A [QUEEN'S BENCH DIVISION]

Ex parte MOLYNEAUX AND OTHERS

1985 Nov. 25 Taylor J.

B *Crown—Prerogative—Treaty-making power—Agreement between United Kingdom and Republic of Ireland setting up Intergovernmental Conference—Status of agreement—Whether derogation from sovereignty—Whether affecting status of Northern Ireland citizens—Union with Ireland Act 1800 (39 & 40 Geo. 3, c. 67), art. 6[1]—Ireland Act 1949 (12, 13 & 14 Geo. 6, c. 41), s. 2[2]*

By an agreement of 15 November 1985 the Government of
C the United Kingdom of Great Britain and Northern Ireland agreed with the Government of the Republic of Ireland to establish an Intergovernmental Conference concerned with Northern Ireland and relations between the two parts of Ireland, to deal, in accordance with the terms of the agreement, with political and legal matters, security and the promotion of cross-border co-operation. It was accepted that the Irish Government would put before the Conference its views and proposals on
D those matters, including the means of achieving the declared policy of the Government of the United Kingdom to devolve within Northern Ireland responsibility in respect of certain matters within the powers of the Secretary of State for Northern Ireland. It was, however, stated in the agreement that there was no derogation from the sovereignty of either government and that each retained responsibility for its decisions and
E administration within its own jurisdiction.

The applicants, who were members of the Ulster Unionist Council and who were opposed to the agreement, sought leave to apply for judicial review claiming that the agreement was invalid in that both the agreement and its implementation imposed fetters upon the statutory powers and duties of the Secretary of State for Northern Ireland, that under the agreement the subjects of Northern Ireland would not have the same rights
F and privileges as other subjects of Great Britain, contrary to the Union with Ireland Act 1800, and that the establishment of the Intergovernmental Conference would amount to the establishment in the United Kingdom of a new standing body for the purpose of influencing the conduct of the government which would be unlawful in the absence of new legislation. Leave to apply for judicial review was refused.

On a renewed application for leave:—

G *Held*, dismissing the application, (1) that since section 2 of the Ireland Act 1949 expressly stated that the Republic of Ireland was not to be regarded as a foreign power and the agreement did not deprive the peoples of Northern Ireland of any privileges or place them on a different footing from the other peoples of the United Kingdom, the agreement did not conflict with the provisions of article 6 of the Union with
H Ireland Act 1800 that expressly provided that all treaties made by the Sovereign with a foreign power should not differentiate between the peoples of Northern Ireland and Great Britain (post, p. 334E–H).

[1] Union with Ireland Act 1800, art. 6: see post, p. 334D.

[2] Ireland Act 1949, s. 2: "(1) . . . the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom . . . whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever . . ."

(2) That, as the Intergovernmental Conference would have no legislative or executive power, its establishment did not contravene any statute, any rule of common law or any constitutional convention; and that the agreement did not fetter the discretion of the Secretary of State (post, p. 335F–G).

(3) That the Intergovernmental Conference would not be "a new standing body in the United Kingdom" but would be of an international nature; and that as the agreement concerned relations between the United Kingdom and another sovereign state it was akin to a treaty and, accordingly, it was not the function of the court to inquire into the exercise of the prerogative in either entering into or implementing the agreement (post, pp. 335H—336B).

The following cases are referred to in the judgment:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508, H.L.(E.)

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)

The following additional cases were cited in argument:

Birkdale District Electric Supply Co. Ltd. v. Southport Corporation [1926] A.C. 355, H.L.(E.)

Laker Airways Ltd. v. Department of Trade [1977] Q.B. 643; [1977] 2 W.L.R. 234; [1977] 2 All E.R. 182, C.A.

Lavender (H.) & Son Ltd. v. Minister of Housing and Local Government [1970] 1 W.L.R. 1231; [1970] 3 All E.R. 871

Parlement Belge, The (1879) 4 P.D. 129

Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] A.C. 1136; [1970] 2 W.L.R. 1264, P.C.

Reg. v. Inland Revenue Comrs., Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)

Sabally and N'Jie v. Attorney-General [1965] 1 Q.B. 273; [1964] 3 W.L.R. 732; [1964] 3 All E.R. 377, C.A.

Stringer v. Minister of Housing and Local Government [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65

APPLICATION for leave to apply for judicial review.

The applicants, James Henry Molyneaux, Sir George Anthony Clark, Hazel Bradford and Jane Turner, applied ex parte to the High Court for leave to apply for judicial review by way of a declaration that it would be contrary to law for Her Majesty's Government to implement the agreement of 15 November without the authority of the Queen in Parliament in the form of new legislation. The grounds of the proposed application for judicial review were that the implementation of the agreement by the establishment of the proposed Intergovernmental Conference on the basis of the agreement and for the purposes and with the functions therein set forth would amount to establishment in the United Kingdom of a new standing body for the purpose of influencing the conduct of the Government without the authority of the Queen in Parliament and would be contrary to law in that (1) the implementation of the agreement would fetter the exercise of discretion by the Secretary of State and of the Crown; (2) the implementation of the agreement would be contrary to article 6 of the Union with Ireland Act 1800; and

(3) the transfer to the Northern Ireland executive authority of power to consult and power to enter into agreements with the Republic of Ireland was a derogation from the royal prerogative and that there was no specific reservation of any part of the prerogative to the Crown in the field of relations with the Republic of Ireland.

