[2009] IEHC 492

THE HIGH COURT

7111 P

[2007 No. [redacted]]

BETWEEN

JOHN CONWAY

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE NATIONAL ROADS AUTHORITY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 21st day of October, 2009.

The proceedings

The plaintiff in these proceedings has described himself in the statement of claim as "a retired gentleman of humble means, a citizen of Europe and a member of a non-governmental organisation which is striving to protect, preserve and improve the state of our environment". The plaintiff does not have legal representation in these proceedings and he appeared on the applications to which this judgment relates in person.

The proceedings were initiated by a plenary summons which issued on 26th September, 2007. In it the plaintiff sought an order of *mandamus* in terms which I will outline later against the first and second defendants (the State parties). He also sought an order of *mandamus* in terms which he reiterated in his statement of claim against the third defendant (the NRA), which is a statutory body established by s. 16 of the Roads Act 1993 (the Act of 1993), and which is charged by s. 17 thereof with

the "general duty … to secure the provision of a safe and efficient network of national roads".

The plaintiff delivered his statement of claim on 10th December, 2007, which is somewhat unusual in format, in that it sets out certain complaints in very general terms against the State parties and the NRA and then seeks certain reliefs which go beyond the reliefs sought in the plenary summons. The reliefs sought are against the State parties solely, the NRA solely and one relief against all of the defendants.

The State parties raised particulars by notice of particulars dated 21st December, 2007 and the particulars were furnished by the plaintiff. The State parties delivered an objection and defence on 18th July, 2008, which contained a number of preliminary objections, including that the statement of claim did not disclose any cause of action or any legal basis for the reliefs sought against the State parties, that the proceedings are improperly constituted because the reliefs should have been sought by way of application for judicial review, that the proceedings are inadmissible to the extent that they question a decision of An Bord Pleanála other than by way of judicial review and within the material time limits and that the plaintiff is not personally affected by the matters in the proceedings and does not have *locus standi* to maintain the proceedings.

The NRA has not delivered a defence.

The applications

This judgment is concerned with two applications:

(1) An application by the State parties pursuant to Order 19, rule 28 of the Rules of the Superior Courts 1986 (the Rules) striking out the statement of claim insofar as it relates to the State parties on the

ground that it discloses no reasonable cause of action and/or staying or dismissing the proceedings against the State parties on the basis that they are frivolous and vexatious. Alternatively, the State parties seek an order pursuant to the inherent jurisdiction of the Court striking out the proceedings as against the State parties on the basis that they are unsustainable and bound to fail and/or are frivolous and vexatious.

(2) A similar application brought by the NRA invoking the jurisdiction of the Court under Order 19, rule 28 and the Court's inherent jurisdiction.

The factual context

Some of the reliefs claimed by the plaintiff are framed in very broad terms and others are framed in specific terms. The latter and the affidavit evidence adduced by the NRA cast light on the factual basis of the plaintiff's claim and what he is striving to achieve.

The specific reliefs claimed by the plaintiff focus on part of a recently constructed national road north of Dundalk. The road in question is the A1/N1 Newry Dundalk Link Road (A1/N1), which is a two-lane dual-carriageway from the Ballymascanlon Roundabout north of Dundalk to the border with Northern Ireland at Cloghoge, where it connects with a section of the A1 in Northern Ireland. The portion of the A1/N1 in respect of which the plaintiff seeks specific reliefs is the portion which lies between Feede Roundabout and Dromad former Garda Station, which, for the sake of brevity, I will refer to as "the contentious stretch". The evidence adduced on behalf of the NRA is that the "footprint" of the contentious stretch significantly impacts on the width of the old N1 road. As I understand the position, in non-technical terms, the old N1 road runs parallel to the A1/N1 almost as

far as Feede Roundabout but along the contentious stretch the A1/N1 is constructed over the old N1 road.

