

THE HIGH COURT ON CIRCUIT
CORK CIRCUIT COUNTY OF CORK

[2016 No. 194 CA]

BETWEEN**IRISH WATER****APPELLANT****AND****WOODSTOWN BAY SHELLFISH LIMITED****RESPONDENT****JUDGMENT of Ms. Justice Baker delivered on the 6th day of April, 2017.**

1. This judgment is given in an appeal from the order of Judge Riordan, judge of the Cork Circuit Court, given on 27th July, 2016 by which he refused to make directions permitting the appellant to carry out an inspection of the mussel bed at Youghal harbour in the County of Cork, the property of the respondent.
2. Youghal harbour comprises an area of approximately 491 hectares and the Devonshire Estate is the owner of the seabed. The town of Youghal has a population of 8,000 people which increases to 14,000 in the summer months. The town has for a long number of years been drained by three storm and foul water drains directly into the harbour. In or around the year 2000 Youghal Urban District Council commenced the process of the provision of a main drainage scheme for the town with a view to modernising the storm and foul drainage in the town.
3. An Environmental Impact Assessment ("EIA") was carried out by An Bord Pleanála for the purpose of the works in or around the year 2001. Because the works involved significant works of development, Youghal Town Council (formerly Youghal Urban District Council) required at a minimum a foreshore licence, a waste water licence, and other licences and permissions the granting of which involved several state agencies. By the middle of 2015 all relevant licences and authorisations had been received and the works were ready to commence.
4. Irish Water is the successor in title of Youghal Urban District Council and is the agency now responsible for the management of water services including the drainage scheme proposed for the town of Youghal.
5. Woodstown Bay Shellfish Ltd ("Woodstown") is a limited liability company which has had since 2002 a licence from the Duke of Devonshire to occupy the entire bed of the harbour. The owner of the reversion is now Lismore Realty Limited and it renewed the licence of Woodstown by formal agreement made on 7th July, 2014, for a further period of ten years.
6. The main drainage scheme proposes *inter alia* the laying of a pipe of 710 millimetres diameter along a route of approximately 365 metres to a channel in the centre of the harbour. Irish Water estimates that the pipe will occupy 0.2% of the entire area of the bay.
7. It is accepted for the purposes of the present application that the laying of the pipe will almost certainly disturb the seabed, is likely to raise silt which will "blanket" the mussel farm, and that the result may be the loss of some or all of the mussel beds. Mitigation measures are proposed, the nature and efficacy of which are not an issue in the present application.
8. Having regard to the licence under which Woodstown is entitled to occupy the entire of the seabed of the harbour, it is accepted that it has sufficient interest in the area through which the main drainage pipe is proposed and has locus standi to oppose the scheme. For the purposes of the present application Irish Water accepts that the enterprise of Woodstown will be impacted.

The statutory provision for entry to lay and maintain pipes

9. Section 97 of the Water Services Act 2007 ("the Act of 2007") makes provision for the laying of water mains, sewers, service connections and related cables and wires for the purposes of the statutory function of the water services authority. This judgment concerns the import of that section and the correctness of the order given by Judge Riordan on an interlocutory application relating to preparatory work for the laying of such mains and sewers.
10. Section 97 in its relevant part provides as follows:

"97 (1) (a) Where in the opinion of a water services authority it is considered necessary for the purpose of any of its functions to—

(i) place, construct, lay or connect, as may be appropriate, water mains, sewers, service connections or any ancillary fixtures or fittings or related cables or wires on, into, through, under or over any land not forming part of a public road

then it may, after giving 28 days notice of its intention to the owner and the occupier of that land or premises, as the case may be, indicating the position of the proposed installations referred to in subparagraph (i), and with the consent of the said owner and occupier, place, construct, lay or connect water mains, sewers, service connections or any ancillary fixtures or fittings or related cables or wires, or attach to the premises such bracket, or notice referred to in subsection (2), or other fixture as indicated in the notice given under this subsection, and may, from time to time, inspect, repair, alter, renew or remove any of them.
11. Provision is made for a response:

(3) Where a person to whom a notice under subsection (1) is addressed has not, within 28 days of the giving of such notice, indicated his or her consent, that person's consent shall be deemed to have been withheld.
12. Application is made to the Circuit Court in the case of a failure or refusal to consent:

(4)(a) Where a person to whom a notice under subsection (1) is addressed has withheld his or her consent, or where his

or her consent is deemed to be withheld under subsection (3), then, the water services authority which issued the notice may appeal to the Circuit Court.

13. The powers of the Circuit Court are set out in the Act:

(4)(b) The Circuit Court in considering an appeal under this section may, by order—

(i) confirm the notice, with or without variation, or

(ii) set the notice aside,

but shall not determine any matter to which subsection (8) refers.

