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2015/061110/A01

IN THE COURT OF APPEAL IN NORTHERN IRELAND

APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ROSALEEN DALTON

AND IN THE MATTER OF AN APPLICATION BY DOROTHY JOHNSTONE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE ATTORNEY GENERAL OF NORTHERN IRELAND

RULING ON THE NOTICE OF MOTION OF ROSALEEN DALTON (THE APPLICANT)

Before: Morgan LCJ, Stephens LJ and Maguire J

MAGUIRE J (delivering the judgment of the court)

Introduction

[1] Following a hearing on 4 October 2018, the court provided its ruling on the applicant's Notice of Motion herein. It decided to order that Rosaleen Dalton be substituted in place of Dorothy Johnstone for the purpose of the appeal taken by the latter, who is now deceased, against the judgment and order of Deeny J delivered on 28 March 2017, whereby he dismissed Dorothy Johnstone's application for judicial review.

[2] At the time of its decision which was given orally the court indicated that it would give the reasons for its ruling at a later date, and it does so now.

The General Background

[3] The general background to the substantive appeal in the matter before the court need not be set out here, in view of the court's decision in respect of what became the applicant's appeal, which has been provided on the same day as the provision of this ruling in respect of reasons. In so far as the reader may be interested in the general background, it can be found in the court's substantive judgment.

The Immediate Background

[4] The immediate background to the applicant's Notice of Motion herein can be succinctly described.

[5] The original applicant in the judicial review proceedings which led to the appeal was Dorothy Johnstone. She was the daughter of Sean Eugene Dalton and belonged to a family consisting of 6 children, one of whom was her sister, Rosaleen Dalton, the applicant in the Notice of Motion now before the court.

[6] In tragic circumstances, Sean Eugene Dalton was killed as a result of a bomb left by terrorists in a block of flats and the substantive judicial review concerned the adequacy and effectiveness of the investigation which took place thereafter leading, inter alia, to a report published by the Police Ombudsman for Northern Ireland in respect of complaints levelled at the police in relation to how they had dealt with unfolding events which surrounded Mr Dalton's death. The principal remedy sought by Dorothy Johnstone in the judicial review was an order that the Attorney General for Northern Ireland (AGNI) should order a fresh inquest into Mr Dalton's death.

[7] The Notice of Motion herein was grounded in an affidavit sworn by the applicant, Rosaleen Dalton, on 25 May 2018. By this date she was the administratrix of the estate of her sister, Dorothy Johnstone, and in her affidavit she provided a potted version of events leading to the judicial review. It is helpful to recall that after explaining the general background, she averred:

> "[6] As a result of the above, we decided as a family that we would seek a fresh inquest into our father's death. At the time of making the application, Dorothy was the administratrix of the estate of our father, and so we decided as a family that she would be best placed to submit the request for a fresh inquest …
>
> [7] … It is the refusal of this application by the Attorney General which is the subject of the present judicial review proceedings and substantive appeal before the court.

> [8] Following the Attorney General's refusal to direct a fresh inquest we decided as a family that the decision should be challenged by way of judicial review. Again, as Dorothy was the administratrix of our father's estate and had submitted the application to the Attorney General she was the applicant in the application, however this was an application which we supported as a family in general and which I myself supported in particular. When this challenge was heard in the High Court of Justice, I attended every hearing and part hearing, both at the leave and substantive stages of the challenge. This was partly as I, like Dorothy, had a strong interest in the challenge and desired a fresh inquest into the death of our father, and partly as a result of Dorothy's health problems to which she very sadly succumbed on 28 September 2017.
>
> [9] After a period of mourning, we as a family resolved that owing to the tragedy of Dorothy's untimely demise, I would apply to be administratrix of her estate in order to continue our family's search for answers to our father's untimely death.
>
> [10] I therefore pray to this Honourable Court for an order permitting me to be substituted as appellant in this appeal."

