

THE HIGH COURT

[2012 No. 11 CAT]

EASTERN CIRCUIT

CO. KILDARE

BETWEEN

THE MINISTER FOR AGRICULTURE AND FOOD

PLAINTIFF

AND

THOMAS JULIAN

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 15th day of March 2013

This is an appeal from an order to the Circuit Court dismissing these proceedings on the basis that the plaintiff's claim herein is statute barred.

The plaintiffs claim herein is for the sum of €35,350.22 which is alleged to be due and owing by the defendant/respondent to the plaintiff/appellant for monies paid the defendant/respondent as aid pursuant to the Rural Environment Protection Scheme (REPS scheme) following application therefore by the defendant and the failure by him to complete his participation in the said scheme for the required period of five years, reimbursement of which monies was demanded by the plaintiff/appellant on or about the 9th August, 2001 and which sum, inclusive of interest, remains unpaid. I will refer in the course of this judgment to the plaintiff as the Minister and the defendant/respondent as the defendant.

The Civil Bill herein issued out the Circuit Court office on the 22nd September, 2006, and was entered in that office on a date between the 20th October, 2006, and the 17th October, 2006. It is not clear what the precise date of entry of the Civil Bill may have been but it is clear from the entry of appearance that the Civil Bill was served on the 10th October, 2006, and the appearance thereto was entered on the 17th October, 2006, and clearly, the Civil Bill must have been entered between those dates.

The appeal before proceeded on the basis that I should consider at the outset the question as to whether or not these proceedings are in fact statute barred.

It is agreed by the parties that the Minister's claim herein is contractual in nature. There is no dispute that the provisions of s. 11(1) of the Statute of Limitations 1957 apply, which provides:-

"(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued

(a) actions founded on simple contract;

(b) actions founded on quasi-contract;

..."

The key issue is therefore to determine the date on which the cause of action accrued. It is the plaintiff's case that the cause of action accrued on the 9th August, 2001, the date of demand referred to in the Civil Bill as contended for in the written submissions of the Minister or possibly as submitted in the oral submissions on behalf of the Minister, the earlier date of the 15th May, 2001. The defendant on the other hand contends that the relevant is the 31st July, 2000 or possibly the 31st August, 2000, being the date on which the breach alleged herein occurred. The explanation for those two dates is explained by reference to the REPS scheme and to the lodgement of documentation making a claim for payment of aid being the 31st July, 2000, in the relevant year or by the 31st August, 2000, in that year to avoid participation in the scheme being terminated. If the defendant herein is correct in his contentions, then the proceedings herein are statute barred. It is immaterial whether the relevant date is the 31st July or the 31st August 2000 as in either case, the Minister's claim would be statute barred if the arguments of the Defendant are correct.

It is necessary to set out some explanation of the REPS scheme in order to understand the background to this case. The REPS scheme was introduced to implement a programme approved under Council Regulation No. 2078/92 of the 30th June, 1992. Its objectives were to:-

"Establish farming practices and controlled methods which reflect the increasing public concern for conservation, landscape protection and wider environmental problems.

Protect wildlife habitats and endangered species of flora and fauna.

Provide quality food in an extensive and environmentally friendly manner."

The REPS scheme provides for measures to be taken by farmers participating in the scheme and those farmers who were admitted to the scheme had to undertake the measures specified by the Minister for a period of five years. The scheme provided for payments to be made to farmers participating in the scheme. It was further provided in the REPS scheme at clause 17(b) as follows:-

"If the applicant fails to abide by the conditions of the scheme or if there is any material change in the circumstances of the applicant which would be in conflict with the terms or the spirit of the scheme all or such portion of aid given or to be given as the Minister may determine shall be reimbursed or withheld. The Minister also reserves the right to off set such amounts against other monies payable by the Department to the applicant in such cases."

