Neutral Citation: [2014] IEHC 248

THE HIGH COURT

[2013 No. 40 J.R.]

BETWEEN

WATERVILLE FISHERIES DEVELOPMENT LIMITED

APPLICANT

AND

AQUACULTURE LICENSES APPEALS BOARD AND THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENTS

AND

(BY ORDER) SILVER KING SEA FOODS LIMITED T/A MARINE HARVEST IRELAND

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 8th April, 2014

1. Where the Oireachtas has provided by statute for an exclusive mechanism of challenging the validity of a particular administrative decision by means of judicial review, is it necessary to serve every party to that decision within the time specified, even though they may have no interest in participating in these judicial review proceedings? This, in essence, is the most critical of the preliminary questions which I am now required to determine. The issues arise in the following way.

2. This is an application for leave to apply for judicial review in respect of a decision of the Acquacultural Licenses Appeals Board ("the Board") dated 31st October, 2012. By that decision the Board confirmed an earlier decision of the Minister for Agriculture, Fisheries and Food on 22nd March 2011 to grant a temporary licence for the amendment of operating procedures to the notice party, Silver King Seafoods Ltd. ("Silver King") in respect of the latter's salmon farming site at Deenish Island, Ballinskelligs Bay, Co. Kerry.

3. That salmon farm itself first become operational in 1989. Silver King acquired the farm in 2005 and operated the farm pursuant to a Licence No. T 6/202 AQ 199. In January 2010 the Waterville Fisheries Development Group ("the Group") complained to the Minister contending that this licence should be revoked. Following the making of submissions by the relevant parties, the Minister made a decision on 9th April 2010 not to revoke the licence. On the 28th April 2010 the Minister informed the parties that the licence was not to be revoked.

4. In February 2011 Silver King applied to the Minister for permission to amend the licence to permit new stocking arrangements at the farm. Silver King maintained that this new stocking arrangements would allow for what is termed an "all out, all in" arrangement which would permit the stocking of 800,000 smolt every two years rather than the existing arrangement of 400,000 smolt per year. While Silver King contend that this would lead to an amelioration of the environmental impact of the farm and that this would be in line with best international practice, this is hotly disputed by the applicant and others.

5. At all events, the Minister granted the licence amendment on 22nd March 2011, but this was appealed by a number of objectors to the Board. The identity and number of objectors is, as we shall see, a matter of some importance in second preliminary issue I am required to determine. While I will return to this matter shortly, it is contended that the failure to serve *all* the parties to the appeal within the statutory time period is fatal to the validity of these proceedings.

6. While s. 73(2) of the Fisheries (Amendment) Act 1997 ("the 1997 Act"), requires that any application to quash a decision of the Board must be made by way of an application for judicial review under O. 84 of the Rules of the Superior Courts and that such application must be heard on notice, it has been agreed that I should determine three questions as a preliminary issue. It has been further agreed that these three preliminary issues will be adjudicated finally by me, subject only to an appeal from my decision.

7. Before proceeding further it is necessary to record one critical feature of the procedure adopted by the applicant. It had filed an appeal to the Board, but so also had Inland Fisheries Ireland and Salmon Watch Ireland. While it is that these proceedings were commenced within the three month period specified in s. 73(2) of the 1997 Act, the proceedings were not, in fact, served on either Salmon Watch Ireland or Inland Fisheries Ireland within that relevant period. As it happens these bodies have indicated they do not wish to take part in the judicial review proceedings. One of the critical questions which I have to consider as a preliminary issue is whether or not the failure to effect such service amounts in the circumstances to a jurisdictional bar to these judicial review proceedings.

Preliminary Issues

8. The preliminary issues which I accordingly have to determine are, therefore, as follows:-

> (1) Whether the applicant has the requisite *locus standi*?
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> (2) Whether the applicant complied with the requirements of s. 73(2) of the 1997 Act regarding time and service and, if it did not, whether the degree of non-compliance was such as to preclude the applicant from maintaining these proceedings?
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> (3) Whether the applicant is in time to challenge or otherwise question the non-revocation by the Minister of the licence in April, 2010.

