Neutral Citation: [2015] IEHC 631

THE HIGH COURT

COMMERCIAL

[2014 No. 2229 P.]

BETWEEN

JAMES ELLIOTT CONSTRUCTION LIMITED

PLAINTIFF

AND

KEVIN LAGAN, TERRY LAGAN, JOHN GALLAGHER, IRISH ASPHALT LIMITED AND LAGAN CEMENT GROUP LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 19th day of October, 2015.

1. The plaintiff seeks an order pursuant to O. 50, r. 4 of the Rules of Superior Courts directing the fourth named defendant to permit the plaintiff, its servants or agents, to inspect the rock at the fourth named defendant's quarry at Bay Lane, Kilshane, Finglas, Dublin 11, to take and remove samples of such rock and permission to drill to obtain such samples. In the proceedings the plaintiff alleges deceit against the fourth named defendant, Irish Asphalt Limited ("IAL"), and the other defendants on foot of what the plaintiff says was a decision to sell aggregate produced at Bay Lane as Clause 804 and 3 inch down, either knowing that it could not conform to the ordinary characteristics of those products or recklessly as to whether or not it could so conform. The plaintiff alleges that the product it purchased from IAL was not either Clause 804 and/or 3 inch down and that when the plaintiff used the product in a variety of developments, the product failed due to the fact, inter alia, that it was not Clause 804 and/or 3 inch down. The plaintiff says that the failure caused fundamental damage to the developments and the plaintiff seeks damages and an indemnity from IAL and the other defendants as a result.

2. Order 50, r. 4 provides as follows:-

> *"[t]he Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."*

3. In this case the defendants agree that it is appropriate and necessary that the plaintiff inspects the quarry and that samples should be taken. The dispute between the parties relates to the samples which should or ought to be taken. The plaintiff wishes to drill six boreholes 102 mm wide up to a depth of 60 metres at locations to be finalised following an initial inspection of the site. It also wishes to take one bulk sample from the quarry face in the south west of the quarry. Unusually, the defendants do not object to the drilling of boreholes but wish the plaintiff to drill 53 boreholes and not to confine itself to six. They say that six boreholes will not be representative of the quarry and will therefore not give evidence which is representative of the rock in the quarry, whereas the extensive grid of boreholes which they propose will give a truer representative picture of the quarry as a whole. They very strongly oppose the taking of a bulk sample. They argue that the case is a claim in deceit and it relates fundamentally to the knowledge of the defendants of the quality of the rock at Bay Lane. They say this is established by taking cores by means of boreholes. The taking of a bulk sample is not the appropriate way to establish the quality of the rock, which should be established by means of cores extracted from boreholes.

4. They further object to the fact that the plaintiff intends to use the bulk sample to try and so far as is possible to replicate the production process employed by IAL when the quarry was in production in order to determine whether or not quarried rock was capable of producing Clause 804 or 3 inch down. For a variety of reasons they say that this is not possible and that permitting the taking of a bulk sample with a view to carrying out a trial production is not necessary within the meaning of the rule.

5. In order to determine the issues between the parties it is necessary to consider the scope of the Court's power to order inspection of lands and the taking of samples and the principles upon which such power ought to be exercised.

6. Order 50, r. 4 permits the Court to authorise any samples to be taken *"which maybe necessary or expedient for the purpose of obtaining full information or evidence."* In Hearne v. Marathon Petroleum Ireland Ltd. [1998] 4 I.R. 186, Morris P. was asked to consider an application to inspect the defendant's oil drilling rig. He considered the two decisions of Murphy J. in *Wymes v. Crowley* (Unreported, High Court, Murphy J., 27th February, 1987) and *Bula Ltd. v. Tara Mines Ltd. (No. 1)* [1987] I.R. 85 and held at p. 189:-

> *"[t]his then is, in my view, a clear indication of the principles which should guide a court in considering applications of this sort. It must in the first instance ensure that circumstances are created in which the plaintiff will have facilities for presenting his case to the court so as to enable the court to have the benefit of all the advices and information which the plaintiff may wish to make available to the court. On the other hand the defendant's rights as a property owner must be protected during this inspection so as to ensure that the inconvenience of the inspection is not injurious to his rights as a property owner.".*

7. It is thus clear that the plaintiff is to have facilities in order to present the case it wishes to advance. It is given the assistance afforded by a court order made pursuant to the Rules in order that the court will have the benefit of all the advices and information which the plaintiff may wish to make available to the court.