The issue before the Court

[8] It is plain from the above that the issue before the court is that of whether in the light of Dorothy Johnstone's death this court ought to permit the application of the applicant to be substituted as the appellant for the purpose of the appeal before the court.

[9] For the avoidance of doubt, the court indicates that at the time when the Notice of Appeal in respect of Deeny J's decision was lodged, Dorothy Johnstone was still alive. Her unfortunate death postdates therefore the initiation of the substantive appeal herein.

[10] The application before the court is resisted by the AGNI and the court expresses now its gratitude to the legal representatives of each side for their helpful oral and written submissions. In the Attorney General's submission the court lacks the jurisdiction to accede to the applicant's application.

Relevant Statutory Provisions and Provisions in the Rules of the Court of Judicature

[11] It is helpful to set out the above before the court provides its reasons for making the order referred to at paragraph [1] above.

[12] Section 34 of the Judicature (Northern Ireland) Act 1978 deals with the general jurisdiction of the Court of Appeal. In its material part, it reads:

> "(1) The court of appeal shall be a superior court of record.
>
> (2) There shall, subject to the provisions of this Act, be exercisable by the Court of Appeal –
>
> (a) All such jurisdiction as was heretofore capable of being exercised by the Court of Appeal in Northern Ireland;
>
> (b) All such jurisdiction as was heretofore capable of being exercised by the Court of Criminal Appeal;
>
> (c) Such other jurisdiction as is conferred by this Act or as may from time to time be conferred on the Court of Appeal by any subsequent statutory provision.
>
> …
>
> (4) The generality of this section is not limited by any other provision of this Act."

[13] Section 35 of the 1978 Act deals with appeal to the Court of Appeal from the High Court. Sub-section 1 of that section reads as follows:

> "(1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof."

[14] Section 38 of the 1978 Act deals with the powers of the court for the purposes of appeals. In its material part, it reads:

> "(1) For all the purposes of and incidental to the hearing or determination of any appeal, other than

an appeal under the Criminal Appeal Act, against any decision or determination of a court, tribunal, authority or person (in this section referred to as `the original court') and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal shall, in addition to all other powers exercisable by it, have all the jurisdiction of the original court and may –

…

(i) make such other order as may be necessary for the due determination of the appeal."

[15] Also relevant is Order 15 Rule 7 of the Rules of the Court of Judicature (Northern Ireland). This rule reads as follows:

"7-(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings be carried on as if he had been substituted for the first-mentioned party.

An application for an order under this paragraph may be made ex parte."

Applicant's Argument

[16] The applicant has contended that the court has the authority to make the Order sought and should do so.

[17] The legal basis for the court's jurisdiction, it was submitted, can be found in more than one place. In short, the court's jurisdiction can be found within Order 15 Rule 7; or, alternatively, within the statutory provisions cited above; or, alternatively, on the basis of the inherent jurisdiction of the court; or, alternatively still, may be

found pursuant to the practice and procedure of the European Convention of Human Rights (ECHR).

[18] As regards the first of these sources, the applicant drew the court's attention to the broad language found in the Rule. It was pointed out that an action or application based on a statutory right, as in this case, where the application relied on the incorporated rights set forth in the Human Rights Act 1998, in particular Art 2 of the ECHR, did not abate on the death of the original appellant. Rather, causes of action by or against the estate of the deceased survive upon death, except in actions for defamation: section 14 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937.

[19] Further, it was submitted that a substitution could be made after judgment under Rule 7 for the purposes of an appeal.