Whether the applicant has the requisite locus standi to maintain these proceedings?
9. The first objection to the applicant's *locus standi* is that inasmuch as it is a company limited by guarantee it is simply being used as a vehicle to avoid any potential liability for costs on the part of individuals who might otherwise have commenced proceedings. This objection, if otherwise well founded, might well justify the making of an application for security for costs, although consideration would now also have to be given in that context to the possible implications of Part 2 of the Protection of the Environment Act 2011 so far as any such application might be concerned.

10. There is, however, no evidence at all that the applicant company was formed simply for the purpose of circumventing these costs rules, such as, for example, formed the backdrop to *Lancefort Ltd. v. An Bord Pleanála (No.2)* [1998] IESC 14, [1999] 2 I.R. 270. Indeed, it was incorporated and formed long before any issue giving rise to these proceedings ever arose.

11. The actual appeal to the respondent was, however, expressed to be in the name of the Waterville Fisheries Development *Group* ("the Group") as distinct from the name of the company which is the applicant in the present proceedings, Waterville Fisheries Development Ltd. ("the company"). In the notice of the appeal to the Board the Group described itself as a "community based Group dedicated to the protection and enhancement of the salmon and seatrout fishery of the Lough Currane catchment."

12. It is clear from the affidavit of the company secretary of the applicant company, Kevin O'Sullivan of the 26th September 2013 that the company and the applicant are in truth one and the same organisation with the same address. According to that affidavit, the company "is managed and made up of a mixture of the local angling association and associated bodies." Mr. O'Sullivan makes the point that the entity is frequently referred to "in common parlance without the full corporate description."

13. I consider that in these particular circumstances the applicant must be regarded as having the requisite *locus standi*, since it is, in essence, one and the same entity as the Group who lodged the appeal. It has been emphasised on many occasions that the *locus standi* rules are, in reality, flexible rules of practice which are ultimately concerned with the conservation and proper use of judicial power: see, *e.g.*, the classic judgments of Henchy J. in *Cahill v. Sutton [*1980] I.R. 269 and that of Walsh J. in *The State (Lynch) v. Cooney* [1982] I.R. 247. Viewed thus, the locus standi principles are accordingly concerned with the underlying reality of the litigant's interest.

14. In the (admittedly unusual) circumstances of the present case, therefore, it is clear that both the Group and company share the same interest in challenging this decision as they are to all intents and purposes the same entity. The only true legal disadvantage which might possibly attach to permitting, as it were, the promiscuous inter-changeability of the group and the company is in the area of potential liability for costs. As has already been noted, however, this concern can satisfactorily be addressed, where necessary, in the context of an application for security for costs.

15. I will accordingly answer the first question in the affirmative.

Question 2: Whether the applicant complied with the requirements of s. 73(2) of the 1997Act regarding time and service?
16. In considering this jurisdictional question the structure of s. 73(2)(b) of the 1997 Act is of some interest. This sub-section provides:

> "(2) An application for leave to apply for judicial review under the Order in respect of a decision or determination referred to in subsection (1)—
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> (a) shall be made within the period of three months commencing on the date on which the decision or determination was made, and
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> (b) shall be made by notice of motion (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) which shall be served on—
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> (i) if the application relates to a decision on an application for a licence, the Minister or the officer of the Minister by whom the decision was made, as the case may be, and where the applicant for leave is not the applicant for the licence, it shall also be served on the applicant for the licence,
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> (ii) if the application relates to a determination referred to in subsection (1) (b), the Board and each party or each other party, as the case may be, to the appeal, or
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> (iii) any other person specified for that purpose by order of the High Court, and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision or determination is invalid or ought to be quashed."

17. Where the application relates to a decision of the Minister on an application for a licence, then s. 73(2)(b)(i) expressly requires that both the Minister and such applicant shall be served, assuming, of course, that the applicant for the licence is not, in fact, the applicant for leave.

18. The present proceedings are, however, governed by s. 73(2)(b)(ii) since they relate to a determination of the Board on an appeal. In these circumstances an applicant seeking leave to commence judicial review proceedings under s. 73 must serve the "Board and each party or each other party". Here it is conceded that the applicant never served Salmon Watch Ireland ("SWI") or Inland Fisheries Ireland ("IFI") within the three month statutory time limit. It is clear, however, that these bodies were served after that time limit had elapsed on 30th January, 2013. It is also not in dispute that they indicated that they had no interest in participating in these proceedings.

