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Judgments

Judgment Title: Klohn -v- An Bord Pleanála

Neutral Citation: [2011] IEHC 196

High Court Record Number: 2004 544 JR

Date of Delivery: 11/05/2011

Court: High Court

Composition of Court:

Judgment by: Hedigan J.

Status of Judgment: Approved

Neutral Citation Number: [2011] IEHC 196

THE HIGH COURT

JUDICIAL REVIEW

2004 544 JR

BETWEEN

VOLKMAR KLOHN

APPLICANT

V

AN BORD PLEANÁLA

RESPONDENT

AND

SLIGO COUNTY COUNCIL AND MATTHEWS ANIMAL COLLECTION LIMITED

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered the 11th day of May 2011.

1. The applicant is a farmer who resides at Crimlin Farm, Tubbercurry, Co Sligo. The respondent is an independent appellate authority, established pursuant to the Local Government (Planning and Development) Act 1976, charged with the determination of certain matters arising under the Planning and Development Acts. The first named notice party is the County Council with responsibility for the administrative area of Sligo. The second named notice party is the operator of a fallen animal unit at Achonry, Co. Sligo.

2. The applicant seeks an order of *certiorari* quashing the decision of the Taxing Master of the 24th June, 2010 to allow to the respondent's legal team costs of approximately €86,000.00. The applicant also seeks a direction from the Court to the effect that when Taxing the costs of legal proceedings challenging administrative decisions which involve Environmental Impact Assessments or Environmental Impact Statements the Taxing Master must take into account Article 10a of the EIA Directive 85/337.

3.1 In March 2006, leave was granted to the applicant to judicially review a decision of An Bord Pleanála. The Board upheld a grant of planning permission from Sligo County Council to Matthews Animal Collection Limited to construct a fallen animal unit at Achonry, Co. Sligo. In February, 2008, McMahon J. heard the judicial review over a period of four days. The Court ultimately found in favour of An Bord Pleanála. On the 6th of May, 2008, there was a further attendance in Court to determine the issue of costs. The Order for costs provided *inter alia*

> "That the respondent and the second named notice party recover against the applicant their costs of this Motion and order when taxed and ascertained…and the Court doth make no Order for Costs in the matter of the application for leave to apply for Judicial Review."

3.2 The respondent's costs were taxed on the 18th May, 2009. Having heard the respective parties the Taxing Master indicated that he would exercise his powers pursuant to Section 27 of the Courts and Court Officers Act, 1995. In this regard the Taxing Master took in the Solicitors full file to include the 33 page judgement of McMahon J. and also a copy of the briefs submitted to Counsel for his consideration. The Taxing Master having considered the matter delivered his reserved ruling on the 25th May, 2009.

3.3 The Taxing Master's allowances to the respondent's legal team came to approximately €86,000.00, which can be

apportioned as follows: Solicitors fees €32,579.62, Sundries €800.00, Senior Counsel's Fees €20,000.00, Junior Counsel's fees €14,250.00, VAT €14,202.24, Stamp Duty €5,013.00. The Master deemed fees for Senior and Junior Counsel to be reasonable but reduced the solicitor's fee from €45,000.00 to €32,000.00. In these proceedings the applicant has lodged objections against every single item of costs identified in the bill.

4. Submissions of the Applicant

4.1 The applicant submits that the Taxing Master erred in not taking into account Article 10a of the EIA Directive 85/337 in considering this matter. Article 10a guarantees that legal proceedings taken to challenge administrative decisions involving Environmental Impact Assessments or Environmental Impact Statements shall not be prohibitively expensive. In *Kavanagh v.The Minister for Justice Equality and Law Reform* [2007] IEHC 389, the High Court decided that it was for the Taxing Master to ensure compliance with Article 10a of the EIA Directive. In this case the Taxing Master has decided that he does not have such powers, the applicant submits that this decision was wrong. The applicant further argues that Article 10a is sufficiently clear and precise to give rights to citizens under the doctrine of Direct Effect. The Taxing Master had the powers to apply European law. The Court must ensure that from the 16th June, 2003, when Article 10a became effective no measure taken by an emanation of the state such as the Taxing Master contravenes the objectives of the European Law.