[20] As regards the second of these sources, the applicant relied on the general proposition that the Court of Appeal making use of its inherent jurisdiction could act in the circumstances before the court. This, it was submitted, had occurred in England and Wales, albeit at the level of the High Court, in the case of *R (River Thames Society) v First Secretary of State* [2006] EWHC 2829 Admin. That case, in effect, was a judicial review application in relation to a planning matter. The proceedings for judicial review had been begun by the River Thames Society, a voluntary organisation. Its Vice-Chairperson at the time had been Lady Berkeley. Later, after the initiation of the proceedings, the Society re-evaluated its position, and for various reasons it became minded not to continue with its judicial review application. In these circumstances, Lady Berkeley wished personally to be substituted as the applicant in place of the Society. Reliance was placed on the provisions of the Civil Practice Rules in England and Wales and, in particular, on Rule 19.2 which permitted substitution where "the existing party's interest or liability has passed to a new party."

[21] Underhill J heard the application and allowed it on the basis of the court exercising its inherent jurisdiction.

[22] In respect of Rule 19.2, he commented at paragraph [3]:

> "the concept of the original claimant having an "interest" which has "passed" to the would-be claimant is inapt. While in one sense claimants in public law proceedings – whether in the form of conventional judicial review proceedings or other statutory challenges of the kind with which we are here concerned – are of course required to have an "interest" in the dispute, it is an interest of a very different kind, and the term is used in a very different sense, from a private law interest; and it is hard to see how such interest can be "passed" to another person.

> Nor, I might add, does a defendant in public law proceedings normally have a "liability" which can be passed. It is fairly clear to me that what the draftsman had in mind was private law rights and obligations, which are indeed capable of being "passed" by being devolved or assigned."

[23] The Judge therefore was not keen to make use of Rule 19.2. However, that was not the end of the matter as the Judge was concerned about the risk of unjust results occurring if there was not a way of effecting a substitution in a proper case.

[24] At paragraph [4] the Judge went on:

> "Yet if it followed that a claimant could never be substituted in public law cases it is not difficult to envisage circumstances in which the result would be most unjust. Take the example of an unincorporated pressure group where judicial review proceedings had been taken in the name of a particular individual, say the chairman, but while the proceedings are pending he dies: it seems to me inconceivable that another member of the group would not be permitted to be substituted as a party. Indeed, the same in my view would be the case even if the original claimant simply had second thoughts and no longer wished to be involved but other members of the group wished to pursue the challenge made in his name. I am told, and it comes of no surprise, that there are many instances in public law cases of such substitution taking place, although I have been referred to no authority where the formal basis of the substitution has been discussed save for Eco Energy, to which I refer below. It is, I suppose, arguable that cases of this kind could be accommodated within the provisions of Section 1 of CPR 19 by a benign construction of the concept of the passing of an interest. But in my view, that would be stretching language beyond breaking point. I prefer – accepting Mr Drabble's eventual submission – to conclude that Part 19 is, though no doubt by oversight, simply not intended to cover public law cases and that the power of substitution which I believe must exist depends on the inherent jurisdiction of the court – it being understood that such jurisdiction would be exercised, as far as possible, in accordance with the principles appearing in Part 19 and the cases relating to it and its predecessor Rules."

[25] Counsel for the applicant maintained that this decision should be followed by the court as its logic was plain and persuasive. In her submission, the principles in Order 15 Rule 7 could guide how the court should apply its power.

[26] As regards the third of the above sources, it was argued that the court should have regard to the practice of the ECHR. If it had regard to them, the court would see that it should approach a case which, at its foundation, involved a potential breach of Art 2 of the Convention, in the same way.

[27] In this context, reference was made to such authorities in Strasbourg as *Deweer v Belgium* (1979-80) 2 EHRR 439; *Malhous v Czech Republic* (GC) (33071/96); and *McKerr v United Kingdom* (Application no. 2888395). Counsel also referred to the European Court of Human Rights', Practical Guide on Admissibility Criteria.

[28] In Deweer, the court had inter alia remarked:

> "The Court, for its part, wishes to mark its full approval of the practice which the Commission has been following in cases of this nature and which it has implicitly confirmed in the present instance: when an applicant dies during the course of the proceedings, his heirs may in principle claim in their turn to be 'victims'…of the alleged violation, as rightful successors and, in certain circumstances, on their own behalf."