The A1/N1 is the subject of a decision of An Bord Pleanála of 16th September, 2003 on an application by Louth County Council made pursuant to s. 51(2) of the Act of 1993 approving the proposed road development. That decision was preceded by an oral hearing conducted by an Inspector appointed by An Bord Pleanála which took place between 29th April, 2003 and 2nd May, 2003. The plaintiff attended the oral hearing and made submissions, which are recorded in the Inspector's Report. It has been suggested on behalf of the NRA that those submissions related to the very same issues as are now before the Court. I am not making any finding that that is the case. The plaintiff did not challenge the decision of An Bord Pleanála by way of judicial review or otherwise following its publication.

What appears to have precipitated these proceedings was that, as part of the road scheme works in relation to the A1/N1, the filling in of the old N1 road along the contentious stretch commenced in June 2007. The evidence before the Court is that the work in issue had been part of the proposed road development as submitted to An Bord Pleanála for approval, it was approved by An Bord Pleanála and has been carried out in accordance with the terms of the decision of 16th September, 2003. By the time these proceedings were instituted on 26th September, 2007 the filling in work was substantially complete.

The case against the NRA solely

The reliefs which the plaintiff seeks against the NRA and the bases on which he seeks them, to the limited extent that such are set out in the statement of claim, are as follows:

(1) He seeks orders to reverse the work carried out on the contentious stretch, in that he seeks an order compelling the NRA to desist from any further "filling-in" of the bed of the former N1 road. As I understand it, that work is a *fait accompli*. However he also seeks an order compelling the NRA to excavate the filling. On the assumption that that will be done, he seeks an order that the NRA extend the former N1 roadbed to the east and directing it to lay the roadbed out as a fully surfaced and marked county road/cycle way/footpath. His view is that the contentious stretch should be a "full blown" motorway and that there should be alongside it on the alignment of the former N1 road a local road to facilitate "motorway-barred" traffic.

(2) He seeks an order compelling the NRA to procure that the A1/N1, which is now designated as a high quality dual carriageway, is re-designated as a "full blown" motorway.

(3) He seeks an order compelling the NRA to separate the traffic going north and south on the A1/N1 by the installation of "a continuous, cast-in-situ, extruded reinforced-concrete barrier". In other words he wants the Court to compel the NRA to replace the barriers on the central medians.

As regards the factual situation as deposed to by Michael Egan, the Head of Corporate Affairs with the NRA, the position of the NRA is that the contentious stretch has been constructed on the authority of, and in accordance with, the decision of An Bord Pleanála of 16th September, 2003 as a two-lane dual-carriageway. In accordance with that decision, a cycleway and footpath were laid out on the contentious stretch. The barriers on the A1/N1 include a variety of barrier types, the

dominant type being a wire rope barrier, while a steel beam barrier and a concrete barrier have also been used in certain sections. The provision of barriers was part of the road development approval, although the specific type of barrier was not determined at that time. However, the barriers now in place are designed in accordance with the NRA's Design Manual for Roads and Bridges Standard TD 19/04 and also comply with the relevant EU standard EN1317 in relation to performance/vehicle containment levels.

Specifically, as regards the plaintiff's claim that the A1/N1 should be re-designated as a "full blown" motorway, the position of the NRA is that, while s. 8 of the Roads Act 2007 empowers the Minister for Transport, subject to certain requirements, on the application of the NRA, by order to declare as a motorway an existing national road, there is no obligation on the NRA to seek such an order and, for reasons deposed to by Mr. Egan, the NRA does not contemplate making such a request at this time. The plaintiff has taken issue with the reasons advanced by the NRA and has deposed to them being "misleading". Even in the unlikely circumstance that the NRA is wrong and the plaintiff is right in relation to the reasons put forward by the NRA, which relate to the regulatory requirements and the land acquisitions and the construction works which would be involved in providing an alternative route for motorway restricted vehicles and users in the event of the A1 /N1 being designated a motorway, there is no legal obligation on the NRA to seek re-designation and in not doing so it is not in breach of the law.