On 20 November 1985, Mann J. refused the applicants leave, holding that the establishment of an Intergovernmental Conference consequent upon mutual acceptance of the intergovernmental agreement of 15 November 1985 would not be contrary to any statutory provision, rule of law or constitutional convention.

The applicants made a renewed application to a single judge sitting in open court.

Mark Littman Q.C. and *David Oliver* for the applicants.

TAYLOR J. This application concerns an agreement which was signed on 15 November 1985 by the Prime Minister, on behalf of Her Majesty's Government, and by Dr. Garret Fitzgerald, for the Government of the Republic of Ireland. The agreement provides for the establishment of an Intergovernmental Conference concerned with Northern Ireland and its relations with the Irish Republic.

The four applicants are all members and officers of the Ulster Unionist Council. They make application for leave to apply for judicial review of the agreement. On 20 November, Mann J. refused the application on the papers put before him. The case is now before me on a renewed application by way of oral hearing. I am prepared to assume, in the applicants' favour, without deciding, that they have in law a sufficient interest in the matters they raise to entitle them to apply for leave. What they seek is a declaration that it would be contrary to law for Her Majesty's Government to implement the agreement without the authority of the Queen in Parliament in the form of new legislation.

The sole ground originally put forward was as follows:

> "That implementation of the said agreement by the establishment of the proposed Anglo-Irish Intergovernmental Conference on the basis of the said agreement and for the purposes and with the functions therein set forth would amount to the establishment in the United Kingdom of a new standing body for the purpose of influencing the conduct of the government without the authority of the Queen in Parliament, and would be contrary to law."

At today's hearing, Mr. Littman, who has appeared on behalf of the applicants, sought leave, which I granted, to amend those grounds by adding three particular respects in which it was to be argued that such implementation would be contrary to law. The first was this: that the agreement and its implementation would involve fetters upon the statutory powers and duties of the Secretary of State for Northern Ireland. It is unnecessary for me to spell out in detail the particular statutory powers specified in the grounds. They are there set out. The proposition is that, as a matter of law, the Secretary of State, entrusted with powers and duties for public purposes, cannot divest himself of those powers and duties, cannot enter into any agreement incompatible with the due exercise of his powers and cannot do any such act or thing

as will fetter his discretion or prejudice the free and proper exercise of his discretion.

Mr. Littman has contended that the inevitable effect of implementing this agreement will be to tie the hands of the Secretary of State, both in appearance and in fact, in the exercise of his discretion. That is because any agreement which is reached in the Conference must so dominate the exercise of his discretion as to make it *Wednesbury* unreasonable or irrational [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223], to use the phraseology of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410. He goes on to say that where any matter is under discussion in the Conference, the need under the agreement to take into account representations made by the Government of the Republic of Ireland might cause delay in the exercise of discretion.

His second ground for saying that implementation would be contrary to law touches more directly on the authority of Parliament—he says of the Queen in Parliament only—to enable such an agreement to be implemented. He relies on the Union with Ireland Act 1800. Article 6 provides, among other matters:

> "that in all treaties made by his Majesty, his heirs and successors, with any foreign power, his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing, as his Majesty's subjects of Great Britain: . . ."

Mr. Littman contends that by this agreement, which gives rights to the Government of Ireland to make representations and proposals as to matters of common interest between Northern Ireland and the Republic, Her Majesty's subjects in Northern Ireland would not have the same privileges and not be on the same footing as Her Majesty's subjects of Great Britain. There are two answers to that and Mr. Littman has very properly brought one to my attention. It derives from the Ireland Act 1949. Section 2 provides that the Republic of Ireland is not to be regarded as a foreign country. Accordingly, the question arises as to whether in article 6 of the Union with Ireland Act 1800, reference to a treaty with any foreign power can now apply to the treaty with the Republic of Ireland. It seems to me that it cannot.

Apart from that argument, the crux of the matter is in the substance of the provisions of article 6 of the Act of 1800. It does not seem to me, looking at this agreement, that the subjects of Her Majesty in Northern Ireland are to have any other privileges or are to be on any other footing than Her Majesty's subjects of Great Britain. The fact that there is to be consultation on matters which may affect them, according to this agreement, with the Government of the Irish Republic, does not, to my mind, deprive them of privileges or place them on a footing other than that of Her Majesty's subjects of Great Britain, who may also be affected by any decisions of policy to be made with regard to Northern Ireland.