14. The effect of an order of the Circuit Court is:

(5) Where the Circuit Court confirms, with or without variation, a notice under subsection (1), consent shall be treated as having been given for the purposes of subsection (1), with effect from the date of such confirmation.

15. I am advised by counsel that the section is entirely free of authority, and that no judgment has been given by any court of record relating to the operation of the section, or of the powers of the Circuit Court on appeal.

16. The basic scheme of the legislation requires the water services authority to give 28 days notice of its intention to lay or place water mains or sewers and any ancillary services through, on or under an identified place in the lands of a third party. The notice can be given only after the water services authority has ascertained the position of the proposed installations, and the section requires that the formal 28 day notice to be furnished must indicate the position of such.

17. Any person to whom a notice of intention to place or lay a sewer or pipe is served may indicate his or her consent thereto, but if consent is not given within 28 days after the giving of such notice that person's consent is deemed to have been withheld: s. 97(3).

18. Irish Water served a notice on Woodstown on 20th January, 2016, and Woodstown formally replied refusing consent by letter of 26th January, 2016.

19. The statutory scheme provides for an appeal to the Circuit Court of a refusal or withholding of consent by the owner or occupier of land on, under or through which it is proposed to lay an installation.

20. An appeal was lodged dated 15th February, 2016 to the Cork Circuit, County of Cork by which Irish Water sought the confirmation of its notice without variation pursuant to s. 97(4)(b) of the Act of 2007.

21. That appeal is yet to be determined by the Circuit Court.

Procedure

22. The procedures in statutory appeals are provided in O. 64C of the Circuit Court Rules, (S.I. 470 of 2009). An appeal is commenced by way of originating notice of motion grounded on affidavit. No argument arises with regard to the procedure adopted by the parties for the purposes of the Circuit Court appeal.

23. Order 64C rule 7 provides for the giving by the Circuit Court of directions and orders for the conduct of the proceedings. Some guidance is contained in the rule with regard to the nature of such case management directions, in that the power is stated to be one to give directions "as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings". A non-exhaustive list of orders is set out, and it is accepted for the purpose of the present application that the Circuit Court judge did have the power to make an order for inspection of any lands by way of an interlocutory order or case management order under the rules.

24. The application for liberty to carry out an inspection came on before Judge Riordan grounded on affidavit and it is accepted that the reason for the request is that set out in a letter of 19th July, 2016 by Irish Water addressed to the solicitors for Woodstown. That letter identifies that an issue likely to arise between the parties in the course of the Circuit Court hearing is whether a further EIA or an AA is required. That the EIA is of some considerable vintage is a matter in respect of which the respondent makes some argument, but is not a matter before me in the present application.

The proposed inspection

25. Irish Water claims that it requires to carry out an inspection and survey of the seabed for the purposes of taking samples of the mussel beds, to determine the nature, quality, location, and distribution of the mussels in the estuary, the ecological character of the seabed habitat, the abundance, shell condition, and size of the mussel species beds at or near the proposed and existing outfall. Because mussels are harvested from the estuary, the survey is said also to be necessary to establish whether any mussel population recorded in the vicinity of the outfalls are naturally occurring or are more likely to have developed as a consequence of seeding mussels harvested out of the estuary area.

26. A video survey has already been carried out by a firm of marine consultants, MERC Consultants ("MERC") which has an expertise and experience in scientific environmental testing, and their report suggests that seabed sampling is necessary to confirm or explain the video data, and recover samples of the mussel species, *mytilus edulis*. As will appear below, sampling of the mussel beds and seabed has had actually been conducted by MERC but without authorisation, on 18th October, 2016.

27. In broad terms, what is proposed is that a small dredger of approximately 40cm with teeth, described as being somewhat similar to a garden rake, will conduct approximately eleven runs along the mussel beds or seabed, and will take samples of the mussels by pulling or recovering these from the seabed. The mechanism is described as being "lightweight", designed to be deployed and recovered by hand, and for use from small boats. A very small number of mussels is expected to be taken by way of sample.

28. Irish Water argues that it requires to carry out the inspection work for the purposes of assembling evidence to further the hearing of the substantive issue in the Circuit Court, and that in order for the Circuit Court to be in a position to properly weigh the property rights of the respondent in its mussel fishery against the public interests in the laying of the proposed discharge pipe, it will be necessary for that Court to have evidence of the likely effect of the proposed works upon the mussel fishery, and the nature of the activity now carried on, the location of the mussel beds relative to the proposed route of the intended discharge pipe, the size and

quality of the beds, and that the duration of the Circuit Court hearing will thereby be reduced.

