THE HIGH COURT

[2024] IEHC 657

Record No. 2013 3081P

Between

MICHAEL NOBLE

Plaintiff

and

GREENSTAR PROPERTIES LIMITED and BALLYNAGRAN LANDFILL LIMITED

Defendants

THE HIGH COURT

Record No. 2013 9713P

Between

MICHAEL NOBLE

Plaintiff

and

DEIRDRE-ANN BARR, JOSEPH BEASHEL, ANN-MARIE BOHAN, FERGUS BOLSTER, GEORGE E L BRADY, BRIAN D BUGGY, MICHAEL DAVID BYRNE, ALAN S CHISWICK, LIAM ANTHONY COLLINS, ALAN CONNELL, BONNIE A COSTELLOE, DUALTA A COUNIHAN, NIAMH COUNIHAN, SHARON C DALY, CHRISTIAN DONAGH, BRIAN P DORAN, TARA M DOYLE, JOSEPH DUFFY, NICOLA DUNLEAVY, BRYAN G DUNNE, DEIRDRE DUNNE, JOHN W DUNNE, PAT ENGLISH, AIDAN FAHY, TURLOUGH J GALVIN, LIBBY GARVEY, JOHN F GILL, THOMAS HAYES, ROBERT HERON, SHANE HOGAN, NIALL HORGAN, RUTH HUNTER, MICHAEL G

JACKSON, HELEN G KELLY, DAMIEN KEOGH, CARINA MARY, CR LAWLOR, SHAY LYDON, RONAN F MCLOUGHLIN, PARAIC T MADIGAN, DARREN MAHER, PATRICK G MOLLOY, BRID MUNNELLY, JULIE MURPHY-O'CONNOR, HELEN NOBLE, PETER O'BRIEN, JOHN C O'CONNOR, MICHAEL M O'CONNOR, PAULINE O'DONOVAN, ANTHONY G O'GRADY, CARA D O'HAGAN, ROBERT G O'SHEA, MARK O'SULLIVAN, ALISTAIR PAYNE, CHRISTOPHER J QUINN, WILLIAM A QUIRKE, TIMOTHY SCANLON, PATRICK FG SPICER, PATRICK SWEETMAN, GERARD MARK THORNTON, STANLEY G WATSON

(PRACTISING UNDER THE STYLE AND TITLE OF MATHESON SOLICITORS (A FIRM) FORMERLY KNOWN AS MATHESON ORMSBY PRENTICE SOLICITORS (A FIRM))

Defendants

Judgment of Mr. Justice Conor Dignam delivered on the 20th day of November 2024

Introduction

1. By Notices of Motion in each of these two sets of proceedings the plaintiff seeks the following:

> "A. An Order for the case management of the proceedings bearing record number 2013 No. 3081P and proceedings bearing record number 2013 No. 713P.
>
> B. An Order regarding the mode and sequencing of trial, in particular that the proceedings aforesaid be heard together and consecutively, with proceedings bearing record number 2013 No. 3081P to be heard first;
>
> C. An Order regarding the exchange of expert lists and reports, and the preparation of joint expert report(s) and joint expert meeting, including any directions as regards inspection that may be required.
>
> D. Such further directions as are deemed necessary for trial."

2. I propose to refer to the first set of proceedings as "the Greenstar proceedings" and to the second set as "the professional negligence proceedings".

3. The defendants in the professional negligence proceedings replied to the plaintiff's motion by applying for a stay on those proceedings pending determination of the Greenstar proceedings. The plaintiff did not insist on those defendants issuing a Notice of Motion

seeking this relief and was satisfied that it should be determined in the context of this motion.

4. Full Defences have been delivered by the defendants in both sets of proceedings. Thus, the facts are in dispute in the substantive proceedings. The fact of that dispute is important to the submissions of the plaintiff because they say that some of the same issues will have to be determined in both cases. However, for the purpose of these applications, the background is set out in affidavits of Mr. Donnacha O'Donovan, the plaintiff's solicitor. No replying affidavit was delivered in the Greenstar proceedings, and while affidavits of Mr. Eamon Gill and Mr. Paul Hughes, both solicitors for the defendants, were delivered in the professional negligence proceedings, they do not contest the following background facts contained in Mr. O'Donovan's affidavit.

5. On the 24th November 2000, the plaintiff and a company then called Celtic Waste Limited (which subsequently changed its name to Greenstar Holdings Limited) entered into contracts in respect of lands at Ballynagran, County Wicklow. These lands are licensed and used as a landfill.

6. Pursuant to same, the plaintiff granted an option to Celtic Waste Limited (referred to as "Greenstar Holdings Limited" hereafter) to acquire the lands on completion of certain conditions. This is referred to as "the First Option". Greenstar Holdings Limited granted the plaintiff an option to buy back the lands after what is called the Determination Date (in effect, the date on which Greenstar Holdings Limited (its successors or assigns) receive notice from the Environmental Protection Agency that the aftercare process had concluded in respect of the landfill). This is referred to as "the Second Option".

7. Under the First Option, if Greenstar Holdings Limited exercised the option, the plaintiff was entitled to be paid the "Agreed Consideration" and "Royalty Payments". The Schedule to the contract deals with the calculation of the Royalty and the plaintiff's right to such Royalty (it essentially provided for an annual payment, amounting to 10% of the "Net Income" arising from the operation of the landfill (to be calculated in the manner provided for in the Schedule). It provided for obligations to certify the volume of waste disposed and provided for quarterly and annual statements verifying the Royalty Payment due for the relevant year ("the Accountant's Statement").

8. Both agreements prohibited any assignment or transfer by the plaintiff. They permitted assignment or transfer by Greenstar Holdings Limited of its rights and obligations to any Related Company of Greenstar Holdings Limited.