The defendant in these proceedings participated in the REPS scheme for a period of some four years. It is not disputed that the defendant put his farm up for auction on the 24th May, 2000, and as a consequence on the sale of the farm, he could not and did not apply for the fifth and final annual REPS payment on the 31st July, 2000, the last date by which he could apply. The Minister in written submissions filed on his behalf pointed out: "there was a somewhat later deadline for the submission by the defendant of the documentation if he merely wished to avoid termination and possible recoupment of scheme monies received by him. This later deadline was the 31st August, 2000". In other words having failed to submit the necessary documentation by the 31st August, 2000, at the latest, the defendant faced the possibility of a claim for reimbursement of monies received by way of aid to the Minister. Thus, the issue for the court is to determine whether or not the cause of action herein accrued on or before the 31st July, 2000/31st August, 2000 as contended for by the defendant or the 9th August, 2001, or possibly the earlier date of the 15th May, 2001, as contended for by the plaintiff.

For completeness, I should add that there was a subsequent REPS scheme (the 1999 REPS scheme) which had different terms, but it is the case of the Minister that the entitlement to seek a reimbursement of monies paid arises by virtue of clause 17(b) of the 1994 REPS scheme.

Submissions and Consideration

Counsel on behalf of both parties in the course of their respective submissions referred to the classic meaning of the phrase "cause of action" as described in the decision in the case of *Read v. Brown* [1888] 22 Q.B.D. 128 where Lord Esher M.R. said at p. 131:-

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The defendant contends that once the necessary documentation was not lodged with the Department by the 31st July, 2000, or at the very latest by the 31st August, 2000, there was a breach of contractual relationship between the parties and that the Minister was then entitled to sue the defendant. The Minister contends that under clause 17(b) there was no immediate requirement to repay the aid provided under the REPS scheme, but rather the Minister had a discretion under the scheme to determine how much of the aid given should be reimbursed. It was argued therefore on behalf of the Minister that until such time as that determination was made, no breach of any obligation to reimburse the Minister had occurred. Accordingly, it was on the basis that the demand for repayment was made on the 9th August, 2001, that it was contended that that was the date on which the determination was made by the Minister although in the course of the submissions it was also suggested that the date of determination could have been between the 15th May, 2001 and the 9th August, 2001. That point was made having regard to letters of those dates and I should refer briefly to those letters. The letter of the 15th May, 2001, from the Department of Agriculture, Food and Rural Development stated:-

"On completion of your fourth year in the scheme you were required to apply for your fifth year payment by the 31st July, 2000, but have not yet made an application to the Department. As more than four months has elapsed since the end of your recording scheme, the Department is not in a position to approve payment in respect of your fifth year in the scheme.

Notwithstanding the above, should you wish to continue in the scheme you must have lodged the application . . . for the year, which is now overdue in your local FDS office by the 31st May, 2001.

. . . failure to make application within the time period specified will lead to your participation in the scheme being terminated and the Department will be required to seek a full refund of payments made to you which amounts to IR£20,135.68."

The extension to the scheme up to the 31st May, 2001, reflected terms included in the 1999 REPS scheme.

I should also refer to the letter of the 9th August, 2001, which stated the following:-

"As you failed to submit your fifth year application within the specified time frame, the Department has no option but to terminate your participation in the scheme. The Department is not in a position to check compliance with the scheme at this late stage, and unfortunately as the EU funds 75% of the scheme, you will appreciate that we have no discretion in this matter.

The position at the moment is that you owe the department IR£20,135.68. Accordingly, a cheque for this amount should be made payable to the Accountant, Department of Agriculture, Food and Rural Development and forwarded to the undersigned within the next ten days.

If payment is not received within the time period specified, interest at the rate of 8% will be charged on the amount owed, in accordance with Commission Regulation (E.C.) No. 746/96."

Essentially the point being made on behalf of the Minister was that that the determination of the minister under clause 17(b) of the 1994 scheme was a necessary condition precedent to the commencement of any proceedings against the defendant.

There was some discussion during the course of the hearing as to whether it was necessary for damage to have occurred at the time of breach. I was referred to the case of *Gibbs v. Gould* [1881] Q.B.D. 296 in that context and I accept that the cause of action accrues as soon as a breach of contract occurs whether or not damage has been suffered at that time. However, that argument does not assist me as to whether or not the exercise of ministerial discretion pursuant to clause 17(b) amounted to a conditional precedent.