The application to strike out on 7th November, 2016

29. The respondent argues that I should take account in coming to my determination the fact that Irish Water, through MERC, carried out an unauthorised inspection and survey and on 18th October, 2016. Woodstown brought an application to the Circuit Court dated 7th November, 2016, for an order striking out the proceedings for abuse of process having regard to what it claimed was an unauthorised entry on its lands and a breach of European and domestic environmental law. The replying affidavit sworn on behalf of Irish Water expressed "the unreserved regret" of Irish Water at the carrying out of the inspection, *inter alia*, such regret being expressed on account of the fact that the inspection was carried out after Judge Riordan had refused to permit inspection by his order of 27th July, 2016, the order under appeal in the present application.

30. When the motion to strike out came on for hearing before Judge Riordan on 19th December, 2016, he made an order precluding the admission of the "the intrusive evidence" and any evidence "such as data and evidence that flows from the taking of samples from the riverbed". Costs were awarded to Woodstown to include costs for junior and senior counsel on a solicitor/client basis.

31. I reject the argument made by Woodstown that the present appeal is moot having regard to the unilateral action of Irish Water to carry out the inspection sought in respect of which Judge Riordan made an order. I cannot accept the argument that the appeal has been "determined" by the fact that Irish Water entered the land and carried out the inspection. It seems to me indeed that the opposite is the case, and Irish Water has accepted that it may not lawfully adduce evidence of the results of the survey and inspection carried out by it unlawfully, but as it contends that the inspection is necessary for the purpose of the conduct of the Circuit Court case, the appeal is correctly before me, and is not moot, as the substantive hearing is yet to take place before the Circuit Court.

The nature of the application in the Circuit Court

32. The purpose of an appeal under s. 97 is to determine the extent to which Irish Water may be permitted to displace the private rights of Woodstown. The exercise envisaged is one where the court must determine whether the public interest in the laying of the pipes may be permitted to override the private interest in property. That private property right is one that is constitutionally guaranteed but is not an absolute right. It may, in a suitable case, be displaced in the public interest, and s. 97(8)(a) provides an express entitlement to compensation as a result of the action of the water authority, such compensation to be measured as "the amount of the reduction in value or the amount of the damage" caused by the placing, renewing or removing of fixtures, cables, pipes *etc.* The measure of compensation is the property arbitrator under s. 199 of the PDA and is not a matter for the Circuit Court. Section 97(4)(b) expressly precludes the Circuit Court from determining any matter of compensation.

33. The Circuit Court in determining whether to permit the entry onto land, and the laying of pipes or sewers over, on or under any land is exercising a jurisdiction somewhat akin to the power vested in a local authority to acquire land under the Land Clauses Act 1845 and other related legislation. The power is not entirely equivalent to the power of compulsory acquisition, as the Circuit Court has a power to refuse to permit the placing, laying or maintenance of a conduit or pipe *etc.*

34. There are no statutory guidelines such as found in other legislation, where the function of the court is to determine whether a refusal to permit entry was reasonable, or how the court is to engage the question of the balancing of rights. There will be many cases where what is engaged by the Circuit Court is the exercise of balancing of public rights or interests against private rights, the right of the water services authority to lay pipes and acquire a form of statutory easement for the purposes of its water service function on the one hand, and the private right or interest in land, and where no other considerations are in play.

35. The present case, however, engages a third interest, the interest arising from the designation of the site as a European site and, therefore, the considerations that must be engaged by the court are not merely those that would be engaged in considering the general powers of compulsory acquisition of land under the Land Clauses Consolidation Act 1845, as amended.

36. I turn now to examine the European context.

The European dimension

37. The exercise by the court of its jurisdiction to award inspection of the site and that it is to be constrained by environmental considerations arises from the fact that the entire bay is a European Site, and comprises an SAC (special area of conservation) and an SPA (special protection area).

38. The section must be construed so as not to preclude or ignore the effect of Council Directive 92/43/EEC ("the Habitats Directive") as amended, and the relevant implementing national legislation. The section must be construed not merely in a negative manner such that any court order would not ignore the special conservation status of the site, but that as a matter of European law the interpretation and application of the powers of the court under the section must be construed and applied in a manner that positively recognises and protects the designation of the site.

39. It is well established in the authorities that the courts play a role as a guardian of the environment under EU law, and the powers under s. 97 must therefore be construed and applied in a manner compatible with EU law, such that the result of an individual application must not offend the policies of a relevant Directive or Regulation.

40. In concrete terms, this means in the present case that an order may not be made by the court permitting inspection of the site, it being a European site, unless the court has evidence on which to assess the environmental impact, if any, of the works proposed, and has sufficient evidence on which it might, in a suitable case, make directions to reduce or ameliorate the environmental impact of the carrying out of such activity.

41. Woodstown argues that in the taking of the samples an environmental effect is likely, in that the silt or sand on the seabed is likely to be disturbed, and that the disturbance could have an impact on the breeding beds of the mussels. It is also argued that the mere fact of removing from the site certain samples is an exercise which impacts upon the integrity of the European site.