8. In *Bula Ltd. v. Tara Mines Ltd. (No. 1*), Murphy J. was asked to make an order permitting the plaintiff to inspect the mine of the defendant in order to ascertain whether or not there had been a trespass onto the first name plaintiff's lands and whether or not there had been unlawful extraction of any mineral ore from under the first named plaintiff's lands and whether or not pillars required for the safety purposes between the two mines had been maintained or compromised. Murphy J. commenced his judgment by observing that the claims made on behalf of the plaintiffs were extremely serious and would appear to be extremely improbable. At p. 92, he stated that:-

> *"[i]t seems to me that the rights of litigants to seek and the power of the courts to grant relief or assistance of a procedural nature must be viewed in the context of litigation and the administration of justice as a whole."*

In the circumstances of the case where the plaintiffs could not have access to the Bula ore body or the ground under the Bula lands, he held (at p. 93):-

> *"[i]n these circumstances it seems to me that it would be impossible to vindicate the plaintiffs' right to litigate if they were not afforded an appropriate opportunity of inspection to attempt to substantiate the claim which they have made."*

9. It is clear therefore that the exercise of the power under O. 50, r. 4 must be viewed in the light of vindicating a plaintiff's right to litigate (or a defendant's right to defend a case brought against him). In the related case of *Wymes v. Crowley*, Murphy J. granted an application to the plaintiffs in that case to drill explorative boreholes on the Bula lands as the preferred means of proving or disproving the allegations of trespassing made against Tara mines. He took the view that the inspection which he permitted in the *Wymes* case met to a large extent the requirements of justice in the *Bula* case. In the circumstances he decided to give an extremely limited right of access to three named experts on behalf of the plaintiffs to conduct a visual inspection over a period of not more than four days. He made no order in relation to the taking of samples and declined to direct the defendants to provide the inspectors with any maps, drawings or documentation of any description. The limited nature of the order must be viewed in the light of the order that he granted in the case of *Wymes v. Crowley*.

10. In *Wymes v. Crowley*, the issue was weather or not the allegations of trespass and larceny could best be pursued by conducting an inspection and survey through Tara Mines with the assistance of plans or drawings prepared by Tara mines or whether it should be by means of the drilling of boreholes. The defendant, the Receiver who was appointed over the lands at Bula, was concerned that damage might be caused to the Bula ore body and secondly that he might expose himself (or others) to liability for damage to persons or property as a result of the works carried out on or under the property in his possession or under his control. There was a conflict of evidence between the experts on behalf of the parties with regard to the potential for damage to the ore body which Murphy J. held that he could not resolve. Nonetheless he directed that the plaintiffs be granted the inspection which they sought. He stated:-

> *"[h]owever it seems to me that (notwithstanding the paucity of the evidence in support of the Plaintiffs' claim) inspection along the lines sought should be facilitated if that can be achieved whilst at the same time protecting the interests of the Defendants."*

11. In *Charlton v. Kenny* [2007] IEHC 308, Clarke J. had to consider an application to inspect property the subject matter of a bitter adverse possession dispute. The defendant objected to the inspection sought on the basis that either no sufficient case had been made out for inspection or that the inspection sought was excessive as it included a list of eight people. Clarke J. concluded that an adequate basis had been made out for inspection of the property by experts but not for non-expert witnesses. At para. 5.4 of his judgment he stated:-

> *"[i]t is clear that the only factual issues at trial will concern the extent to which it may be said that the Kennys, have, in fact, occupied the property in the manner which they contend for and the extent, if any, which it may be said that the Charltons or their friends or family continued to have any use of the property. These are the issues which will arise in a claim for adverse possession and its defence. It does not seem to me that individuals who may claim to have been present on the land (and thus to have maintained some degree of possession on the part of the Charltons), need to now to go on the land to be able to give their evidence. To the extent that an architect or horticulturist may be able to give evidence as to when certain physical or planting works are likely to have taken place then that is evidence which the Charltons are entitled to lead if they should consider it to be advantageous to their case. In those circumstances it seems to me that they have made out a case for the attendance of those two persons."*

Summary of principles

12. From these authorities the following principles relevant to the application before the Court emerge:

> (1) The Court may order that a party may take samples of the property of another party to proceedings which may be necessary or expedient for the purpose of obtaining full information or evidence.
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> (2) The power must be viewed in the context of a party's constitutional right of access to the courts.
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> (3) The Court must ensure that the litigant will have facilities to present his case to the Court. This includes all the advices and information which the litigant wishes to present to the courts, either in support of his own case, or to undermine that of his opponent.
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> (4) The right to an order for inspection or the taking of samples is not dependant upon the strength of the case of the party seeking the order.
>
> (5) Inspection, or the ordering of the taking of samples, should be facilitated if it can be achieved while at the same time protecting the interests of the opposing party. The interests of an opposing party that a court takes into account are those relating to that party's rights as an owner or occupier of property.
>
> (6) The proposed inspection or taking of samples must be shown to be necessary or expedient by reference to the issues in the case.
>
> (7) The inspection or sampling ordered should be limited to that which the party seeking the order has shown to be necessary or expedient to his own case or his defence of his opponent's case.