The third argument which is addressed by Mr. Littman arises from section 12 of the Northern Ireland Constitution Act 1973. That provides:

> "(1) A Northern Ireland executive authority may—(*a*) consult on any matter with any authority of the Republic of Ireland; (*b*) enter into agreements or arrangements with any authority of the Republic of Ireland in respect of any transferred matter."

A The effect of that subsection was to transfer to the Northern Ireland executive authority under the Act, which included the Assembly of Northern Ireland, powers to consult and powers to enter into agreements with regard to any transferred matter. Mr. Littman submits that that was, in a sense, a derogation from the royal prerogative by giving executive powers to the Northern Ireland executive authority, which previously resided in the Crown. Although it was only partial, he B indicates that there was no specific reservation of any part of the prerogative to the Crown in the field of relations with the Republic of Ireland. That particular section has been overtaken by events in that in 1974, the Northern Ireland Act was passed which took that authority from the Northern Ireland executive and gave it, as far as legislative matters are concerned, to the Queen in Council and, as far as executive C matters are concerned, to the Secretary of State. It does not follow that the absence of any reference to a residual prerogative power in section 12 is to be taken as any indication that there was no residual prerogative power. It seems to me that what has happened is that part of the prerogative power was delegated through section 12 of the Northern Ireland Constitution Act 1973 and it came back under the later Act. The power, therefore, remains within the executive exercising the prerogative D to enter into agreements with the Republic of Ireland.

Mr. Littman has referred me to *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508. In particular, he referred to a passage at p. 561, in which there is a sentence bearing directly on this issue in the speech of Lord Sumner:

> "There is no object in dealing by statute with the same subject-E matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object."

It seems to me that passage applies to the enactment of section 12 of the Northern Ireland Constitution Act 1973 and subsequently of the Northern Ireland Act 1974.

F Looking at Mr. Littman's three arguments, I conclude that there is no merit in the two which are based upon statute. So far as any fetter of discretion is concerned, I have considered the text of the agreement. I have considered also the joint communiqué which was issued by the two signatories. In the result I agree with Mann J. that the proposed Intergovernmental Conference will have no legislative or executive G power. Mr. Littman concedes that. I conclude that its establishment does not contravene any statute, any rule of common law or any constitutional convention. In that, I also agree with Mann J. I would go further and say as to the assertion that the agreement would inevitably involve a fetter on the discretion of the Secretary of State, I can find nothing in its text to suggest that that would be so. Indeed, I find quite the contrary. The agreement specifically provides:

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> "There is no derogation from the sovereignty of either the United Kingdom Government or the Irish Government, and each retains responsibility for the decisions and administration of government within its own jurisdiction."

The agreement would not establish, as is suggested in the grounds filed by the applicants, "a new standing body *in* the United Kingdom." As its name indicates, the Intergovernmental Conference between the

Government of the United Kingdom and that of another sovereign state would be of an international nature. The agreement itself is in the field of international relations. It is akin to a treaty. It concerns relations between the United Kingdom and another sovereign state and it is not the function of this court to inquire into the exercise of the prerogative in entering into such an agreement or by way of anticipation to decide whether the method proposed of implementing the agreement is appropriate.

I can find nothing in this application which raises what could be an arguable case. I say that with no disrespect to Mr. Littman, who has put forward his submissions persuasively and courteously, as always. In the result I conclude that this application must fail.

Application dismissed.

Solicitors: Herbert Smith & Co.

[Reported by Bernadette Miscampbell, Barrister-at-Law.]

[QUEEN'S BENCH DIVISION]

*WORMELL v. R.H.M. AGRICULTURE (EAST) LTD.

[1984 W. No. 35]

1985 Dec. 3, 4, 5, 6 Piers Ashworth Q.C., sitting as a deputy High Court judge

Sale of Goods—Implied term—Fitness for purpose and merchantable quality—Herbicide sold for purpose of killing wild oats—Manufacturer's instructions misleading—Whether instructions part of "goods"—Whether goods fit for purpose—Whether herbicide sold with inadequate instructions of merchantable quality—Sale of Goods Act 1979 (c. 54), s. 14(2), (3)

The plaintiff, a farmer, needed to kill the wild oats growing in his crop of winter wheat but adverse weather conditions prevented him spraying his crop. Although by the end of March it was too late to use most herbicides the defendants, suppliers of agricultural goods, recommended a herbicide for killing wild oats at a later stage than usual, which the plaintiff purchased. The plaintiff understood from the manufacturer's instructions on the containers of herbicide that the herbicide was effective against wild oats at any stage in their growth but if it was used at a late stage, there was a danger of damage to the main crop. In mid-June when the weather conditions were finally suitable for spraying, the plaintiff decided to take the risk of some damage to the winter wheat and sprayed the crop in accordance with the instructions but the herbicide had little or no effect on the wild oats.