9. One fact which is not expressly adverted to in Mr. O'Donovan's affidavits but which is pleaded in the relevant Statements of Claim, and which is in substance admitted by the defendants in the Greenstar proceedings, is that in 2005 Greenstar Holdings Limited exercised its option to acquire the lands and on the 29th September 2005 Greenstar Properties Limited (rather than Greenstar Holdings Limited) became registered as the full owner of the lands. The plaintiff pleads that this was as the successor and/or assignee of Greenstar Holdings Limited. The defendants in the Greenstar proceedings plead that Greenstar Holdings Limited nominated Greenstar Properties Limited to take a transfer of the lands, as it was entitled to do under the First Option and that the plaintiff executed a Memorandum of Agreement for the sale of the lands to Greenstar Properties Limited, without objection, on the 23rd February 2005. A draft contract for sale was appended to the First Option and if the option was exercised this was the form of contract that the parties were to execute. It made no reference to Royalty Payments.

10. Greenstar Holdings Limited or other companies in the group discharged the contractual obligations to the plaintiff by providing Royalty Statements to him and, when Royalty Payments became due, by making such payments.

11. On the 23rd August 2012, receivers were appointed to certain assets of Greenstar Holdings Limited and Greenstar Limited. Annual and quarterly statements continued to be provided. On the 4th February 2013, Greenstar Holdings Limited provided a Royalty Statement for 2012. It specified the amount that was due for the period 1st January 2012 to the 22nd August 2012 but Greenstar Holding Limited's solicitors informed the plaintiff that the said sum was not going to be paid. They also informed the plaintiff that Greenstar South-East Limited was operating the landfill on the lands and that company would be honouring payments from 23rd August 2012 to the 31st December 2012.

12. This led to correspondence between solicitors for the plaintiff and solicitors acting for the receiver and Greenstar Properties Limited. According to paragraph 25 of the Amended Statement of Claim (5th October 2023) "*Greenstar Properties Limited has indicated to the Plaintiff that it does not intend to be and is not bound by the terms of the First Option and has claimed that it is under no contractual duty to pay the royalty payments.*"

The Greenstar Proceedings

13. The plaintiff commenced the Greenstar proceedings on the 26th March 2013 against Greenstar Properties Limited.

14. Greenstar Properties Limited transferred the lands to Ballynagran Landfill Limited on the 4th March 2014 (paragraph 50 of the Amended Statement of Claim in the Greenstar proceedings).

15. Ballynagran Landfill Limited ("Ballynagran") was added to the proceedings on the 12th March 2014 and an Amended Plenary Summons was issued on the 21st March 2014. An Amended Statement of Claim was delivered on the 24th May 2014. The face of the Amended Statement of Claim in the papers states 24th May 2013 but this must be an error.

16. On the 25th July 2017, Greenstar Properties Limited was dissolved.

17. In the Greenstar proceedings, the plaintiff seeks to enforce the terms of the First and Second Options against Greenstar Properties Limited and Ballynagran. The detailed bases for the plaintiff's claim are pleaded in the Amended Statement of Claim of the 24th May 2014. It is sufficient to note that the core of his case is that if either of the defendants took a transfer of the lands they are bound in contract and equity by the rights and obligations provided for under the First and Second Option agreements and hold the lands subject to any interest of the plaintiff and, in particular, that they are obliged to discharge Royalty Payments provided for in the First Option Agreement. The reliefs sought include declarations that the agreements of the 24th November 2000 between the plaintiff and Celtic Waste Limited are binding on the defendants as successor or assignee of Celtic Waste Limited, and a declaration that Ballynagran takes the lands subject to the equitable or other interests of the plaintiff and subject to the requirement to pay to the plaintiff the Royalty Payments as provided for in the First Option and to be bound by the Second Option to comply with the terms of both Option Agreements.

The Professional Negligence Proceedings

18. The plaintiff issued proceedings against the defendants in the professional negligence proceedings on the 12th September 2013 and delivered a Statement of Claim on the 11th February 2015. It is claimed that the defendants ("Matheson") were the plaintiff's solicitors in respect of the two options and the sale of the lands to Greenstar Properties Limited in 2005. The plaintiff's claim against Matheson is summarised in paragraphs 24 and 25 of the plaintiff's written submissions:

> "24. Matheson was retained by the Plaintiff and had a duty to exercise professional care, skill and diligence in relation to advices, drafting and negotiation of these two contracts concerning the Lands, in particular on securing the payment of royalty payments due to the Plaintiff, advising him on all aspects of the contracts and ensuring his royalty payments was (sic)

secured and enforceable. The Plaintiff relied on Matheson to advise on the most suitable and appropriate legal arrangements in respect of the option agreements and the sale of the Lands.

25. Those duties were not discharged by Matheson as described and pleaded in the Statement of Claim delivered on the 11th February 2015 and in the particulars delivered in the proceedings."

19. In *Noble v Barr & Ors [2021] IECA 269*, the Court of Appeal held that a portion of the plaintiff's claim against Matheson is statute-barred. In the course of giving judgment, Collins J gave a useful summary of the plaintiff's claim at paragraphs 19 and 20 (and paragraphs 38-41):

"19. The Plaintiff's Statement of Claim (delivered on 11 February 2015) sets out in some detail the alleged negligence of Matheson. According to the Plaintiff, Matheson should have advised him not to sign the contract of sale with Greenstar Properties Limited. However, the Plaintiff's fundamental complaint is that Matheson failed to ensure that the obligations undertaken by Greenstar Holdings Limited under the First and Second Options were binding on Greenstar Properties Limited and failed to ensure that there was an adequate mechanism for enforcing those obligations against Greenstar Properties Limited. The Plaintiff claims that provision should have been made for the registration of his right to a royalty payment and/or his option to re-acquire the Ballynagran Lands as a burden in the Land Registry. Alternatively, a charge should have been executed by Greenstar Holdings Limited and/or Greenstar Properties Limited and registered as a burden or inhibition on the folios at the time of the transfer from the Plaintiff. It is also said that Matheson failed to ensure that "*the contracts*" contained any adequate protection for the Plaintiff in the event that Greenstar Holdings Limited went into receivership or liquidation.