That last point illustrates how fundamentally misconceived the plaintiff's case is. Another complaint made by the plaintiff in the statement of claim, in respect of which no specific relief is claimed, illustrates the same point. The plaintiff has complained that the NRA has failed to provide any proper, sufficient "dedicated

strategic traffic services" (which I understand to mean service stations and suchlike) on the motorway network, forcing motorway traffic on to local roads. At the hearing, the plaintiff commented that that is being addressed now. However, the position is that, even if it were not, if the NRA is not under a legal obligation to do it, which I understand to be the case, there is no basis on which the Court can compel it to do it.

Counsel for the NRA submitted that, in relation to the complaints in respect of which he seeks relief, what the plaintiff is doing is attempting to pursue a collateral challenge to the decision of An Bord Pleanála of 16th September, 2003, which it is not entitled to do for a number of reasons. First, a challenge to that decision could only have been, and may only be, brought by way of judicial review under Order 84 of the Rules by virtue of s. 50 of the Act of 2000, as amended. Secondly, in bringing such challenge, the plaintiff would have to comply with the requirements of s. 50. The application for leave to challenge the validity of the decision would have to be on notice. It would have to be brought within eight weeks beginning on the date on which the decision was first published, subject, however, to such extension as might granted by the Court, which may only be granted if the Court is satisfied that there is good and sufficient reason for doing so and that the reason for the failure to make the application in time was outside the control of the applicant. In order to maintain the challenge the plaintiff would have to show that he has a substantial interest in the matter which is the subject of the application. Counsel for the NRA submitted that these proceedings are misconceived and cannot be re-constituted as a challenge to the decision of 16th September, 2003 on the ground of delay alone.

If the claims against the NRA are, in substance, a challenge to the decision of 16th September, 2003, counsel for the NRA is correct in the submission that they are bound to fail for non-compliance with the provisions with the Act of 2000 on the

ground of delay alone. While the plaintiff has not acknowledged that these proceedings are a collateral challenge to the decision of the 16th September, 2003 and has not sought an extension of time, counsel for the NRA is correct in submitting that the plaintiff would not be granted an extension of time because the decision has been implemented and the new road is in use and he could not satisfy the Court that the pre-conditions to granting an extension exist.

Whether it is the plaintiff's case against the NRA that An Bord Pleanála should not have approved the construction of the A1/N1 as it did in the decision of 16th September, 2003, which would, in substance, be a challenge to the decision or, alternatively, the plaintiff's case is that the NRA should create a designated motorway with barriers on the central medians of the type which he has suggested and also a county road and cycle way and footpath along the route of the contentious stretch, his claim must fail. While he has asserted that the NRA is under a statutory duty to competently and prudently carry out a statutory duty to provide a strategic road traffic infrastructure in the manner he suggested, he has not pointed to any statute or law which imposes such a duty on the NRA.

The main thrust of the submissions of counsel for the NRA was that the proceedings should be struck out under the Court's inherent jurisdiction on the ground that they are unsustainable and are bound to fail. The law on the exercise by the Court of its inherent jurisdiction is well settled. It is recognised that the jurisdiction of the Court "should be exercised sparingly and only in clear cases" (*Barry v. Buckley* [1981] I.R. 306, at p. 308). It is also recognised that the Court is entitled to hear evidence on affidavit on the application. The evidence adduced by the NRA that the A1/N1 has been constructed in conformity with the decision of 16th September, 2003, in my view, has not been contradicted. The plaintiff has not established that there is

any statutory or other legally enforceable duty on the NRA to re-develop the A1/N1 in the manner in which he asks the Court to enjoin the NRA or to re-designate it as a motorway. Accordingly, there is no basis on which the Court could grant the relief against the NRA which the plaintiff claims and his proceedings against the NRA are unsustainable and are bound to fail.

On that basis, the proceedings against the NRA solely must be struck out.

Proceedings against the State parties solely

In the plenary summons the plaintiff sought an order compelling the State parties to ratify the Aarhus Convention (the Convention) and to comply with its provisions by assisting the plaintiff to access justice "in challenging the legality of this and related public authority decisions". That claim was not reiterated in the statement of claim. Nonetheless, counsel for the State parties addressed it and I propose to consider it.