42. Irish Water argues that what is proposed is an examination or inspection more in the form of a scientific survey, and the evidence is that the inspection is intended to be carried out by a firm of specialist and experienced consultants.

43. In *Sweetman v. Ireland* Case C-258/11 the CJEU considered at length the nature of the consideration in planning terms of whether works might adversely affect the integrity of a European site within the meaning of Article 6.3 of the Habitats Directive. Article 6.3 envisages a two stage process implemented by s.s. 177U and 177V of the Planning and Development Act ("PDA"), i.e. a screening for appropriate assessment, and then if necessary following screening the carrying out of an appropriate assessment in

accordance with the statutory provisions.

44. In *Sweetman v. Ireland*, Advocate General Sharpston explained the scope of assessment required and the nature and purpose of the screening process as follows:

"It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). (20) The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect." (emphasis in original) (para. 47)

45. Finlay Geoghegan J. in her judgment in *Kelly v. An Bord Pleanála* [2014] IEHC 400 considered the nature of the statutory obligations derived from the Directive and the decision of the CJEU in *Sweetman v. Ireland*. In summary, she held that a screening and formal assessment is required if there is a possibility of a significant effect on a European site, and that while the effect in question must be "significant", in the sense that it must be appreciable and not de minimis, the threshold at which the requirement exists is low.

46. As to the nature of the assessment to be carried out, Finlay Geoghegan J. explained the strict requirements that the appropriate assessment be carried out "in the light of the best scientific knowledge in the field" and on the basis of "complete, precise and definitive findings and conclusions which may not have lacunae or gaps".

47. The level of scrutiny is intense, as she explained in 40 (iii), that a decision maker:

"... may only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

48. For the purpose of the present application it seems to me sufficient to note the statutory and European context in which the site must be seen, and that context requires any decision made by a court by which activity is authorised or directed be assessed in the light of the low entry threshold, and the strict requirement to avoid adverse environmental effect.

49. A court must proceed cautiously in the light of that strict requirement, as activity in a European site can only be authorised if it is "certain there would be no adverse effect": See *Waddenzee* (Case C-127/02) [2004] E.C.R. I-7405 also noted by Finlay Geoghegan J. at para. 37 of her judgment.

Conclusion and discussion

50. I accept that the test engaged by a court in considering whether inspection should be granted would be whether inspection was necessary and relevant to the issues in hand, and that the court would import a requirement of the proportionality. However, the final element to be considered arising from the designation of the site may not be ignored in the present case.

51. I am satisfied that one factor that will engage the consideration of the court is whether a refusal to permit entry and the laying of conduits is unreasonable, whether that unreasonableness arises as a result of an environmental concern or a private concern.

52. The European dimension has the consequence in the present application the Circuit Court must engage with the Habitats Directive arising from the fact that the site is a European site. Any application for an interlocutory order in the form of inspection could not be determined without a consideration of the impact on the site, if any, of the proposed inspection. Thus, the present application is not to be determined as if it were an application for inspection in a private law case or even in an action which engaged both public and private interests, and the Circuit Court in considering whether inspection is relevant and necessary must also consider whether it is proportionate and consistent with the environmental imperatives of the Habitats Directive.

53. I consider, therefore, that the Circuit Court was correct to refuse inspection, having regard to the stage of the process at which the application was made and the evidence before it. I consider that the court may not make an order for inspection of the subject lands without engaging with the environmental issues and it is a matter for the Circuit Court to determine whether it needs oral evidence of those matters before making a determination.

54. The Circuit Court will not be artificially truncated and unsatisfactory merely on account of the fact that an interlocutory order for inspection has not been made. A notice of intention to enter must indicate "the position of the proposed installations", as provided in section 97(1)(a). Irish Water, therefore, must know where it proposed to lay the pipes. It is known that the seabed is a European site. It is also common case that Woodstown operates a mussel farm in the entire bay. Further, the nature and extent of the mussel beds and the level of destruction that is likely to be caused is a matter that falls to be considered in the context of an application for compensation, not a matter within the competence of the Circuit Court. It is neither appropriate nor necessary that the full extent of the commercial activity carried out on the seabed be ascertainable before the hearing on s. 97 application.

55. I reject the suggestion the Habitats Directive is not engaged in the interlocutory application as I am satisfied that the preliminary inspection required to be carried out by Irish Water is one that comprises development within the meanings of ss. 2 and 3 of the PDA, is one that is capable of affecting the integrity of the European site, and therefore, is one that may not be made unless the court is satisfied as to the likely environmental impact of the inspection process and activity proposed.

56. For those reasons, I reject the suggestion that the application is a "straightforward and practical" matter. The exercise to be engaged by the Circuit Court involves the balancing of private, public and environmental interests.

57. The appeal is dismissed.