20. As a result of Matheson's negligence and breach of duty (so it is pleaded) the Plaintiff suffered loss, damage, inconvenience and expense. The Statement of Claim identifies value of royalty payment, loss of interest, value of lands (buy-back) and costs in the proceedings against Greenstar Properties Limited as items of loss and damage in this context, with the quantum of loss "*to be ascertained*" in every case."

20. The Court of Appeal held that the plaintiff's claim arising from Matheson's retainer in 2005 is statute-barred, whereas the claim arising from the retainer in 2000 is not.

21. An Amended Statement of Claim to reflect this decision was delivered on the 5th October 2023. An Amended Defence was delivered on the 1st November 2023. This is a full Defence which either expressly denies or puts the plaintiff on proof of all matters.

22. It is in the context of those claims that the case management and procedural directions are sought. Neither set of defendants dispute the Court's jurisdiction to admit

the proceedings to case management or to make the directions sought. Nor do they oppose the proceedings being admitted to case management. The dispute is about what directions should be made. The plaintiff's position was set out in the affidavits of Mr. O'Donovan, written submissions and oral submissions. He also relied on an affidavit of Mr. Aidan O'Connor, Legal Costs Accountant. The defendants in the Greenstar proceedings did not file a replying affidavit or written submissions and their position was therefore set out in oral submissions. The defendants in the professional negligence proceedings set out their position in an affidavit of Mr. Eamon Gill and Mr. Shane Hughes, written submissions and oral submissions. There was also extensive correspondence exchanged between the parties which was provided to the Court. I have had regard to all of this material.

23. I will deal with the reliefs sought in turn. Reliefs A and B in the plaintiff's Notices of Motion and Matheson's application for a stay on the professional negligence proceedings can be dealt with together, though, of course, to an extent the other reliefs will depend on the decision in relation to the application for a stay.

Case Management and Timing of Trials

24. Order 63C Rule 6 of the Rules of the Superior Courts provides for the making of a case management order. No party disputed the Court's jurisdiction to make a case management order or objected to the making of such an order. I am satisfied that it is appropriate to do so in circumstances where the hearing of this application was assigned to me by the List Judge and where both cases are over eleven years old at this stage and a case management order would facilitate bringing them to a determination expeditiously and without further delay.

25. The real issue in this regard was the question of the timing and sequencing of the trial of the proceedings, i.e., Relief B in the Notices of Motion. The defendants in the Greenstar proceedings did not take any strong position on this. Matheson strongly opposed an Order that the two sets of proceedings be heard together and consecutively, with the Greenstar proceedings being heard first, i.e., the relief sought in the Notice of Motion, and in fact sought a stay on the professional negligence proceedings.

26. I was referred to Delany and McGrath, 4th Edition, 2018, at paragraph 7-26, in which the authors state as follows in relation to directions as to the trial of proceedings:

> "Where there is some commonality between proceedings, and regardless of whether the criteria for the consolidation of proceedings are satisfied, the courts have an inherent

> jurisdiction to make directions as to the trial of proceedings. Thus, a court may in an appropriate case direct that cases be heard simultaneously, or that they be linked or joined so that they are heard consecutively or sequentially. As Clarke J commented in Kalix Fund Ltd v HSBC Institutional Trust Services (Ireland) Ltd, in ordering its business a court should ensure that its resources and the resources of parties to litigation are not inappropriately wasted by unnecessary duplication. He added that it is important to minimise the risk of inconsistent determinations arising from different proceedings and that the practice has grown up of cases being linked as a procedural measure to ensure that a series of cases which have common factors are assigned to a single judge, who will determine all relevant issues across the range of cases concerned."

27. The authors treat of the subject slightly differently in the 5th Edition (2023) but there is no material difference.

28. Charleton J, in *Talbot v Hermitage Golf Club [2014] IESC 57*, noted the courts' discretion to manage cases and the importance of the proper use of court resources in doing so. That was a case where judgment was given on the eighty-third day that the matter was in court and where Charleton J was critical of the manner in which the case had been presented and must be seen in that context but, nonetheless, his comments are of some general application. He said, inter alia:

> "Among the unenumerated rights in Article 40.3 of the Constitution is the right to have access to the courts for the purpose of litigation…Courts are entitled, and indeed are required, to foster their resources. This is both a matter of public and private interest. Court resources used in litigation are funded by public money. In addition, the parties pay for legal representation…"

29. Clarke J in *Kalix Fund v HSBC Institutional Trust Services (Ireland) Ltd [2010] 2 IR 581*, referred to in the above passage from Delaney & McGrath, held that the court has a discretion to make directions in relation to the mode and sequencing of trials and to grant a stay on proceedings (though he noted that where what was sought was a procedural direction that has the effect of freezing one case until another case has been determined, it might not be appropriate to refer to it as a stay). That case was concerned with Commercial Court proceedings (to which Order 63A applied) but Clarke J held that the court has an inherent jurisdiction to make such directions. He considered the factors to be taken into account at paragraphs 8.8 - 8.13 of his judgment.

30. MacDonald J summarised the principles to be derived from *Kalix Fund* at paragraph 29 of his judgment in *Avoncore Ltd v Leeson Motors Limited [2021] IEHC 163*:

"(a) The court has a broad power to give directions for the conduct of proceedings entered in the Commercial List. O.63A, r.5 makes this clear. Under that rule, the court can give directions "*as appear convenient for the determination of proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings*";

(b) The court has an inherent power to stay proceedings in a range of different circumstances. For present purposes, what is relevant is that the court has the power to stay one set of proceedings until another related case has been determined. A stay of this kind is, in essence, a procedural direction to the effect that no further steps should be taken in one set of proceedings until some other proceedings, or set of proceedings, have been heard and determined;

(c) In ordering its business, the court has a discretion to ensure that scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition, it is important that measures are taken to minimise the risk of inconsistent determinations arising from different proceedings. For the latter reason, cases can be linked with a view to ensuring that a particular series of cases (which share common factors) are assigned to a single judge who will determine all relevant issues across the range of cases concerned;

(d) As part of its power to manage the conduct of a series of cases in which there is either a significant factual or legal overlap, the court should aim to bring about a just and expeditious trial while, at the same time, seeking to minimise costs and to ensure that scarce court resources are not wasted;

(e) Among the factors to be borne in mind in assessing how a series of cases are to be managed are the following:-

(i) The fact that each individual plaintiff is entitled to have the proceedings determined in an expeditious manner "subject only to ensuring that there is no disproportionate added expense or drain on court time imposed";

(ii) Consideration should be given as to the extent to which the first case to be tried is likely to bind all other cases in whole or in part;

(iii) It is important to ensure that any measures adopted which have the effect of preventing a case from progressing in the ordinary way must be no more than is necessary and proportionate to achieve the end of preventing unnecessary expense of use of court time.