19. It is in these circumstances that the Board, Silver Lang and, to some degree, the Minister all maintain that the present application should be dismissed in limine by reason of the failure to serve these particular parties. When pressed, these respondents do not resile from admitting that such service would have been an empty formality since those parties who were not served had no interest in taking part in these judicial review proceedings. It is nevertheless said that this is a mandatory requirement of statute which subsection gives no power to relax.

20. The respondents thus contend for an absolutely literal interpretation of s. 73(2). It is true that the literal words are often the best guide to the meaning of the statute. As Denham J. said in *Board of Management of St. Malaga's National School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 362:

> "As the [statutory words in question] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

21. The statute must nonetheless be read in a sensible fashion and in a manner which respects fundamental constitutional values. It is clear from Article 5 of the Constitution that the state is a democracy which is founded on the rule of law. All of this is underscored by Article 34 which assigns the administration of justice to the courts. In these circumstances, access to the courts for the resolution of justicable matters is a key ingredient of the free and democratic society postulated by the Constitution: see, *e.g. Mccauley v. Minister for Posts and Telegraphs* [1966] I.R. 345, *The State (McEldowney) v. Kelliher* [1983] I.R. 289, *Murphy v. Greene* [1990] 2 I.R. 560 and *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275.

22. All of this means that s. 73(2) cannot be read in the unyielding fashion urged by the Board and Silver Lang. It would be easy to envisage circumstances where dozens – perhaps even hundreds – of parties have appealed a particular decision to the Board. If the Board's argument were correct then it would mean that an application for leave under s. 73(2) would have to be dismissed on jurisdictional grounds by reason of the fact that, for example, only 49 out of 50 parties have been served, although though such a party might well perhaps prove difficult to serve or where they could not be easily located, even if they had no interest whatever in such proceedings. If this, indeed, were the true interpretation of s. 73(2)(b), then it would serve to place a huge logistical and administrative burden on the right of access to the courts which might not readily be capable of objective justification.

23. In these circumstances it is necessary to look at the requirements of s. 73(2)(b) through the prism of this constitutional right of access to courts. This approach is underscored by several contemporary authorities of which it is, perhaps, sufficient to mention only *Re MJBCH Ltd. (in liquidation)* [2013] IEHC 256 and *Dunmanus Bay Mussels Ltd. v. Acquaculture Licences Appeals Board* [2013] IEHC 214.

24. In *Re MJMBCH* the plaintiff claimed damages for personal injuries against the defendant company. She had issued proceedings without realising that an order had been made by this Court some two months previously providing for the winding-up of the company. When the proceedings were then served on the company, the plaintiff's solicitor received a letter from the official liquidator advising them of this development. The plaintiff's solicitors then applied to this Court for an order pursuant to s. 222 of the Companies Act 1963 ("the 1963 Act") seeking the retrospective leave of the court to the commencement of the proceedings: Such an application was considered necessary in view of the requirements of s.222 of the 1963 Act which provides that no such action can be commenced without the prior leave of this Court.

25. As the plaintiff had not commenced the proceedings without complying with this statutory requirement did this, however, mean that the proceedings were a nullity. Applying the principles enunciated in *Murphy v. Greene* [1990] 2 I.R. 560, Finlay Geoghegan J. concluded that s. 222 should not be construed as prohibiting the retrospective grant of leave:

> "…having regard to the purpose of s.222..and the [relevant] constitutional principles, in the absence of express words which provide that that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event, s. 222 should not be so construed."

26. Finlay Geoghegan J. then went on to hold that this was an appropriate case in which to grant leave. The grant of leave would not compromise an essential objective of the section – namely, that all proceedings relating to the company being would up should be placed under court supervision – and nor would it prejudice the orderly wind-up of the defendant company. She noted that failure to grant leave might have serious consequences for the plaintiff, not least because if the plaintiff was required to issue fresh proceedings and then seek leave, it might then transpire that the action was statute-barred. The plaintiff, moreover, was not to know that the defendant had already been wound up when the first set of proceedings had been issued.