I was also referred by counsel on behalf of the defendant to the decision in the House of Lords in the case of *Central Electricity Board v. Halifax Corporation* [1963] 1 A.C. 785. That was a case in which the Electricity Act 1847 provided that the assets of electricity undertakings were transferred to electricity boards and, by virtue of ss. 14(1) and 15(1), property held by a local authority "wholly or mainly in their capacity as authorised undertakers" should "on the vesting date vest by virtue of this act and without further assurance" in the relevant board, save that under s. 14(2)(iii) cash was to vest in the central authority, the predecessors of

the appellants. Before the vesting date, 1st April, 1948, the respondent corporation, who were electricity undertakers, had accumulated £34,500 out of revenues of the undertaking, and on 31st March, 1948, they transferred it from their electricity account to their general rate account at the bank. The appellants claimed that this fund vested in them and on the 3rd January, 1957, the question was referred to the Minister under s. 15(3) of the Act. The Minister refused to consider the question whether the claim was then statute barred, and on the 18th September, 1958, held that the sum was held by the respondents wholly or mainly as electricity undertakers. Ultimately the House of Lords held that the period of limitation began to run from the vesting date when the cause of action accrued and the decision of the Minister created no new right of action. If the action had been begun within six years of the vesting date, the proceedings could have been stayed to await his decision. It was therefore held that the action was statute barred.

Lord Reid in the course of his opinion at p. 800 commented:-

"I do not think that the giving of a decision by the Minister was a condition precedent. Let me contrast this case with a case such as that dealt with in this House in the *Board of Trade v. Cayzer, Irvine & Co. Ltd.* [1927] A.C. 610. There it was held that the form of the arbitration clause was such that there was no cause of action until an award was made. The reason clearly appears from the speech of Viscount Dunedin [1927] A.C. 610 at 616: "If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the government, except the liability which sprang from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the government any liability unless there has been found to be such a liability by the award of an arbitrator". Then he quotes well known passages from *Scott v. Avery and Caledonian Insurance Co. v. Gilmour* which make it clear that there cannot be a cause of action until a liability exists and that in such cases the effect of the award was not to declare that a liability had existed but to create for the first time a right and a liability which only came into existence at the date of the award.

In the present case that was not the effect of the Minister's decision. No new right or liability came into existence at its date. It is quite clear, and it is now admitted by the appellants, that the effect of the Minister's decision was merely to prove that this sum had belonged to the appellants ever since the vesting date. It created no new right of property or chose in action: it merely enabled a pre-existing right to be enforced."

I would also refer briefly to the opinion of Lord Hodson at p. 804 where he stated:-

"The respondents aptly illustrated their argument by comparison with the case of an executor who derives his title to sue because the property vests in him by the will of the testator. He has a cause of action to get in the property although he cannot get judgment until he has obtained probate and thus made good his title; compare *Chetty v. Chetty*. This is a procedural requirement and is a useful illustration of a case where time begins to run under the Statute of Limitation from a moment when the plaintiff cannot prove all that he has to prove to obtain judgment. Other illustrations are to be found in cases like *Haylock v. Sparke*, which shows that a cause of action for false imprisonment arises when the act complained of happens although the action itself cannot be brought until after the conviction is quashed. The reference to the Minister does no more than show the method by which in this case a procedural requirement is fulfilled."

Having referred to that decision, the point made on behalf of the defendant is that the discretion of the Minister under clause 17(b) is a form of procedural discretion in determining the amount of monies to be paid not the right of action for payment of the monies.

Decision

This is a case in which the relevant facts were that the defendant had participated in the REPS scheme; he was required under the terms of the scheme to do so for five years; he terminated his participation in the scheme following the sale of his farm. As a result, he was liable under the terms of Clause 17(b) to reimburse the Minister to the extent of the money paid to him. What else was necessary before a cause of action could be said to have accrued? The only other step relied on by the Minister was determination by the Minister to sue and in what amount.

The words of Lord Reid in the case of *Central Electricity Board v. Halifax Corporation* seem to me to be particularly apposite. The Minister's decision to sue the defendant for the repayment of the sums paid to him under the REPS scheme did not create any new right or liability as of the date of determination to sue. It merely enabled a pre-existing right to be enforced. I have therefore come to the conclusion that the determination of the Minister to pursue its claim for the sum of IR£35,350.22 was not a condition precedent to the commencement of proceedings. It was, in my view, no more than a procedural requirement. In the circumstances, I am satisfied that the cause of action herein accrued on the 31st August, 2000, at the very latest and that these proceedings are consequently statute barred.