(f) There is no reason, in principle, why a number of cases could not come to trial at the same time. Furthermore, in the context of a sequenced trial of all of the cases, there is no reason why the issues which arise in the various cases could not be tried in a logical way with only those parties who had a logical and legitimate interest in the particular set of issues in question, having an entitlement to be heard in respect of those issues."

31. I was also referred to *Merck & Co Inc v GD Searle & Co [2002] 3 IR 614*, *Friends of the Irish Environment Ltd v Minister for the Environment, Heritage and Local Government [2007] 3 IR 459*, and *Re Condensed Aminodihydrothiazine Derivative [2018] IEHC 467*. In circumstances where these were concerned with particular aspects of European law I find them to be of limited assistance. The first and third of these cases concerned patent proceedings in circumstances where there were also proceedings in the European Patent Office. The courts identified some of the same factors as set out in *Avoncore* as being relevant to whether or not the domestic proceedings should be stayed, ie. the desirability of avoiding conflicting decisions, the desirability of avoiding significant costs, and the resources of the court being taken up with a hearing that may transpire to be wholly unnecessary. However, as is clear from both judgments, there are particular features of the patent regime which inform the approach to be taken to applications for a stay of such proceedings. For example, McCracken J said at page 618 of *Merck*:

> "As the State has recognised the right of the European Patent Office to determine applications for the grant of a patent which would extend to this jurisdiction, including the right to allow amendments to and to hear objections in relation to such patent, it would seem somewhat illogical, unless there was very good reason, for revocation proceedings to be heard in this country before the final determination of the existence and form of the patent by the European Patent Office."

32. He went on to say that in those circumstances the court should start from the premise that, if possible, a stay should be granted. MacDonald J in *Re Condensed Aminodihydrothiazine Derivative* said "*I believe it is fair to say that the approach taken by McCracken J was straightforward. One starts from the premise that a stay should be granted. However, one also has to consider the competing reasons put forward as to why it would be unfair or unjust to grant a stay…*"

33. This approach was followed by Murphy J in the *Friends of the Irish Environment* case referred to above. This was a case in which a declaration was sought that section 33(2)(c) of the Planning and Development Act 2000 and the regulations made thereunder were null and void and invalid having regard to the provisions of the law of the European Union but where the Commission had issued a reasoned opinion under Article 226 that the State had failed to comply with its obligations under the relevant Directive and the Commission intended to issue Article 226 proceedings against the State. Murphy J held that the subject matter of the proceedings, the process initiated by the Commission and the relief sought were substantially the same and therefore parallel proceedings would be wasteful of time and money.

34. Thus, while many of the same factors have to be considered in this case, the approach is different in that in those cases the starting point was that a stay should be granted. That is not the approach set out in *Kalix Fund* and *Avoncore*. Furthermore, in those cases there was an immediate and direct connection between the decisions which were to be made in the domestic courts and in the Court of Justice. There are, of course, connections and commonalities between the Greenstar proceedings and the professional negligence proceedings but they are not as direct or immediate as in those other cases.

35. I therefore apply the principles set out in *Kalix Fund* and *Avoncore*.

36. The relief sought in the Notices of Motion is "*An Order regarding the mode and sequencing of trial, in particular that the proceeding aforesaid be heard together and consecutively, with proceedings bearing record number 2013 No. 2081P to be heard first*." This position was repeatedly stated in correspondence. At the hearing, it was suggested on behalf of the plaintiff that the two sets of proceedings could be heard contemporaneously so as to allow cross-examination by Matheson of relevant witnesses in the course of the Greenstar proceedings. That was not what was sought in the Notices of Motion, in correspondence or written submissions. I have therefore considered the application as an application for the two sets of proceedings to be tried consecutively, ie. as sought in the Notices of Motion. In any event, I am of the same view in relation to the alternative. The defendants in the professional negligence proceedings submit that those proceedings should be stayed until the Greenstar proceedings are determined.

37. In my view, neither approach is appropriate or in accordance with the principles set out by Clarke J in *Kalix Fund* and MacDonald J in *Avoncore*.

38. The plaintiff's approach involves one judge hearing the Greenstar proceedings and then immediately hearing the professional negligence proceedings before delivering judgment in the Greenstar proceedings.

39. However, as currently pleaded, subject to the point discussed in the next paragraph the professional negligence proceedings will only need to proceed in the event that the plaintiff is unsuccessful in the Greenstar proceedings. If he succeeds in establishing that Greenstar Properties Limited or, more particularly as that company is now dissolved, Ballynagran, is bound by the terms of the 2000 transaction then there would appear to be no necessity to hear and determine the professional negligence proceedings. The evidence is that the trial of the professional negligence proceedings will take up to eight days and that the defendants' total costs on a party/party basis will be €388,250.00 (affidavit of Aidan O'Connor, Legal Cost Accountant, sworn on the 21st November 2023). The effect of

the course of action advanced by the plaintiff is that the Court will have to set aside eight days which may prove to be unnecessary. That is not an efficient use of very limited court resources. It would involve a very significant cost on the public resources and would have an adverse impact on other litigants who wish to have their cases tried. It would also involve very significant cost to the parties. That is not appropriate in circumstances where it may prove to be unnecessary.