27. I took a similar view in my judgment in *Dunmanus Bay Mussels*. This was a case in which leave to apply for judicial review had been granted *ex parte* and the parties served within the three month period, but where the applicant had overlooked the fact that the proceedings were, indeed, governed by s. 73(2)(b) of the 1997 Act with the result that the respondents were not put on notice of the application for leave in the manner required by statute.

28. While the actual order granting leave was set aside by consent, I took the view that the proceedings were nonetheless not manifestly irregular:

> "….it can be said that compliance with the requirements of s. 73(2) of the 1997 Act has been stipulated by the Oireachtas as being necessary so far as the timeliness and notice requirements are concerned. Yet, in my view, these requirements have been substantially complied with so far as the present case is concerned. The respondent and the notice parties have all been served with the proceedings within the relevant three month period. It is true that this service was strictly irregular in that it was founded on an originating notice of motion which in turn had been issued pursuant to the purported grant of leave in a manner which was at odds with an express statutory requirement.
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> It is nevertheless clear that one key objective of the sub-section – namely, the timely notification of the nature of the intended claim – has already been satisfied. Moreover, were the notice of motion seeking the relief to be itself amended, the respondent and the notice parties would then have the opportunity to oppose the grant of leave, so that the other main objective of the sub-section would also have been satisfied in such circumstances. Second, a conclusion that the non-compliance with these statutory requirements rendered the proceedings wholly irregular and thus beyond the capacity of the courts to rescue by means of an appropriate amendment would amount to a manifestly disproportionate interference with the applicant's constitutional right of access to the courts. In *Murphy v. Greene* [1990] 2 I.R. 566 the Supreme Court held that the requirements of the (then) s. 260 of the Mental Treatment Act 1945 (which subjected certain types of civil proceedings to a prior application for leave on notice requirement) amounted to a curtailment of the constitutional right of access to the courts and, as such, it had to be strictly construed. As Finlay C.J. said of the section it constituted ([1990] 2 I.R. 560, 572):"*prima facie* a curtailment of the constitutional right of access to the courts to the extent that it requires a precondition of leave of the court for the bringing by him of a claim for damages for an asserted wrong."
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> Much the same can be said by analogy so far as the present case is concerned. As I have already indicated, once the applicants were served (even if irregularly) with the proceedings within time, the statutory objectives which s. 73(2) seeks to serve would not be substantially compromised by now granting leave to amend the proceedings. Conversely, the

> consequences for the applicant would be at least as severe as that presaged by Finlay Geoghegan J. in *Re MJBCH* with regard to the personal injuries litigant in that case. Indeed, whereas in that case there was a risk that the plaintiff's action *might* be statute-barred were leave refused and she was required to commence her personal injuries proceedings afresh, this would certainly be the case here if no such leave to amend were to be granted. Nor can it even be said that the automatic nullification of the proceedings by reason of the non-compliance with the statutory provisions is itself an object of the legislation. No one would credibly suggest that the Oireachtas sought to lay a form of forensic trap for litigants who through some mischance have not perfectly complied with these statutory requirements. On the contrary, the Oireachtas instead merely insisted by the enactment of s. 73(2) that potential respondents receive adequate notice of the claim and have an opportunity to be heard in opposition to the application for leave. Once the objectives are at least substantially safeguarded, then it may be inferred that the Oireachtas had no interest in seeing that applicants were struck out in *limine* merely by reason of a non-compliance with statutory requirements which did not otherwise unfairly prejudice the interests of the respondent and notice parties. This is especially true in a state bound by the rule of law, where, in the words of Denham J. in *White v. Dublin City Council* [2004] 1 I.R. 545, 564: "any person affected by an administrative decision has a constitutionally protected right of access to courts to contest its legality."

29. Viewed thus and in the light of these constitutional considerations, then s. 73(2)(b) can and should be read as if it referred to relevant parties who had a real interest in the outcome of the proceedings.

30. This approach is also supported by the case law dealing with the corresponding provisions of s. 50 of the Planning and Development Act 2000, (and its earlier statutory antecedents). It is true that in *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 I.R. 128 the Supreme Court held that the obligation to serve parties within the relevant period was mandatory. That case concerned, however, the failure to serve a developer with the time period. Finlay C.J. stressed ([1994] 2 I.R. 128, 136) the importance of this:-

> "….the true interpretation of the section is that it may be complied with by an application which has been made within the time limited in the sense that a notice of motion grounded as is provided in Ord. 84 has been filed in the High Court and it has been served on all the mandatory parties provided for in the sub-section. If, however, it is not served on all the parties provided for mandatorily within the sub-section, as distinct from the power of the court at a later stage to order the service of additional parties, then it has not been completed within the time limited by the section."