13. I turn now to applying these principles to the current application.

Boreholes
14. The plaintiff wishes to drill six boreholes and remove six cores as set above. The defendants object to this on the basis that it will not present a truly representative picture of the quarry. It is not for the Court to determine on this Motion whether or not this is correct and indeed the Court is not in a position so to do. The plaintiff has moved the Court for relief which it seeks in order that it may advance the case it wishes to present to the Court. It is not truly contested that the taking of samples from the Bay Lane quarry by means of boreholes is not necessary or expedient. It is a matter solely for the plaintiff to determine whether or not that which it has sought is adequate for its purposes. The defendants have not objected to the drilling of boreholes by reference to any damage to the interests of IAL as the owner of the quarry. I reject the objections to the drilling of six boreholes on the grounds advanced by the defendants. They fail to facilitate the plaintiff's right to advance the case it wishes to advance. If the defendants wish to carry out more extensive drilling as set out in Mr. Lennon's affidavit they, as the owners and occupiers of the quarry, are free so to do. The evidence their experts will then present can be assessed against the evidence presented by the plaintiff's experts in due course in the normal way.

Bulk sampling
15. The plaintiff wishes to obtain a bulk sample from the south west quarry face in addition to the six cores it will obtain by means of the boreholes. It says it requires a bulk sample in order to replicate the production process, as is explained by Mr. O'Donovan at para. 34 of his first affidavit, sworn on 23rd April, 2015, on behalf of the plaintiffs:-

> *"[i]n order to obtain representative samples of rock for lab testing, large bulk samples are necessary. Samples of greater then 100 kg are not unusual. The samples have to be crushed at a quarry or in a lab and prepared for testing. It would also be best to test from different horizons and in different areas of the quarry. When access to an existing quarry is available, it is more practical and cost effective to take bulk samples from the quarry faces rather than from coring. Coring is expensive and only yields a small diameter core. It is therefore necessary to crush long lengths of core to get sufficient material for testing. Coring is used at the exploration stage since there is no existing quarry face to access the rock. The most constructive approach would be for the Plaintiff to take bulk samples as this would better simulate the production material that IAL was producing from the quarry between 2003 and 2007. The core samples would be an attempt to simulate what rock IAL had available to it in 1999 from GWP's coring. Thus the testing on the core would simulate the material available to IAL for evaluation prior to 2003."*

16. At para. 28 of his second affidavit, sworn on 26th June, 2015, Mr. O'Donovan states that:-

> *"…the inspection protocol to be directed by the Court must replicate to the extent possible, the pre-production testing and the production life of Bay Lane [quarry]."*

17. The defendants object to the taking of a bulk sample. They say that it would not be representative of the rock produced from the quarry, more representative samples would be achieved if their protocol of taking 53 cores were followed. Secondly, they say that the attempt to reproduce the production process is legally irrelevant and entirely misconceived. It is legally irrelevant because the case is one of deceit. The plaintiff must establish as a preliminary point that as a matter of fact the rock at Bay Lane was never capable of producing Clause 804 or 3 inch down product. This will be established (if true, which they vehemently deny) by the cores produced as a result of the boreholes to be drilled. The balance of the claim, according to the defendants, necessarily relates to the knowledge of the defendants (or their reckless lack of knowledge) of the nature of the rock at Bay Lane. The case does not concern how aggregate product was produced at Bay Lane. The justification for seeking the bulk sample and for carrying out the production process trial relates more to a case in negligence or breach of contract or misrepresentation than to a case in deceit. They therefore submit that a production trial is legally irrelevant.

18. Thirdly, they submit that a production process trial is not feasible from a practical point of view and on that basis the Court should not facilitate the plaintiff in a fruitless attempt to replicate the process of production which existed when the quarry was in production. They say that this will lead to unnecessary expense and will vastly increase the length of the trial and complicate the issues at trial. They say that this should be avoided at this stage by the Court declining to order that a bulk sample be furnished to the plaintiff.