40. At the hearing, the point was made on behalf of the plaintiff that even if the plaintiff succeeds against the defendants in the Greenstar proceedings they may still have to proceed against Matheson. Considerable emphasis was placed on this by the plaintiff. Collins J, in his judgment in *Noble v Barr & Ors*, identified the security which should have been available to the plaintiff as a measure of damage. Counsel posited the situation where any judgment against Ballynagran was a paper judgment and they could not recover any award. In those circumstances, they would wish to proceed against the defendants in the professional negligence proceedings. There are a number of reasons why this does not persuade me that the proceedings should be heard in the manner sought in the Notice of Motion. Firstly, there is no claim in the pleadings in respect of the loss of security. The only relief sought is damages and the particulars of loss, damage, inconvenience and expense that are pleaded are "*Value of royalty payments, Loss of interest, Value of lands (buy back), Costs in proceedings No. 2013/3081, Other*". This is particularly significant where the Statement of Claim was amended after Collins J had given his judgment in which he referred to the issue of loss of security. Secondly, it seems to me that the same point still applies. The question of recovery for a loss of security only arises if Ballynagran is not bound by the obligations under the First Option or the plaintiff can not recover the amount of any award from Ballynagran. Thirdly, even if I am wrong on both of these points, there is no evidential basis upon which I could conclude that there is a likelihood that the plaintiff would not be able to recover from Ballynagran and, thus, while I appreciate that it is always a possibility that a party may not be able to recover against a defendant, that is not sufficient to outweigh the factors just discussed.

41. There is, of course, some commonality between the proceedings as they arise from the same transactions and I accept that it may be that there will be some duplication. This is relevant in two respects: firstly, it gives rise to the potential of duplication which would mean the use of additional court time and additional costs for the parties; secondly, it potentially gives rise to a risk of conflicting judgments. In relation to the first, I am of the view that those risks do not offset the inevitability that additional court resources and legal costs would have been expended in unnecessarily hearing the professional negligence proceedings if the trial judge subsequently decides that the plaintiff should be successful in the Greenstar proceedings. I address the risk of conflicting judgments below.

42. However, nor do I think that a stay on any further step in the professional negligence proceedings until the Greenstar proceedings have been determined is appropriate. That would not be a proper balancing of the plaintiff's rights. The effect of that course would be that if the plaintiff is unsuccessful in the Greenstar proceedings (or indeed if he was successful but could not recover against the defendants) a number of steps would remain to be taken at that stage to get the professional negligence proceedings ready for trial. The plaintiff has a right to have the proceedings determined in an expeditious manner "*subject only to ensuring that there is no disproportionate added expense or drain on court time imposed*" and the court is required to ensure that any measures adopted which have the effect of preventing a case from progressing in the ordinary way must be no more than is necessary and proportionate to achieve the end of preventing unnecessary expense and use of court time (see point (e)(iii) in *Avoncore)*. Thus, it seems to me that the proper balancing of all of these factors is that the professional negligence proceedings must be advanced to the point of being ready for trial but not listed for trial.

43. This does, of course, involve costs which might prove to be unnecessary. However, I do not believe that these are disproportionate.

44. The Court must also have regard to the necessity to avoid the risk of conflicting judgments. This is, of course, an important consideration. However, this does not require the two cases to be heard immediately one after the other and can be met by them both being heard by the same judge.

45. I will, therefore, make an Order in terms of Relief A and will direct under Relief B that the Greenstar proceedings and the professional negligence proceedings should both be heard by the same judge, the Greenstar proceedings to proceed before the professional negligence proceedings, and I will place a stay on the hearing of the professional negligence proceedings until the Greenstar proceedings have been determined or until further Order. This puts in place a mechanism to deal with the situation of the plaintiff not being able to recover against Ballynagran.

Directions

46. It is then necessary to consider what directions should be made to get the matters ready for trial.

Greenstar Proceedings

47. There has been extensive correspondence between the solicitors for the plaintiff and the solicitors for Ballynagran (and formerly Greenstar Properties Limited) in relation to a number of issues upon which the plaintiff seeks directions. This correspondence largely culminated in a letter from the plaintiff's solicitor of the 18th October 2023, a reply from Ballynagran's solicitor of the 1st November 2023, a letter from the plaintiff's solicitor of the 3rd November 2023, a reply thereto from Ballynagran's solicitor of the 8th November 2023, and a reply from the plaintiff's solicitor of the 28th November 2023.

48. A number of issues were canvassed in this correspondence. At the hearing Senior Counsel on behalf of the plaintiff identified the outstanding issues between the parties. They are as follows:

(i) The plaintiff seeks inspection of the site in order to calculate future capacity.

(ii) The plaintiff seeks financial data in order to calculate the royalty amounts and therefore his alleged loss;

(iii) The plaintiff seeks a copy of the Asset Sale Agreement (dated the 4th March 2014) by which Ballynagran took the lands from Greenstar Properties.

49. The plaintiff sought agreement to an inspection of the site by his expert, Enviroguide Consulting, including the possible use of a drone, by letter of the 13th June 2022. Inspection was declined by letter of the 22nd August 2022 on the basis that is "*not necessary for the plaintiff to prepare for trial and in circumstances where our client's relevant records are publicly available*." By letter of the 1st December 2022, the plaintiff sought, inter alia, "*Agreement and proposed dates for a joint inspection, including use of a drone…*" and the question of inspection was raised again in a letter of the 18th October 2023 (there had been extensive correspondence between the parties in the meantime). By letter of the 1st November 2023 the solicitors for Ballynagran indicated that their client undertakes void surveys which are conducted conducted by independent consultants in order to comply with its licence and to monitor annual waste acceptance. They indicated that they would provide the plaintiff with the most recent survey (8th October 2023) which includes drone imagery and void calculations. They did not explicitly decline inspection facilities but that appears to have been the meaning of the letter. By letter of the 3rd November 2023, the plaintiff's solicitors requested a copy of that survey and repeated the

request for agreement to its own inspection. The solicitors for Ballynagran, by letter of the 8th November 2023, agreed to provide a copy of all surveys carried out since 2014 and rejected the plaintiff's request for his expert to carry out an inspection on the grounds that it is not necessary because those void surveys are sufficient.