In the statement of claim the plaintiff seeks against the State parties the following reliefs:

(1) The plaintiff seeks an order compelling the State parties to provide the plaintiff with "civil-engineering consultancy and legal advice and representation equal to that available to and used by" the NRA "in processing matters such as these". The basis on which the plaintiff seeks this relief, as I understand it, is his complaint that the State parties are "operating an informal policy of obfuscation and obstruction in matters relating to the granting of assistance to citizens who are trying to achieve access to justice, but are prevented from such access due to their lack of means and to the prohibitive costs of such

access to justice". He specifically complains that the State parties have failed to provide him with the necessary civil-engineering and suchlike consultancy services and the necessary legal advice and representation, but, as to the purpose for such assistance, he vaguely asserts that it is to enable him to "properly lay his case in protection, preservation and improvement of our environment before appropriate fora". While the plaintiff has raised certain safety issues in the pleadings, it is difficult to discern what case he is making concerning the impact on the environment of the development of the A1/N1 in his pleadings.

(2) The plaintiff seeks an order permitting the plaintiff to substantially amend these proceedings when he has been placed in a position to avail of the services which he contends the State parties should be compelled to provide for him. As counsel for the State parties pointed out, that relief is predicated on the Court compelling the State parties to provide such services. Therefore, it falls to be considered in conjunction with the relief referred to at (1) above.

(3) The plaintiff also seeks an order compelling the State parties to enforce the law which forbids drivers who have not acquired a certificate of competence to drive a motor vehicle from driving motor vehicles on the motorway network. In response to that claim, the State parties adduced affidavit evidence to the effect that between 2001 and July 2009 An Garda Síochána have prosecuted 488 learner drivers found to be driving on a motorway. Of the 488 prosecuted, 89 were convicted. The position of the State parties accordingly is that the plaintiff's allegation that the law in relation to learner drivers driving on

> motorways is not being enforced is factually incorrect and is completely without substance or foundation. At the hearing of the application, the plaintiff informed the Court that the evidence adduced by the State parties convinced him that he was mistaken. He withdrew his complaint and this claim for relief.

Therefore, in relation to the case against the State parties, the claims which remain to be considered are the claim that the Court should order that the Convention be ratified by the State and the claim that professional assistance and services be provided to the plaintiff.

It is important to record that counsel for the State parties emphasised that, in advancing arguments in response to the plaintiff's claims against the State parties, there may appear to be an underlying assumption that the plaintiff has *locus standi* to pursue the claims. While acknowledging that the plaintiff has genuine and *bona fide* concerns in relation to the issues he is pursuing, it was submitted that it is difficult to see how he is affected by those issues in a manner that would give him standing.

Finally, counsel for the State parties submitted that, as regards the application of the State parties, it is open to the Court to make an order under Order 19, rule 28 or under the Court's inherent jurisdiction.

The Convention

The State is a signatory to the "Convention on access to information, public participation in decision-making and access to justice in environmental matters" done at Aarhus, Denmark on 25th July, 1998, being an international agreement under the auspices of the United Nations Economic Commission for Europe.

As counsel for the State parties submitted, the Constitution adopts a dualist approach to international agreements. The power to commit the State to an international agreement is vested in the Executive by virtue of Article 29.4. However, Article 29.6 provides that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas, that is to say, by legislation.

Whether this Court has power by order of *mandamus* to require the State to ratify an international agreement was considered by this Court (Blayney J.) in *Hutchinson v. Minister for Justice* [1993] 3 I.R. 567. In that case, the plaintiff was seeking an order of *mandamus* requiring the Minister to ratify the "Convention on the Transfer of Sentenced Persons", which was passed by the Council of Europe in 1983 and to which Ireland was a signatory. In his judgment, Blayney J. stated (at p. 570):

> "The fundamental issue in this case is whether there is any obligation on the Government to ratify the Convention. Unless there is such an obligation, the case fails *in limine*. The applicant says that the obligation arises under international law, but no authority was referred to in support of this proposition and I am satisfied that there is none."

Having considered a number of texts on international law, Blayney J. continued (at p. 571):

> "I am satisfied that the applicant has failed to establish that there is any principle of international law requiring Ireland to ratify the Convention. I am equally satisfied that the Convention itself does not impose any such obligation."

