

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Engalv (Ireland) Ltd's Application [2010] NIQB 87

IN THE MATTER OF AN APPLICATION
BY ENGALV (IRELAND) LIMITED

IN THE MATTER OF THE LOCAL GOVERNMENT ACT
(NORTHERN IRELAND) 1934

AND IN THE MATTER OF THE HARBOUR'S ACT
(NORTHERN IRELAND) 1970

TREACY J

Introduction

[1] By Originating Motion (Order 55 Rule 14 RSC) (NI) 1980 dated 24 July 2009 the applicant claims relief against the Department of Regional Development ("DRD") seeking, inter alia, an Order pursuant to Section 22(2)(b)(ii) of the Local Government Act (NI) 1934 quashing the Vesting Order made by the DRD on 1 July 2009 in respect of the applicant's leasehold interest in the lands identified in the Originating Motion. Notice of the application was also served upon the Warrenpoint Harbour Authority ("WHA"). No relief is claimed against anyone other than the DRD.

[2] The grounds on which the relief claimed is sought include a claim that the DRD misdirected itself, that it acted irrationally, that it was contrary to the applicant's legitimate expectation, that it was a breach of Article 1 Protocol 1 of the ECHR, that they failed to provide proper reasons, that the vesting order statutory powers had been used for an improper purpose and that the decision was unnecessary and disproportionate. The DRD is identified in the Originating

Motion as the Defendant and the document concludes with the usual paragraphs that if the Defendant didn't enter an appearance judgment may be made against it and it also gave directions to the Defendant for entering an appearance. The DRD is thus Defendant to the proceedings and WHA has been put on notice of the proceedings by virtue of the Originating Motion.

[3] By Summons of February 2010 the applicant has sought Orders against WHA in respect of various documents itemised in the schedule to the Summons. They seek an Order pursuant to Order 24 Rule 3 that WHA should file a list of documents to include those matters identified in the schedule; alternatively an Order pursuant to Order 24 Rule 7 requiring WHA to make an affidavit stating whether any of the documents specified in the schedule etc is or at any time has been in its custody; an Order pursuant to Order 24 Rule 10 and 12(2) requiring the WHA to produce for inspection all of the documents within its custody, possession or power relating to the issues raised by these proceedings; alternatively an Order granting to the applicant leave to obtain and serve a subpoena duces tecum upon the WHA requiring that it attend the trial and bring copies of all the documents identified in the schedules; alternatively an Order pursuant to Order 15 Rule 62 that the WHA be made a respondent to these proceedings and it provide to the plaintiff copies of all documents relevant to the matters raised by the proceedings.

[4] In moving the application for discovery against WHA Mr McLaughlin, on behalf of the plaintiff, submitted that it was based upon three principles: (i) that the WHA is a party to the proceedings and should make discovery by list pursuant to Order 24 Rule 3(i) or specific discovery to Order 24 Rule 7 and that copies of any such documents should thereafter be produced for inspection; (ii) alternatively WHA is a necessary and proper party and should be joined pursuant to Order 15 Rule 6 thereafter discovery should be made against it; and finally (iii) WHA is a non-party which is likely to be in possession of relevant documents and the plaintiff should have leave to serve a subpoena duces tecum upon the Chairman of WHA requiring him to attend and bring copy documents and that the return date for the subpoena should be a date in advance of the hearing.

[5] Order 24 Rule 3(i) provides as follows:

“Subject to the provisions of this Rule and of Rules 4 and 8, the Court may order any party to a cause or matter (whether begun by Writ, Originating Summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power

relating to any matter in question in the cause or matter and may, at the same time or subsequently, also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party". [Emphasis added]

[6] Is WHA a "party"? Is it liable to make discovery? Mr McLaughlin pointed out that the statutory right to challenge the vesting order is contained in Section 22(2)(b) of the Local Government Act (NI) 1934. No procedure is proscribed within the Act by which proceedings should be commenced:

"If any person aggrieved by a vesting order desires to question its validity on the ground that it is not within the powers of this section, or that any requirement of this section or of any order or regulation made thereunder has not been complied with he may, within three weeks after the publication of the notice of the making of the vesting order, make an application for the purpose to the High Court and where any such application is duly made the Court-

(i) may by *interim order* suspend the operation of the vesting order either generally or insofar as it affects any property of the applicant until the final determination of the proceedings; and

(ii) if satisfied upon the hearing of the application that the vesting order is not within the powers of this section or that the interests of the applicant have been substantially prejudiced by any requirement of this section or of any order or regulation made thereunder not having been complied with, may *quash* the vesting order either generally or insofar as it affects any property of the applicant".