4.2 The applicant maintains that he was informed prior to initiating proceedings that there was no fear of prohibitively high legal costs given the European and International law governing access to justice when challenging administrative decisions involving Environmental Impact Assessments or Environmental Impact Statements. In addition to the Article 10a of the EIA Directive, Article 9 of the Aarhus Convention, signed by Ireland in 1998 seeks to ensure that the costs of legal proceedings challenging environmental administrative decisions shall not be prohibitively expensive. Under Article 50B (II) of the Planning and Development Act which came into effect in July 2010, the legislature decided that the proper transposition of the said provisions is that when administrative decisions in EIA cases are challenged no cost orders shall be made as a rule. Whilst the applicant accepts that this law was not in place at the time the adverse costs order was made by the High Court in May 2008, it shows how the Irish legislature proposes to transpose this law and for the purposes of the instant proceedings it gives the Court the direction as to how to decide on the amount of the respondents bill.

4.3 The applicant submits that the Taxing Master failed to take account of the fees charged by his own legal advisors in the sum of approximately €32,550.00. The applicant further submits that the respondent's costs should be less than those he has incurred as traditionally the costs of the moving party will be higher. The applicant further submits that the Taxing Master failed to take into account his very limited resources, he is a small farmer in the West of Ireland, he is also the holder of a medical card and underwent a means test in applying for same, therefore he is of

very limited means.

5. Submissions of the Respondent
5.1 Article 10a of the EIA Directive 85/337 is not applicable to these proceedings. The planning application in this case was made before the date for implementation of the Directive. The Directive came into force on 25th June, 2003 and provided that Member States must implement it by 25th June, 2005. The implementation date, *i.e.* 25th June, 2005, is the relevant date for assessing the application of Article 10a. Member States are only required to provide access to a review procedure, which is not prohibitively expensive, in respect of applications for development consent initiated, and decisions made, after the deadline for implementation of Article 10a *i.e.* 25th June, 2005. The planning application in this case was made on the 9th September, 2003, An Bord Pleanála made its decision on 20th April, 2004. The application for planning permission was lodged and the decision was made prior to the implementation date and thus Article 10 a is not applicable.

5.2 It has already been determined by the High Court in the substantive judicial review that Article 10a does not apply in this case. The respondent submits that the applicant is attempting to use a review of taxation as an appeal from a decision of the High Court. It was open to the applicant to appeal McMahon J's decision in this regard. The applicant chose not to appeal. It is not open to the applicant now to attempt to use a review of taxation to again argue this point. In these proceedings the Court is confined to a review of the decision of the Taxing Master regarding his assessment of the value of work done.

5.3 The applicant has also sought to rely on the Aarhus Convention 1998. The respondent submits that the Aarhus Convention is not applicable because Ireland has not formally ratified it. Like other common law legal systems, the Irish legal system is a dualist one and the terms of an international agreement do not become part of the State's law unless expressly incorporated by or under an Act of the Oireachtas. This principle is contained in Article 29.6 of the Constitution which provides that:

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

Decision of the Court
6.1 In reviewing the decision of the Taxing Master the Court does not have powers that the Taxing Master does not have. The powers of the Taxing Master are set out in Section 27(1) of the Courts and Courts Officers Act, 1995, which provides:-

> "On a taxation of costs between party and party by the Taxing Master of the High Court, … the Taxing Master shall have the power to examine the nature and extent of any work done, or services rendered or provided by Counsel (whether Senior or Junior) or

> by a Solicitor, or by an expert witness at hearing in a case or any expert engaged by the party, and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a Bill of Costs."

This provision affords the Taxing Master powers additional to those provided in Order 99 Rule 37 (18) of the Rules of the Superior Courts and obliges the Taxing Master to allow:-

> "All such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but save as against the party who incurred same, no costs shall be allowed which appear to the Taxing Master to have been incurred through over caution, negligence or mistake or by payment of special fees to Counsel or special charges or expenses to witnesses or any other persons or by any other usual expenses."

The powers vested in the Taxing Master are clearly limited to assessing and determining the value of work done. The Courts role in reviewing the decision of the Taxing Master is likewise limited to the issue of determining the value of work done.

