and 2012 shut the plaintiff out of the fisheries in question. It was submitted that the re-measurement by the MSO (in 2003) and the Minister's acquisition of the knowledge that this re-measurement had taken place (in 2006) were merely part of the narrative, but that it was not until the introduction of the Policy Directives in 2011 and 2012 respectively that the plaintiff suffered the particular damage complained of in these proceedings and/or that his cause of action arose. It was submitted that he was not out of time with respect to the period of time prescribed by the Statute of Limitations because the damage did not accrue until 2011 and/or 2012, and that, even if the claim was characterised as a judicial review claim in its essence, the authorities (in particular, the *Shell* case) did not preclude him from bringing such a claim outside judicial review time limit in all circumstances.

Relevant authorities

12. In *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301, a county manager imposed water rates; the plaintiffs refused to pay; and the corporation then disconnected their water supply. The plaintiffs instituted proceedings challenging the validity of the orders imposing the water rates, seeking a declaration that their water supply had been wrongfully disconnected and claiming damages for the wrongful disconnection. The High Court (Costello J.) held that the impugned orders were *ultra vires* and void, and found that the plaintiffs were not liable to pay the said charges, declaring that the decision to disconnect their water supply was *ultra vires*, although the court refused to make an award of damages. The specific reason for the finding that the orders were *ultra vires* is not of concern here. What is of importance is that Costello J. held that a plaintiff will not be barred from obtaining declaratory relief simply by failing to seek an order of *certiorari*, because the courts have a statutory discretion to grant the relief; neither could O. 84 of the Rules of the Superior Courts 1986 be construed as to provide an exclusive procedure for persons seeking declaratory relief in matters of public law because the courts cannot decide as a matter of public policy that litigants who ask the courts to exercise their statutory discretion are engaging in an abuse of process. He said that the delay would not be a bar when seeking declaratory relief in plenary proceedings if the court were satisfied that, had the relief been sought in an application for judicial review, there would have been good reasons for extending the time in which to issue proceedings. Thus, it is clear from this decision that a public law decision may be challenged in proceedings other than in judicial review proceedings; and that, in appropriate cases, time may be extended if there is good reason for doing so.

13. In *Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food* [2004] 1 I.R. 92, the plaintiff brought plenary proceedings for damages in circumstances where the Minister refused to refund money under the Beef Export Refund Scheme. The Supreme Court held that the function of paying expert refunds had a public law character and that the plaintiffs should have challenged the decision of the Minister by way of judicial review and that not to do so had been misconceived. The Ministerial decision, until set aside or abandoned, had effect and could not simply be ignored or bypassed by a direct claim for payment of the refund.

14. In *Shell E&P Ireland Limited v. McGrath & Ors* [2013] 1 I.R. 247, the plaintiff instituted proceedings against certain individual defendants on the basis they had obstructed or interfered with the plaintiff's right to carry out work in respect of the construction of a gas pipeline. As part of the defence to the claim, the defendants joined Ireland and Attorney General as defendants to a counterclaim in which the validity of the relevant statutory decisions concerned were challenged. These decisions included a consent order and a compulsory purchase order in respect of lands owned by the individuals. The plaintiff subsequently discontinued its claims against the defendants but the remaining part of the case remained in existence i.e., the counterclaim described above. The court ordered a trial of the preliminary issue as to whether the defendants were out of time to raise public law issues. The High Court held that the defendants were not time barred, but the appeal was allowed by the Supreme Court. It held that the time limit for making an application for judicial review applied by analogy to claims which had, as their substance, the seeking of the types of relief ordinarily obtained by judicial review even if framed in another fashion such as in declaratory proceedings. The court stated that it would make a nonsense out of the system of judicial review if a party could by-pass any obligation arising in that system, such as time limits and the need to seek leave of the court, simply by issuing plenary proceedings which, in substance, sought the same relief or the same substantive ends. In the course of his judgment on behalf of the court, Clarke J. (as he then was) referred to the decision in *O'Donnell* with approval. He said that the counterclaim seeking damages was properly characterised as a substantive claim rather than simply a defence and, therefore, there was no reason for not applying the same strictures as to time which would apply were the defendants to be the moving parties as plaintiffs. He did say that there might be circumstances in which a defendant, faced with proceedings which relied on a public law measure, might be justified in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a direct challenge to the relevant measure. However, this passage in his judgment seems to me to describe a rather narrow exception to the normal principle that a claim should be within time, and appears to envisage some latitude being given where the person is defending a claim brought by a public law authority, rather than instituting a claim against it.