[29] In Malhous the court permitted the nephew of the deceased applicant to continue the application despite the fact that he was not the next of kin. The Grand Chamber observed:

> "Moreover, it is not only material interests which the successor of a deceased applicant may pursue by his wish to maintain the application. Human rights cases before the court generally also have a moral dimension and persons near to an applicant may thus have a legitimate interest in seeing to it that justice is done even after an applicant's death. This holds true all the more if, as in the present case, the leading issue raised by the case transcends the person and the interests of the applicant and his heirs in that it may affect other persons. If in such circumstances a potential heir wishes to maintain the application it cannot be said that the matter has been resolved or that for other reasons it is no longer justified to continue the examination of the application…"

[30] In McKerr, an Article 2 case, the original applicant had been the deceased's mother. But when she died the court sanctioned her son continuing with the application.

[31] A matter dealt with in the ECtHR's Practical Guide on Admissibility Criteria related to the death of the victim. In that circumstance, the Guide indicated that:

> "In principle, an application lodged by the original applicant before his or her death may be continued by heirs or close family members expressing the wish to pursue the proceedings provided that he or she has sufficient interest in the case."

Respondent's Argument

[32] The respondent contended that the court lacked the jurisdiction to substitute the applicant in place of the original, now deceased, applicant.

[33] In his submission the AGNI argued that none of the applicant's arguments was legally correct.

[34] As regards Order 15 Rule 7 it was submitted that the terminology used by the rule maker, especially the use of the term "action", was intended to limit the circumstances in which the rule applied to cases involving claims for damages in respect of personal injuries. The language, it was submitted, did not extend to an application for judicial review which was not an action.

[35] The issue of substitution, moreover, could not be dealt with on the basis of the inherent jurisdiction of the court. The case of the River Thames Society was based on provisions in the CPR in England and Wales which were different to those which applied in Northern Ireland and was distinguishable from the present case. The court was warned about permitting substitution on the basis of an ill-defined and unduly expansive approach to inherent jurisdiction.

[36] Further, it was submitted that the practice of the Strasbourg court was of no assistance when the issue was one of ascertaining the limits of the scope of the domestic law which was applicable in this area.

[37] In construing the powers of the court, the court had to be mindful of section 38, referred to above. The powers in section 38 were, it was submitted, subject to the constraint that they were exercisable "for all the purposes of and incidental to the hearing or determination of any appeal against any decision or determination of the original court." An order to substitute a different appellant, who did not exercise the option to join in the original application for judicial review, could not be characterised as being made for the purposes of, and incidental to, the appellate function of the court in determining an appeal by the original appellant. The effect of

such a substitution would be to transform the proceedings into an entirely different set of proceedings involving a different appellant.

[38] In support of the respondent's argument, the court's attention was drawn to the case of *Ocean Software v Kay and others* [1992] 1 QB 633. This concerned the power of the Court of Appeal in England and Wales to hear a substantive issue in the context of injunction proceedings. On the particular facts of the case, the Court of Appeal declined jurisdiction on the basis that the issue before it – the discharging of an Order already made – did not engage the appellate capacity of the court and was one for the High Court to deal with.

[39] This reasoning, it was submitted, could be applied to the present case, at least where it could be concluded that the step involved was not ancillary to the appellate function, which was said to be the position in the case before this court.

[40] Reliance was placed on the following passage in Scott LJ's judgment:

> "Where the Court of Appeal has granted an injunction, whether ex parte or inter partes, it may very well be necessary for one or other of the parties to the appeal to come back to the Court of Appeal for some point of clarification or variation of the terms of the order that has been made. I would suppose that the Court of Appeal's jurisdiction to deal with such matters falls within section 15 (3) of the Act of 1981. But, on the other hand, an application for relief which arises out of an order that the Court of Appeal has made but which is not strictly ancillary to the appellate function that the court was exercising in making the order and which cannot be described as either the amendment or the execution or the enforcement of the order ought not, in my opinion, be made by the Court of Appeal. In such a case the Court of Appeal, as it seems to me, would not have jurisdiction to entertain the application.
>
> Where the line is to be drawn between applications which are ancillary to the exercise by the Court of Appeal of its appellate jurisdiction and applications which are free standing first instance applications may be difficult to draw. It may be a matter of degree. In the present case, the proposed application by the plaintiff for additional relief in order to protect its share of future payments of royalties that may be received by the third defendant from Nintendo is clearly, in my opinion, on the wrong side of the jurisdictional line. It is not ancillary to any appeal. An application to discharge an ex parte

> injunction on the ground that the plaintiff's cause of action is insufficiently substantial to justify the grant of the injunction also, in my opinion, falls on the wrong side of the line. It is not ancillary to an order allowing an appeal against a first instance refusal of the injunction."

The court's assessment

[41] The court is of the clear view that in the context of a judicial review application it has the authority to substitute for a deceased appellant an appellant who wishes to continue with the proceedings and who is well placed to do so. Whether the court, in fact, permits such a substitution to occur will, of course, depend on the facts and circumstances of the particular case.

[42] In fact, there have been a range of cases at the level of the Court of Appeal in England and Wales where such substitution has been permitted. These have been referred to in Mr Fordham's, Judicial Review Handbook: see 4th Edition at page 468 and 5th Edition page 232, though in the cases cited, there was no argument opposing the use of the power to substitute[1].

[43] Had there been opposition to the step proposed to be taken by the Court of Appeal in those cases, the court believes the court would have had no difficulty in concluding that it had the authority to effect a substitution in a proper case.

[44] There was no dispute before this court that in a judicial review application the High Court had the authority to substitute a new applicant for an applicant who had died, as it possesses inherent jurisdiction. This is important as it is plain that the Court of Appeal has all the jurisdiction of the original court: see section 38(1) of the Judicature Act. It seems to us that this must mean that just as the High Court could in principle substitute a new applicant in the case of a death of the original applicant, likewise the Court of Appeal possesses the power in principle to substitute a new appellant in the case of a death of the original appellant.

[45] The court approves the approach taken by Underhill J in the River Thames Society case and will apply his reasoning. We agree, in particular, with the sentiments of the Judge and his conclusion as set out at paragraph [4] of his judgment.

[46] The court further is of the opinion that the case before the court can be distinguished from the Ocean Software case relied on by the respondent. This case

[1] The cases referred to include: R v Secretary of State for the Environment ex p Friends of the Earth (1995) 7 Admin LR 739; R v Gloucester County Council ex p Barry [1996] 4 AER 421; R v North West Leicestershire District Council ex p Moses (2000) Env LR 443; R (Beeson) v Dorset County Council; and [2002] EWCA Civ 1812. See also: R v Richmond London Borough Council ex p Watson [2002] 2 AC 1127 (House of Lords). These authorities may have been among those which caused Underhill J to have made the remark (quoted above) in relation to the many cases of substitution in public law.

was dealing with a situation far distant to that under discussion in the present case and the remarks of the learned Judge in that case were directed at a very different issue to that involved in the application before us. In the present case, the court is dealing with an issue in the course of appellate proceedings which have already been initiated and these proceedings appear to us to engage the court's appellate function. In this context, there is no good reason why the court should not see the present application as falling within the general language of section 38 of the Judicature Act and, in particular, the opening words of sub-section (1): "[f]or all the purposes of and incidental to the hearing and determination of any appeal."

[47] The court need not offer any final view about the width of the language used in relation to Order 15 rule 7 or about the applicant's argument in relation to the assistance to be afforded by reference to the practice of the ECtHR and will refrain from doing so.

[48] The court is satisfied that, assuming it has the authority to order a substitution of the applicant in place of Dorothy Johnstone, this is a proper case in which to exercise that power, for the reasons given in the current applicant's grounding affidavit, referred to above.