6. 2 While these proceedings are simply a review of a decision of the Taxing Master the applicant is in effect inviting this Court to set aside the decision of McMahon J. that the EIA Directive does not apply to these proceedings. This decision was not appealed to the Supreme Court. McMahon J determined at page 9 of his judgment that :-

> "It should be noted that Directive 2003/35/EEC of the European Parliament and of the Council of 26 May, 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC OJ L156/17 25.6.2003 amending Directive 85/337/EEC had not come into effect when these proceedings were commenced and for that reason is not relevant to the Court's deliberations."

6.3 The EIA Directive 85/337 was amended by Article 10a on the 25th June, 2003. Article 10a guarantees that legal proceedings taken to challenge administrative decisions involving Environmental Impact Assessments or Environmental Impact Statements shall not be prohibitively expensive. The reason that Article 10a of the EIA Directive 85/337 is not applicable, is that the planning application predates the expiry of the date for implementation of the Directive. The amendment to the Directive came into force on 25th June, 2003, and provided that Member States must implement it by 25th June, 2005. The implementation date, *i.e.* 25th June, 2005, is the relevant date

for assessing the application of the Directive and not 25th June, 2003, as contended for by the applicant. The EIA Directive itself came into force on 3rd July, 1985. It is well established that the EIA Directive does not apply to projects where the application for consent was lodged before the deadline for the implementation of the Directive. The rationale for this approach was elaborated upon by the European Court of Justice in the Case C-81/96 *Burgemeester* [1998] E.C.R. O-3923:-

> "The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of expiry of the period for transposing the directive, to be made more cumbersome and time consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it."

The EIA Directive equally does not apply to cases where the development consent was granted before the deadline for its implementation.

6.4 The same principles which apply to the EIA Directive also apply to amendments to the Directive including the amendments under Article 10a. Member States are required to comply with Article 10a in respect of applications for development consent initiated and decisions made after the deadline for implementation of the Directive *i.e.* 25th June, 2005. The planning application the subject of these proceedings was lodged on 9th September, 2003, the Respondent made its decision on 20th April, 2004, and the applicant instituted proceedings on 24th June, 2004. Article 10a therefore does not apply in this case as not only was the application lodged but the decision was also made and proceedings commenced before 25th June, 2005.

6.5 The applicant has also sought to argue that the Directive was directly effective from the date it came into force *i.e.* the 25th June, 2003. A Directive can only have direct effect after the time limit for its implementation has expired. The ECJ held in Case C-8/81 Becker [1982] ECR 53 that:-

> "wherever the provisions of a directive appear… to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or insofar as the provisions define rights which individuals are able to assert against the State."

The High Court has also held in *Friends of the Curragh Environment Limited v An Bord Pleanála* [2006] IEHC 243 that Article 10a was not directly effective as the Directive is lacking in clarity, and precision so as to make it incapable of direct effect. The applicant has also sought to rely on the doctrine of

indirect effect which obliges the Court to interpret national law so far as possible in accordance with the aims of a Directive where same has not been implemented. Indirect effect also only arises after the implementation date has expired. The applicant is accordingly not entitled as a matter of European Law to rely on the Directive in respect of the decision the subject matter of these proceedings and it can have no bearing direct, indirect or otherwise on the taxation of the respondent's costs. With regard to the Aarhus Convention, this convention is not applicable as Ireland has not formally ratified it.

6.7 It may well be the case that if the planning application post-dated the 25th June, 2005, which was the date for implementation of Article 10a of the EIA Directive the applicant would have an arguable case that costs of approximately €86,000.00 violated this provision. However that is not the situation here, the planning application predates the 25th of June, 2005.

6.8 Turning to the proper role of the HC in review of taxation, no grounds have been advanced challenging the Taxing Master's allowances in this case. Moreover, it seems to me that the Taxing Masters allowance is not excessive in the context of the extensive Judicial Review of four days that took place before the High Court in this case. The costs, as assessed, appear to reflect economic reality for litigants in the State. I therefore refuse the reliefs sought by the applicant.

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