50. Ballynagran's agreement to provide previous surveys is very welcome. However, I do not believe that the fact that Ballynagran has agreed to provide surveys which were carried out on its behalf (albeit by an independent consultant) is sufficient or renders an inspection by the expert engaged by the plaintiff unnecessary. It seems to me that the question of future capacity is directly relevant to the plaintiff's alleged losses and he is entitled to engage an expert to conduct an inspection of the lands for the purposes of those alleged losses being calculated and to call that witness at trial, if necessary. A decision on whether or not to make an Order for inspection requires a balancing of one party's right of access to the courts and the other party's property rights. An Order should only be made if it is necessary and proportionate. I am satisfied that the interference caused by the type of inspection sought and the costs attached thereto are not disproportionate. Indeed, it has not been suggested that any such inspection would be unduly burdensome or inconvenient to the defendant.

51. In relation to the financial data, the plaintiff's solicitor, in their letter of the 13th June 2022, sought "…*the Accountant's Statement in the terms set out in the Option Agreement of 24th November 2000 for each of the Relevant Accounting Periods from 1st January 2014 to 31st December 2021.*" This was refused by the defendants' solicitor on the basis that they were "*not necessary for the plaintiff to prepare for trial and in circumstances where our client's relevant records are publicly available*" (letter of the 22nd August 2022). The request was repeated in a letter of the 30th November 2022. By letter of the 17th October 2023, the solicitors for the defendant stated "…*the issue of quantum of royalty payments owing to your client, should our client be found liable for same, is readily calculable by reference to the formula contained in the Option Agreements. Please confirm whether you would be willing to agree this figure on the basis, with a view to narrowing issues between the parties*." The plaintiff's solicitors replied to say that "*We note what you say in relation to the issue of quantum. The plaintiff would welcome any opportunity to narrow the issues between the parties*" and went on to suggest that the "*Second defendant is to provide details of "Receipts" and details of "Outgoings" within the meaning of the Schedule for each of the accounting years up to 31st December 2022 to the plaintiff within four weeks from the date hereof.*" The defendants' response was contained in their solicitors' letter of the 1st November 2022. It stated:

> "Our client acquired the landfill on 5 September 2016 and therefore does not have access to the information required to provide details of "Receipts" and "Outgoings" within the meaning of the Schedule. Instead, it is in a position to provide profit and loss accounts and balance sheet reports for the years 2016 – 2022 (inclusive).
>
> In addition, please note that Annual Environmental Reports (AER), which are publicly available through the Licensing and Enforcement Access Portal on the Environmental Protection Agency's website (leap.epa.ie), provide information as to tonnes of waste accepted. We enclose herewith our Client's most recent AER. You will note at page 32 of the enclosed AER that figures for waste accepted are set out in tonnes. For your ease of reference, the figures for the years 2016 – 2022 are as follows:"

The letter then goes on to set out the figures for the number of tonnes of waste accepted for each of those years. It was subsequently clarified that the date of the 5th September 2016 was an error and it is accepted that the relevant date is the 4th March 2014.

52. The plaintiff's solicitor wrote on the 3rd November 2023. It is not clear from that letter whether it was in reply to the letter of the 1st November or in reply to what Counsel for the defendant had said in court or in discussions. The solicitors noted the indication that the defendant would provide the profit and loss accounts and balance sheet reports and requested that audited accounts be provided together with a confirmation that the accounts and reports represent the entirety of the income generated by the landfill, and that no other person/entity has received or accounted for income from the landfill during that period. They also noted that the defendant's Counsel had "*suggested that the information to the end of 2016 could be provided immediately, but that it would take some more time for the gross receipts, outgoing and net receipts (which are the inputs required under the Contract to determine the royalty payment) to be worked out and provided…*" They then provided an example statement for the year ending 31st December 2012 and stated that "*This is in ease of the parties and the Court as it identifies precisely the information that is required and available to your client*." They also noted that the royalty calculation is subject to one revision, i.e. a revision upwards by reference to the average price paid by the top three third party customers and therefore sought details relating to the top three third party customers. They went on to state that "*We do believe, as suggested in your letter, that the quantum of the royalty payments is readily capable of agreement (without admission of liability), once the relevant inputs are identified by BLL. The figure ought not to be in dispute or a matter that the trial judge will be required to spend time on determining.*"

53. Ballynagran's solicitor replied on the 8th November 2023. They agreed to provide audited accounts for the years that such accounts were available and unaudited accounts for the other years. They also confirmed that those accounts represent the entirety of the

income generated by the landfill, and that no other person/entity has received or accounted for income from the landfill during the period of Ballynagran's interest in the landfill (i.e. since the 4th March 2014). They went on to state:

> "You have provided an example royalty statement for year ending 31 December 2012 and also what you describe as identical tables that you suggest our client should populate for each year to date, which we assume your client would then seek to rely upon in quantification of his alleged claim (which for the avoidance of doubt is denied.) Respectfully, it is not for our client to assist your client in formulating the quantification of his claim. Further, doing so in the manner suggested by you would completely ignore the fact that the operation of a landfill has changed significantly since 2012. For example, different waste-streams are now presented by customers than was the case in 2012. There are also variations and additional factors affecting pricing for each different stream of waste. The revenue of any landfill operator is dictated to a large extent by these variable factors. Use of these tables would only serve to confuse matters.
>
> With respect to table 2, our client is not prepared to share its top three customers by year with your client as this is sensitive commercial information. In any event, figures for revenue per customer fluctuate significantly year on year due to differing waste-streams, which would render any such information of little use for your client as regards his alleged claim.
>
> Accordingly, our client has provided extensive financial and documentary information to your client. There is no need for the Court to impose any directions aside from the standard directions as regards the potential future exchange of pleadings.
>
> We agree that this issue may ultimately require input from our clients' respective experts…however to seek to impose any direction requiring our client to provide any information over and above what has not been provided is inappropriate."