Blayney J. then considered a submission on behalf of the applicant that the Government was in breach of Article 29.5.1 of the Constitution, which provides that every international agreement to which the State becomes a party shall be laid before

Dáil Éireann. Blayney J. found that, in respect of Ireland, the Convention did not have at that point in time the status of an agreement and that it would not become an agreement until it had been ratified, so that at that time it did not have to be laid before Dáil Éireann until ratified.

Counsel for the State parties referred the Court to Articles 17, 19 and 20 of the Convention from which it is clear that it comes into force for each signatory State which ratifies, accepts or approves the Convention when the instrument of ratification, acceptance or approval is deposited with the depositary, the Secretary General of the United Nations.

Following the decision in *Hutchinson v. Minister for Justice*, I am satisfied that this Court does not have jurisdiction to grant an order of *mandamus* directing the State parties to ratify the Convention. Accordingly, this aspect of the plaintiff's claim fails *in limine*.

There is a further dimension to the significance of the Convention for Ireland, which counsel for the State parties brought to the Court's attention. That is the European law dimension arising under Directive 2003/35/EC (the Public Participation Directive), which recites that the Community signed the Convention on 25th June, 1998 and approved it in accordance with the procedure laid down in the EC Treaty on 15th January, 2003. The objective of the Public Participation Directive is to contribute to the implementation of the obligations arising under the Convention by, *inter alia*, improving public participation and providing for provisions for access to justice within Council Directives 85/337/EEC and 96/61/EC. By virtue of Article 6 of the Public Participation Directive, Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with it by 25th June, 2005 at the latest.

As counsel for the State parties pointed out, the European Court of Justice in a judgment of the Court (2nd Chamber) of 16th July, 2009 in *Commission v. Ireland* (Case C/427/07) has upheld some of the complaints made by the Commission against Ireland for failure to transpose the Public Participation Directive. Counsel for the State parties submitted that the Directive is not in point on the plaintiff's application.

Access to professional services

The manner in which the plaintiff's complaint is formulated and, in particular, his reference to access to justice being prevented due to "lack of means and to the prohibitive costs of such access" echoes Articles 3.7 and 4.4 of the Public Participation Directive, which provides that procedure for access to justice shall not be "prohibitively expensive", which in turn is intended to reflect Article 9 of the Convention. The plaintiff, however, indicated that he was not relying on the Convention alone. He submitted that it was implicit in the Constitution that every citizen should have access to justice in any important matter, not just where the matter is criminal in nature.

Counsel for the State parties submitted that the plaintiff's claims for access to professional services are not justiciable. There is no legal obligation on the State, whether at common law, under statute or otherwise, to provide the services claimed to the plaintiff. Nor is there any cognisable right on the part of the plaintiff under the Constitution to such services. Further such protection as is afforded by the Convention is not capable of cognition by the Court. Ratification of the Convention and its implementation is a matter of political judgment for the Executive in the first instance and thereafter for the Oireachtas. Counsel for the State parties also submitted that, even if such a right was recognised, it would be impossible for the Court to

determine whether there was compliance with an order which attempted to enforce it. Accordingly, counsel submitted that, as there is no basis for making the order sought, the plaintiff's claim for such an order is bound to fail. The response of the plaintiff was that, if his claims were held to be non-justiciable, this would open up an appalling vista for citizens such as himself who wished to contribute to the safe and sustainable development of the environment.

I am satisfied that a person in the position of the plaintiff has no right under the Constitution or by virtue of statute law or the common law to what the plaintiff seeks, which is professional assistance, both technical and legal, equivalent to the assistance available to and used by the NRA in connection with planning and development and operation of major road infrastructure. The provisions of the Convention are not part of the law of the State and cannot be invoked by him. For a number of reasons, the plaintiff cannot mount such a claim in reliance on the Directive. First, insofar as the plaintiff is pursuing a collateral or indirect challenge to the decision of An Bord Pleanála of 16th September, 2003, that decision-making process and the entitlement to challenge its validity expired more than a year and a half before the expiry of the deadline for the implementation of the Directive by the State. Alternatively, if the plaintiff's claims against the NRA have a foundation distinct from that decision, in reality the plaintiff's claims are based on the his belief, and no more, that there should be a different type of new road (a motorway) constructed differently (with solid barriers on the centre medians) together with a local road, as I understand it, for safety reasons. Secondly, what the Directive provides in Articles 3.7 and 4.4 is that members of the public shall have access to a review procedure before a court of law and that such procedure shall not be "prohibitively expensive". Nothing in the Directive imposes an obligation on a