31. The comments in *KSK* must, however, be viewed in their appropriate context. But they cannot and should not be read as extending more widely than this. This was the point made by Geoghegan J. in *McCarthy v. An Bord Pleanála* [2000] 1 I.R. 42, 45 where he stressed that by providing for a statutory scheme governing judicial review applications in planning matters the Oireachtas had never intended that "parties who would have not been necessary parties under the old procedure had to be added in as parties under the new procedure". In this respect I entirely agree with the comments of Geoghegan J. to the effect that it was "far from the court's thinking (in *KSK Enterprises*) that irrelevant parties would have to be served".

32. This is also the conclusion which accords with first principles. If an objector to the grant of a statutory licence were to apply to have that decision to grant quashed, only the grantor and the grantee of the licence would be necessary parties to the judicial review proceedings. Other objectors might apply to be joined to the proceedings, but absent an express court order to that effect, they could not otherwise be regarded as relevant parties.

33. The same is true here. The reference in s. 73(2)(b)(ii) to "each party or each other party…to the appeal" must, therefore, be understood as being a reference to each relevant party. Quite obviously the Board must be a party (because the subsection says so), but so also must the grantee of the licence. Other objectors do not fall into this category because they would not have been regarded as necessary parties to any judicial review proceedings governed solely by Ord. 84 of the Rules of the Superior Courts. As Geoghegan J. said in *McCarthy* it was not the intention of the Oireachtas to effect such a change by providing for a statutory scheme governing applications to quash particular types of administrative decisions.

34. Nor can it be said that this conclusion is at variance with the judgment of Quirke J. in *Murray v. An Bord Pleanála* [2000] 1 I.R. 58. This was an application for judicial review to quash a decision of An Bord Pleanála which had allowed an appeal by an objector against the grant of planning permission. Quirke J. noted that under the terms of s. 82(3)(a) of the Local Government (Planning and Development) Act 1963, (the forerunner to s. 50), the planning authority against whose decision an appeal is made is expressly defined as a party to appeal. It followed that the Oireachtas had expressly ordered that such an authority must be served. But this really just another way of saying that the Oireachtas had designated such planning authorities as relevant parties for the purposes of subsequent judicial review proceedings of An Bord Pleanála. Viewed thus, *Murray* provides no support for the wide proposition urged here by the Board and Sliver King that all other objectors who lodged separate and independent appeals to the Board should be regarded as relevant parties to the judicial review proceedings.

35. In summary, therefore, I would reject the contention that the proceedings should be struck out by reason of the failure to serve SWI and IFI. If s. 73(2)(b) were to be read in the absolutely literal fashion urged by the Board and Silver King, it would mean that the present proceedings would have to be dismissed by reason of a failure to serve parties who were never necessary parties in the first place – irrespective of whether they did or did not wish to take part – and even though this could have no real bearing on the real issues in the proceedings.

36. Adapting here the reasoning of Finlay Geoghegan J. in *Re MJBCH*, I am of the view that such an interpretation would be manifestly at odds with the applicant's constitutional right of access to the courts.

37. It follows, therefore, that s. 73(2)(b)(ii) must be read as referring to a relevant or necessary party. Since SWI or IFI were never a relevant or necessary party in this sense, I would accordingly reject the argument that the proceedings should be dismissed on this ground.

Question 3: Whether the applicant is in time to challenge or otherwise question the non-revocation by the Minister of the licence in April, 2010.

38. It is accepted by the applicant that it is now out of time to challenge the validity of the Minister's decision not to revoke the licence granted to Silver King in April 2010. It follows that the third preliminary question must now be answered in the negative.

Conclusions

39. It follows, therefore, that I would accordingly rule that the present proceedings are validly constituted and brought by a party with the appropriate *locus standi*. The applicant cannot, however, challenge – whether directly or indirectly – the validity of the decision of the Minister not to revoke the licence granted in April 2010 to Silver King.