15. The defendant also relied on the decision of the Court of Appeal in *Express Bus Limited v. National Transport Authority* [2018] IECA 236. This case involved a claim for damages for breach of statutory duty and a claim for damages in respect of an alleged breach of EU law (so-called *Francovich* damages). In issue was a decision of the National Transport Authority in respect of a public bus passenger service which had an impact on the provision of services by Express Bus from Dublin City Centre to a location near IBM. The question considered was whether the judicial review time limit applied to the plenary proceedings which had been commenced in respect of the decision. Hogan J., delivering the judgment of the Court of Appeal, said that the plaintiff's claim amounted to a contention that the Authority violated the procurement rules in relation to public transport as contained in Regulation 1370/2007 by permitting an amendment to the bus timetables without inviting a fresh tender process. In order to succeed, the plaintiff needed to demonstrate that the breach of EU law alleged was "grave and manifest" or "inexcusable". Hogan J. said that it was plain that the plaintiff could not hope to do this without simultaneously challenging what, in substance, was the validity of the administrative decision of the Authority. He said that one way or another, the plaintiff's claim amounted, in substance, to a collateral challenge to the validity of the Authority's decision because, to succeed in its damages claim, the plaintiff would also, at a minimum, have to challenge the validity of that decision, even if only indirectly. It was, therefore, clear that the judicial review time limits did apply.

Decision

16. It seems to me that what the plaintiff seeks to do in these proceedings is, in essence, to challenge certain decisions of public authorities of a kind typically and classically amenable to judicial review. This is so, whether one considers the issue of the Policy Directives in 2011 and 2012, or the earlier decisions concerning the vessel's measurement in 2003 or the refusal of licences/authorisations in the over 65ft category from 2006 onwards. I note in passing that the plaintiff sought to emphasise the year 2006 as the date upon which the Minister acquired knowledge that the plaintiff's vessel had been reclassified as falling within the under 65-foot category, but I fail to see how this acquiring of knowledge amounts to the exercise of any power by the Minister at all. Insofar as there were any decisions concerning the re-classification of the plaintiff's vessel, these occurred by decision not of the Minister but of the MSO in 2003; and the refusal of licence decisions were made by the Sea Fishing Licensing Authority.