Member State to make available to members of the public expert professional assistance and representation equivalent to that available to and used by bodies such as the NRA involved infrastructural development.

For the foregoing reasons, in my view, the plaintiff's claim for access to professional services is non-justiciable and it is bound to fail.

For the record, before counsel for NRA opened his application, the plaintiff applied to the Court for legal assistance and sought a stay on the application of the NRA until such assistance was available. That application was refused by the Court on the grounds that the Court had no jurisdiction to accede to it.

Claim against all defendants

The plaintiff seeks an order against all of the defendants in the following terms:

> "To join in common cause to use their best endeavours to persuade the Authorities of the adjoining Member State to mitigate the damage done to the strategic traffic infrastructure on the island of Ireland by the aforementioned conspiracy to subvert the E.C. route-selection Directives, by immediately operating a proper Directive-compliant route-selection process to identify a route for the last remaining "non-motorway" section of the strategic traffic infrastructure joining Dublin with Belfast and by commencing the expeditious construction of such section of motorway".

In the replies to particulars raised on behalf of the State parties, the plaintiff has identified the "Authorities" referred to as the Department of the Environment for Northern Ireland, the Northern Ireland Assembly and the Secretary of State for Northern Ireland. He has further identified the Directive to which he refers as

Directive 85/337/EC and Directive 97/11/EC, which are Directives relating to Environment Impact Assessment. The basis on which the plaintiff seeks that order is a complaint in the statement of claim that there exists the conspiracy referred to earlier.

Counsel for the State parties submitted that there is no obligation in law whereby the State could be compelled by its courts to do something in conjunction with another State. Indeed, counsel for the State parties pointed out that the plaintiff is not contending that there is such an obligation, he is merely seeking that the State should be compelled to use its "best endeavours". Aside from the fact that there exists no legal obligation for a court to enforce, it was submitted that the plaintiff has not presented a claim which is capable of being resolved in a court of law because there are no legal standards by which a court could judge compliance with its order or otherwise. Counsel for the State parties submitted that what the plaintiff is presenting is a political complaint which, while no doubt genuine and *bona bide*, is not justiciable. Counsel cited the decisions of the Supreme Court in *Tormey v. Ireland* [1985] I.R. 289 and *T.D. v. Minister for Education* [2001] 4 I.R. 259. For those reasons, it was submitted on behalf of the State parties, that this claim is not justiciable and is bound to fail.

Having regard to the foregoing submissions made by counsel for the State parties and the submissions made by him in relation to the Court entering into the area of external relations, this claim is bound to fail. First, the claim for relief, as formulated, envisages the Court compelling all of the defendants, including the State, to pursue a certain course of conduct in relation with another State, the United Kingdom of Great Britain and Northern Ireland. Article 29.4.1 of the Constitution provides that the executive power of the State in connection with external relations

shall be exercised by or on the authority of the Government. So long as this power is exercised in accordance with the Constitution, the Court cannot intervene and, even where it is alleged that it is not being so exercised, the Court can only intervene in the case of a clear disregard of the Constitution: *Boland v. An Taoiseach* [1974] I.R. 338; *Crotty v. An Taoiseach* [1987] I.R. 713. The plaintiff has established nothing of that nature and, on this ground alone, this claim must fail. Apart from that, the other points made on behalf of the State parties are correct.

Order

There will be an order of the Court dismissing the proceedings under the inherent jurisdiction of the Court on the basis that the proceedings and all aspects thereof are bound to fail.

Approved.
Mary Peart
23rd October, 2009