54. This is where matters rested at the time of the hearing. I do not accept that the Court's power to make directions is limited to "*standard directions as regards the potential future exchange of pleadings*." The Court has a broad discretion to make such directions for the conduct of proceedings, as "a*ppears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of the proceedings*" (Order 63C Rule 4). Order 63C Rule 5(1)(xi) provides that the Court may make an Order "*providing for the exchange of documents or information between the parties…*". The Court also has an inherent jurisdiction to make directions to ensure the just, expeditious and cost-efficient disposal of proceedings, subject, of course, to the proper balancing of the rights of the parties.

55. In my view, it is appropriate to make an Order directing the second-named defendant to provide the elements of information that go the calculation of the Royalty Payment. Those elements are set out in the schedule to the First Option. The Royalty

Payment is 10% of the net income for a period of twelve calendar months. Net income is the amount by which the Receipts exceed the Outgoings over such period. Outgoings are defined as:

> "(a) all Value Added Tax forming part of the Receipts and any other Value Added Tax payable in respect of the Receipts or any part thereof and including any tax substituting Value Added Tax;
>
> (b) any Landfill tax or other equivalent tax payable specifically in respect of Landfill/Waste Disposal Operations and include any analogous tax;
>
> (c) any charges (whether statutory or otherwise payable to the European Union, the State or the Local Authority) specifically by reference to the development and/or operation of the Landfill;
>
> (d) any recurring or regular payments payable to the Local Authority on foot of the Planning Permission or payable to the Agency;
>
> (e) all accountants fees in connection with certifying the Receipts pursuant to the provisions of this Schedule;
>
> (f) any rates assessable by the Local Authority in respect of the development of the Landfill."

56. Receipts are defined as:

> "the aggregate of all gross income received in respect of the Void [in that period] and in this regard for the purpose of determining the gross income from any Related Company of the Grantee in respect of waste supplied by such companies to the Void the prices charged to such Related Companies shall be:
>
> (a) in the case where such Related Company is charged on a per tonnage basis for a particular type of waste, the average price per ton charged to the three largest (by tonnage) bona fide third party waste operator customers of the Grantee in respect of that particular type of waste in relation to the Void or;
>
> (b) in the case where such Related Company is charged on a cubic metre basis, the average price per cubic metre charged to the three largest bona fide third party waste operator customers of the Grantee (by cubic metre),
>
> each of said average prices in (a) or (b) above to be calculated for each 6 month period, which average price shall be applied to determine Receipts for the following 6 month period.

If, in any 6 month period, the number of bona fide third party waste operator customers of the Grantee's landfill, either by tonnage, or by cubic metre, is less than three, the average price per ton to be determined hereunder shall be calculated using that lesser number of customers."

57. It sems to me, therefore, that it is appropriate to direct Ballynagran to provide the figures for Receipts and Outgoings within the meaning of the Schedule for each of the years since 2014. I am of the view that this direction should be made for the following reasons.

(i) Firstly, while audited accounts have been provided, it seems to me that at the very least the extraction of the relevant information from these accounts would be difficult and cumbersome and would be likely to be inaccurate and incomplete. That will simply lead to additional costs, protracted engagement between the financial experts, and possibly unnecessarily extended cross-examination at trial.

(ii) Secondly, it is difficult to see how Ballynagran could approach the defence of the proceedings without calculating what its financial liability might be. At least part of that financial liability is determined by what royalty payments should have been made since 2014 and that involves a calculation of Receipts and Outgoings. Thus, the information will have to be compiled in some form by Ballynagran. The proposed direction is therefore not oppressive, burdensome or disproportionate. In any event, it was not claimed by the defendant that it would be oppressive, burdensome or disproportionate to have to provide the information (other than, perhaps, information in relation to the top three third party customers).

(iii) Thirdly, I accept the point made on behalf of Ballynagran that they are not under a contractual duty to provide the information. That is not the basis upon which the direction is to be made.

(iv) Fourthly, it was stated on behalf Ballynagran that it does not have access to the information required to provide details of Receipts and Outgoings within the meaning of the Schedule because it acquired the landfill in 2014. That does not explain why it would not have the information for the period after that. Related to this is the assertion that providing the information "*in the manner suggested would completely ignore the fact that the operation of a landfill has changed significantly since 2012. For example, different waste-streams are now presented by customers than was the case in 2012. There are also variations and additional factors affecting pricing for each different stream of waste. The revenue of any landfill operator is dictated to a large extent by these variable factors. Use of these tables would only*

serve to confuse matters." No explanation of this was given on affidavit but, even dealing with it on its face, it is impossible to see, how, even allowing for a changing business, Ballynagran would not have records by which they can calculate Receipts and Outgoings.

(v) Fifthly, Ballynagran itself, through its solicitor, stated that "*…the issue of quantum of royalty payments owing to your client, should our client be found liable for same, is readily calculable by reference to the formula contained in the Option Agreement. Please confirm whether you would be willing to agree this figure on that basis. With a view to narrowing the issues.*" Thus, Ballynagran itself suggested using the formula in the First Option to calculate quantum. The constituent elements of that formula are necessary in order to do so.

(vi) Finally, one way of approaching this would have been to hold a modular trial in which liability is determined first and then for the Court to deal with quantum. If the Court held that Ballynagran was bound by the obligations in the Option Agreement then they would have been under a contractual obligation to provide Accountants Statements as defined in the Option Agreement. However, neither party suggested such a course, presumably for their own reasons, and I will therefore not impose such an approach on them.