19. Finally, they also state that the quarry ceased production in February, 2008, the last blast having taken place on 11th February, 2008, and that the quarry is in its *"restoration phase"*. They point to the fact that the planning permission for the quarry expires on 3rd June, 2017, and state that there is a risk that Fingal County Council or the Court could take a view that the planning permission has been abandoned so that any reopening of the quarry would require a new planning permission. Thus the taking of a bulk sample by means of blasting and drilling would amount to an unauthorised development. This difficulty does not apply to the drilling of the proposed boreholes as the drilling of boreholes for exploratory purposes constitutes exempted development. They therefore say that the Court ought not to order a taking of bulk samples as the very act of taking the sample could result in an illegal activity.

20. In view of the principles outlined above it is clear that I must assess the application for an order pursuant to O. 50, r. 4 on the basis of the information which the plaintiff seeks in order to present its case and the evidence which it will seek to present to the trial judge. In my opinion, the plaintiff has established that the taking of one bulk sample of rock from the quarry face is necessary in order that the plaintiff and its advisors obtain full information in relation to the rock and the quarry so that they can then present the evidence which the plaintiff wishes to present to the Court. The interests of IAL, as the owner of the quarry, are not unduly prejudiced by the taking of a bulk sample. Indeed, the application was not opposed upon that ground. Insofar as it is urged that the taking of a bulk sample could amount to an unlawful use of the quarry, I do not believe that this is a valid argument. The quarry continues to enjoy a planning permission which runs until June, 2017. The fact that it is being used in its *"restoration phase"* does not alter the fact that the planning permission is therefore still in use. I do not accept that the components of a planning permission can be divided up, as is implicit in the submissions of the defendants, so that it can then be argued that part of the planning permission has been abandoned. Furthermore, the taking of one bulk sample would not in my opinion constitute the reopening of a quarry as was submitted by the defendants.

21. Thus, the real question to be determined is whether or not a possible prejudice in relation to the use of the information or evidence sought to be obtained pursuant to a court order under O. 50, r. 4 at the subsequent trial of the action is a matter which the Court ought to take into account in determining whether or not to make such an order in the first place. It seems to me that once a party has established that the taking of the sample is necessary within the meaning of the Order, that party should be given some latitude as to the use that is made of the information obtained upon foot of the inspection or the taking of a sample. Unless it can be shown that the information sought to be obtained from the sample the party wishes to take from its opponent's property can have no bearing on the case as pleaded, I am of the opinion that it is not for the Court to decide on such a motion to shut the party out from

obtaining the information it seeks. It is to be borne in mind that Murphy J. was of the opinion that the case articulated by the plaintiffs in Bula was highly improbable but nonetheless he made a limited order for inspection. The limitation was not designed to limit the information obtainable by the plaintiffs, it was limited to the minimum degree of access to facilitate a visual inspection by experts necessary for the plaintiffs to obtain the information they sought. Similarly in *Charlton*, Clarke J. did not limit the information sought but rather controlled the process of obtaining the information with a view to minimising the disruption which would arise as a result of the inspection and thus to the interests of the defendants as owners of the property . I am therefore not persuaded by the defendants' arguments that a bulk sample ought not to be taken from the quarry on the grounds that it would lead to irrelevant evidence at the trial of the hearing and thus lead to prejudice of the defendants.

22. The plaintiff has advanced reasons why it requires the bulk sample. Insofar as there is a conflict in relation to this matter, I cannot resolve it upon affidavit. As in *Wymes v. Crowley*, I am prepared to accept the evidence of the plaintiff in this case that the inspection and the sample sought are necessary for the case it wishes to advance. Accordingly, I am prepared to order that the plaintiff may inspect the lands at Bay Lane for the purposes of drilling six boreholes as outlined above and for the purposes of taking one large bulk sample from the quarry face in the south west of the quarry.

23. I accept the submissions of the defendants that the protocol as presented by the plaintiff is insufficiently detailed to allow for a meaningful order to be drafted. Before the Court can make an order on the Motion, further information will be required in relation to the proposed initial inspection, the identification of the sites of the proposed boreholes and of the bulk sample, the possession of the site which will be required, the identity of the experts who will carry out any blasting or drilling on the site and any other experts whom the plaintiff indicates may be required to attend. The fourth named defendant will be required to furnish information to the plaintiff relating to the protocol which operated during the production phase of the quarry with air traffic control at Dublin Airport and any other party who was required to be involved in the process prior to the carrying out of blasting while the quarry was in production. There will need to be satisfactory insurance in place and bonds covering the costs of the inspection and sampling. I will therefore adjourn the matter for a number of weeks and hear the parties' further submissions in relation to these points.