[7] The relevant procedure is proscribed by a combination of Order 55 Rules 14 and 20 and the application should be by way of "Originating Motion" (see *Re Scalene Investments Ltd* [2004] NIQB 32). In accordance with the provisions of Order 55 Rule 15(2) the application must be served upon "every person affected" by it. Under Rule 15(2) the Court may direct that the proceedings should be served upon other persons. Mr McLaughlin pointed to the distinction between an Originating Motion and an Originating Summons. Whereas an appearance is

required to be entered to an Originating Summons (Order 12 Rule 9) it is not necessarily required for an Originating Motion. Order 55 Rule 15 has no requirement for entry of an appearance. Rather it is directed to ensuring that those “affected by” the application are aware of it and may appear, as distinct from those parties against whom relief is sought.

[8] Mr McLaughlin also referred the Court to Section 120 of the Judicature Act and it was upon this provision that he placed considerable reliance. Section 120 states that a “party” to proceedings “includes every person served with notice of or attending any proceeding although not named on the record”. Accordingly, since the WHA had been served with notice of the proceedings they were therefore a party not only within the meaning of the Judicature Act but also within the meaning of Order 24.

[9] In my view the parties to the present application are the plaintiff (or applicant) and the defendant DRD. Whilst the WHA may have an interest in the outcome and may be regarded as a “person affected” within Order 55 Rule 15(2) that is insufficient, in my view, to render them a party with all of the rights, obligations and potential exposure that such a designation might entail. Nor was the Court referred to any authority in support of the proposition contended for by the plaintiff. In view of my conclusion that the WHA is not a party within the meaning of Order 24 the Court does not enjoy jurisdiction under that Order to require discovery whether by way of list or in respect of specific documents.

[10] I should add, however, that even if the WHA was a party within the meaning of Order 24, I was unpersuaded that the discovery sought was necessary to the fair disposal of the case. The WHA has not been made a party and no relief is sought against it. It would have been open to the plaintiff, had it wished to challenge the WHA’s invocation of the statutory procedure, to have done so. Moreover, in these circumstances, and having regard to the basis of the challenges raised against the DRD, I am not persuaded that the Court should order WHA to attend and produce the documents sought.

[11] The plaintiff has also sought an Order pursuant to Order 15 Rule 6(2) that the WHA be made a respondent and that they be required in that context to provide the plaintiff with copies of all relevant documents. In opposition to this Counsel for the WHA referred the Court to the White Book at para 15.47 and to the decision in *Wilson v Church* [1878] 9 Chancery Division 552. In that case, in an action against the corporation where an officer of the corporation against whom no relief was claimed was made a defendant for the purposes of discovery, it was held that he was improperly joined as a defendant. Jessel, M R stated:

“It appears to me, therefore, that Colonel Church is improperly made a party where he is made a party for the purposes of discovery only.

In this particular instance there is no question that he is made a party for the purpose of discovery only ... There are cases in which it may be a matter of some difficulty to determine. You will have to read the pleadings and see, where a man is made a party against whom no relief is claimed and formed, whether he is made a party for the purpose of discovery or whether he is made a party with a view to find out his interest.”

[12] In the present case, as I have earlier observed, the WHA was never made a party to the proceedings and no relief is sought against it and it seems to this Court reasonably clear that the purpose of joining the WHA as a party is for the purposes of obtaining discovery and discovery only and accordingly by reference to the decision cited this would not be an appropriate course.

Conclusion

[13] Accordingly the applications must be dismissed.