58. The defendant objected to providing details of their largest three customers on the basis, inter alia, that such information is commercially sensitive. This arises because the Schedule provides that the price paid by Related Companies is to be calculated by reference to the prices paid by the top three non-related customers and that the grantee (Greenstar Holdings Ltd) must provide an Accountants Statement giving the full details of (i) the receipts (ii) the outgoings (iii) the net income and (iv) stating the amount to be paid as a Royalty Payment, and in the Accountants Statements that were given prior the transfer of the lands to Ballynagran, extensive details were given, including the name of the customers, the actual tonnes, the actual revenue and the average price per tonne. In my view, to compel Ballynagran to provide details of their three largest customers would be disproportionate. It would fall into the trap flagged by counsel for Ballynagran of proceeding on the basis that Ballynagran is under a contractual duty to provide this information. That, of course, has to be determined in the proceedings. What the Court has to do is balance the rights of all parties and ensure the proper and efficient use of Court resources. It seems to me that what is required at this stage are the figures for Receipts and Outgoings and it is not necessary at this stage that the details of the top customers are provided. I appreciate that to a certain extent that may impede the interrogation of the figures by the plaintiff. However, it is

a balancing exercise. It will allow meaningful engagement between the parties' respective financial experts. If any specific issues arise, then it is open to the parties to apply for further directions.

59. The final issue is the Asset Sale Agreement. Ballynagran has provided a copy of the Agreement but with Schedule Four, which contains the names of employees who transferred from Greenstar Limited to Ballynagran, redacted. It seems from a letter from Ballynagran's solicitors that this was on the basis of it being "*personal data within the meaning of the General Data Protection Regulation*." The plaintiff says that he needs and is entitled to the names of these employees on the basis of paragraphs 33 and 34 of the Amended Statement of Claim. In paragraph 33 of the Amended Statement of Claim (24th May) the plaintiff pleads that the first defendant took an assignment of the obligations under the Option Agreements and is bound by those obligations in equity and contract and is estopped from denying that it is bound by those obligations. A number of particular pleas are also made, including the following ones which were identified by Senior Counsel as relevant to the current discussion:

> "a. The First and Second Defendant knew at all material times and had actual and/or constructive notice of the obligations under the First and Second Option Agreement prior to being named on the transfers.
>
> b. The First and Second Defendant have common Directors, including Chris Bell, with Greenstar Holdings Limited and other group companies which discharged obligations under the Agreements (including the discharge of the royalty payment required by the first Option Agreement) and the Second Defendant.
>
> c. The First and Second Defendant knew prior to the Transfer that the conveyance was subject to the royalty payment and the option to buy back the lands…"

60. It is pleaded in paragraph 34 that:

> "In their dealings with the Plaintiff the First Defendant, Greenstar Holdings Limited and Greenstar Limited acted as a single economic entity and it would be unjust and inequitable to allow the First Defendant to rely now on the doctrine of separate legal personality to defeat the Plaintiffs' claim."

61. This seems to me to be more properly a matter for discovery. However, the defendant did not object to the Court considering it as part of the motion for directions and I have therefore done so. It is appropriate to apply the principles that attach to applications for discovery.

62. I am not satisfied that there is a proper basis in the pleadings to direct the provision of those details. The mere fact that all employees of one company transferred to another is not sufficient to ground a claim that the court should disregard the separate legal personality of those companies. The notion of a single economic entity refers primarily to membership, control and governance. Thus, the individuals who are relevant to the case that is pleaded are the directors of both companies. That information is available to the plaintiffs.

Professional Negligence Proceedings

63. There has also been a very extensive exchange of correspondence between the solicitors for the plaintiff and the solicitors for Matheson. Their positions are stated in an exchange of letters of the 7th November 2023 and the 8th November 2023 by direction of the Court. The outstanding issue between the plaintiff and Matheson (other than the question of the sequencing of the trials) is the sequencing of the exchange of expert reports and interactions between experts. There was also an issue in the correspondence in relation to whether Enviroguide is being engaged to deal with an issue which is properly pleaded, i.e. a claim for loss of royalties into the future. I have not been asked to resolve this.

64. Insofar as directly relevant to the current application, the solicitors for the defendants identify their expert witnesses and submit that the engagements between the parties' respective experts should be sequenced as follows once the pleadings have been closed and discovery exchanged:

> "(a) Our environmental expert will engage with your environmental expert in respect of any site investigations and reports in the normal way.
>
> (b) When the environmental experts have completed their investigation and their reports, our respective financial loss experts can engage in the normal way.
>
> (c) In the period between the completion of the above-mentioned expert reports and the final determination of the Greenstar/Ballynagran proceedings our respective legal experts can engage in relation to the legal issues arising in the proceedings against our clients."

The stated purpose of this sequencing approach is "*…to establish first the alleged quantities to which royalties may apply and, secondly, the alleged financial impact of those alleged quantities*".

65. The plaintiff submits that the engagement of the experts should not be sequenced and that this approach will simply delay matters.

66. It seems to me that the work of the financial experts can only be completed when the environmental experts have engaged and completed their reports. One of the heads of loss claimed by the plaintiff is loss of future royalties. In order to estimate that quantum, the environmental experts will have to reach views or a view on the remaining capacity of the site. Thus, it seems to me that the engagement between the financial experts should take place after the engagement of the environmental experts. It is also important to note that the plaintiff's financial expert will have to await the information which I am directing Ballynagran to provide. The environmental experts can be getting on with their work in the meantime.

67. I see no reason why the engagement between the parties' legal experts should await the engagement between the environmental and financial experts. The latter's expertise is relevant to quantum. The legal experts will be dealing with liability.

Conclusion

68. Thus, I propose to admit the two sets of proceedings into case management and make the following directions:

(i) That the two sets of proceedings be heard by one judge with the Greenstar proceedings being heard first,

(ii) In the Greenstar proceedings:

(a) Inspection by the expert engaged by the plaintiff of the lands to be permitted; and

(b) Ballynagran to provide the plaintiff with the figures for Receipts and Outgoing within the meaning of the Schedule for each of the years since 2014.

(iii) In the professional negligence proceedings:

(a) That engagement between the plaintiff's and the defendants' environmental experts must also take place followed by engagement between the parties' respective financial loss experts;

(b) That engagement must take place between the parties' respective legal experts;

(c) That a stay be placed on the hearing of the professional negligence proceedings pending determination of the Greenstar proceedings.

69. I will provide the parties with an opportunity to agree a schedule to be incorporated into the Order. All parties are represented by solicitors and junior and Senior Counsel. It should be possible to agree this schedule. If it is not, the Court will resolve any disagreement.