17. The plaintiff, as noted earlier, sought to emphasise that each new season brings a fresh decision of the Minister/authorisations with regard to the allocation of quotas/fishing opportunity and (if I understand his argument correctly) that it was only from 2011 and 2012 that time should be deemed to run because it was only on those dates that the earlier re-measurement 'decisions' and the introduction of the Policy Directives combined to have the impact on his fishing livelihood of which he now complains. However, it seems to me that the situation is similar to that in the *Express Bus* case insofar as the plaintiff could not hope to succeed in his claim without also simultaneously challenging what, in substance, was the validity of an administrative decision to reclassify his fishing vessel in 2003 (or, even taking the timescale at its most favourable to the plaintiff, when that decision was confirmed to the Minister in 2006). The situation does appear to me to fall within the description of Hogan J. in *Express Bus*, in other words, I am of the view that the plaintiff's claim amounts in substance to a collateral challenge to the validity of the earlier decision(s) concerning the re-measurement of his vessel because, to succeed in its damages claim, the plaintiff would also, at a minimum, have to challenge the validity of that decision(s), even if only indirectly. This reality is underlined by the fact that the plaintiff has included, among the declaratory reliefs sought in his plenary summons, reliefs relating to the decisions that he says were made in 2006. Even if I were to assume that he is correct in contending that it was not until 2011/2012 that he suffered the specific damage of which he now complains, it is manifestly an essential part of his claim to challenge the validity of the earlier decision(s). In circumstances where a claim clearly involves a challenge to a decision or decisions of a public law character, the judicial review time limits apply unless the exceptional situation described by Clarke J. in the *Shell* case applies. That exceptional situation there described appears to me to apply only where a person is defending proceedings brought against him or her by a public authority; and the present case clearly is not one of those cases. If I am wrong about the narrowness of that exception, I would find in any event that the plaintiff did not have such a good reason for the delay in bringing proceeding as to warrant an extension of time; though the particular damage he claims to have been caused by the policy decisions in 2011/0212 could not have been foreseen in 2006/2007, it was manifestly obvious that he would have some limitation of his fishing opportunity by reason of the re-measurement decision, which was borne out by the licences he obtained from 2006 onwards. In those circumstances, I would therefore be reluctant, even if I had a discretion to extend time, to exercise that discretion in favour of the plaintiff.

18. I note the submission of the plaintiff that the rationale in *Express Bus* does not apply because that case concerned a claim for damages for breach of statutory duty and a claim for *Frankovich* damages, but I do not understand the principles set out in the authorities discussed above to be limited to those particular types of damages claim; what seems to me to be essential is whether the cause of action consists fundamentally of a challenge to a decision with a public law character, which in my view is the proper characterisation of the present proceedings.

19. As regards the issue of when the cause of action in tort accrued, it seems to me that the present case does not, in reality, involve a negligence claim at all. Either the vessel was measured correctly and lawfully in accordance with the relevant Regulation and/or the Minister's introduction of the Policy Directives were lawful or not. This seems to me to be quintessentially a public law challenge to which the principles of accrual of action in tort/economic loss, discussed in cases such as *Hegarty v. O'Loughran* [1990] 1 IR 148, *Gallagher v. ACC Bank plc* [2012] 2 IR 620, and *Brandley v. Deane* [2017] IESC 83, simply do not apply, and that the appropriate time limit is that applicable to judicial review proceedings. Therefore, it does not seem to me to be necessary or appropriate to decide whether the cause of action accrued in 2011/2012, when the *particular damage* now complained of is said to have arisen, or in 2006, the earliest date from which *some damage* (in the sense of the limitation of the plaintiff's authorisation to fish by reason of his vessel being re-categorised) could be said to have arisen. If I am correct in classifying the substance of the challenge as a challenge to a decision of a public law character, the judicial review time limit is the appropriate one to apply.

20. I set out my determinations on the preliminary issues which were set down for trial before me as follows:

> (i) The issue of whether the plaintiff's alleged cause or causes of action as against the defendants is and/or are time barred pursuant to section 11 (as amended) of the Statute of Limitations Act 1957 is not applicable by virtue of my finding on issue (iii) below.
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> (ii) The issue of whether the plaintiff is guilty of prolonged, inordinate and inexcusable delay such that the defendants would have been or would now be prejudiced and unable to get a fair trial was not pursued, therefore it is not necessary for me to make a finding on same.
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> (iii) Regarding the issue of whether the plaintiff's claim in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions, and, whether, insofar as the plaintiff has not sought to challenge the decisions listed in the submissions on public law grounds, he accordingly is precluded from pursuing the relief in respect of same, I find that the answer to both questions is yes and that the plaintiff is precluded from pursuing the reliefs described. In respect of whether the plaintiff has failed to make such challenge or challenges promptly and/or within the applicable time limits and in that regard should be accordingly dismissed, I find the answer to be yes.