

THE HIGH COURT

2009 2068 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 (1) OF THE COURTS
(SUPPLEMENTAL PROVISIONS)

ACT 1961

BETWEEN

MONICA MULLER

APPLICANT

AND

SHELL E&P IRELAND LIMITED

RESPONDENT

JUDGMENT of Kearns P delivered on the 18th day of June, 2010

This is an appeal by way of case stated from the decision of the District Court made on the 4th September, 2009 in which that Court found that the respondent's entry onto certain lands at Rosspoint and Muingnabo Commonages was contrary to a Court Order made on the 14th November, 2007 and constituted contempt of court. At the sitting in November, 2007 the Court made an Order for prohibition pursuant to s. 26(4) of the Gas Act, 1976 prohibiting the respondent from entering onto the commonage lands either to carry out site investigations or otherwise until such time as the provisions of the Gas Act, 1976 had been complied with. The respondent has sought to appeal the finding of the Court in respect of its decision of the 4th September, 2009 by way of case stated in an application for an appeal by way of case stated dated 15th September, 2009.

It is common case that the respondent purchased a 1/62nd share in the commonage lands on 26th May, 2008 and thereafter it entered onto the commonage lands and carried out observations and surveys on those lands.

On 6th March 2009, the applicant brought an application seeking the attachment and committal of the respondent and a number of its consultants and contractors for breaching the Order of the District Court. On 4th September, 2009, District Judge Devins made the following findings:-

"(a) As I found the act of ingress on the lands constituted contempt I did not consider it necessary to consider whether or not acquisition of the commonage rights allowed the respondent to carry out works on the lands. I further held that the actions of ingress on the commonage lands have been proved beyond reasonable doubt and were in contempt of my Order of the 14th day of November, 2007;

(b) My Order of the 14th day of November, 2007 was specific in its terms. It prohibited entry by the respondent until the provisions of the Gas Act, 1976 (as amended) had been complied with. It did not provide for any other means of complying with the Order. The respondent ignored the Order and was guilty of civil contempt. If the respondent considered that acquisition of the commonage rights rendered the Order moot then an application to vacate the Order should have been made.

(C) The purchase of the share in the commonage lands by the respondent rendered my Order of the 14th day of November, 2007 moot. I indicated that the respondent should make an application to vacate the District Court Order as soon as practicable and that I would consider any such application favourably."

The learned judge has now sought the opinion of the High Court in relation to the following questions:-

"(a) Can an Order of the District Court made pursuant to s. 26(4) of the Gas Act, 1976 (as amended) which prohibited entry onto certain lands for the purpose of carrying out investigations or otherwise until such time as the provisions of such section have been complied with operate to prohibit the person against whom the said Order was made when entering onto lands, the subject matter of the Order after that person has acquired co-ownership of those lands

(b) Was it open to the Court to hold that the Order made on the 14th day of November, 2007 absolutely prohibited any entry whatsoever on to the commonage lands by the respondent and thus hold that any such entry amounted to contempt?"

STATUTORY PROVISIONS

Section 26 of the Gas Act, 1976 provides as follows:-

"(1) Any officer of the Board or any other person appointed in writing by the Board to be an authorised officer for the purposes of this section (which person is subsequently in this section referred to as an "authorised person") may at any reasonable time enter on any land for any one or more of the following purposes, namely;

(a) for inspecting and surveying the land and making thereon any inquiry, investigation or examination for the

purpose of ascertaining whether or not the land, or a right over the land, is suitable for acquisition by the Board for a purpose of this Act,

(b) for carrying out thereon any investigation or examination preliminary or incidental to the acquisition by the Board of the land or any right over the land.

(2) An authorised person entering on land under this section may do thereon all things ancillary to or reasonably necessary for the purpose for which the entry is made, and without prejudice to the foregoing he may in particular do, or cause to be done, any of the following, namely, line sight, drill, bore, probe or excavate, or carry out soil tests and, if necessary, remove soil.

(3) Before an authorised person enters under subsection (1) of this section on any land, he shall either obtain the consent, in the case of occupied land, of the occupier, or, in the case of unoccupied land, of the owner, or shall give to the owner or occupier, as the case may be, not less than fourteen days' notice in writing of his intention to make the entry.

(4) A person to whom a notice of intention to enter on land has been given under this section by an authorised person may, not later than fourteen days after the giving of such notice, apply, on notice to such authorised person, to the Justice of the District Court having jurisdiction in the district court district in which the land is situate for an order prohibiting the entry, and, upon the hearing of the application, the Justice may, if he so thinks proper, either wholly prohibit the entry or specify conditions to be observed by the authorised person making the entry.

(5) Where a Justice of the District Court prohibits under this section a proposed entry on land, it shall not be lawful for any person to enter under subsection (1) of this section on the land, and where a Justice of the District Court specifies under this section conditions to be observed by persons entering on land, every person who enters land under the said subsection (1) shall observe the conditions so specified."

By virtue of s. 20 of the Gas (Amendment) Act, 2000 the application of s. 26 of the Act of 1976 was extended to "relevant persons" as defined in the Act of 2000 and the respondents thereby come within the provisions of s. 26 of the Gas Act, 1976 in the same manner as any officer of the Board or any other person appointed in writing by the Board to be an authorised person.

In October, 2007 the respondent served notice under s. 26 of the Gas Act, 1976 (as amended) on ascertained or potential owners of licensees of certain commonage lands at Rossport, Ballina, County Mayo of its intention to enter on the commonage lands pursuant to the provisions of s. 26 to carry out site investigations.

An application pursuant to s. 26 (4) was brought by the applicant, whose is the owner of a share in the said commonage lands, for an Order prohibiting the entry of the respondent on to the commonage lands either to carry out site investigations or otherwise.

That application was heard by District Judge Mary Devins on 14th November, 2007 and she made an Order in the following terms:-

"Whereas on the 14th day of November, 2007 at the sitting of the District Court held in Belmullet in the said District before Mary C. Devins, the Judge for the time being assigned to the said District an application was made to the Judge pursuant to the provisions of Section 26(4) of the Gas Act, 1976 (as amended) by Monica Muller, of Rossport South, Ballina, County Mayo (being a person who is the Occupier and/or Owner of a share in the Commonage Lands at Rossport and Muingnabo Commonages) for an Order prohibiting entry on to such lands by the Respondent, its servants and/or Agents wither to carry out site investigations or otherwise:

It was adjudged as follows:

An Order for prohibition was granted until such time as the provisions of the Gas Act, 1976 have been complied with."

As already noted, the respondent thereafter purchased a share in the commonage lands in the month of May, 2008 and thereafter entered on to the said lands and carried out observations and surveys on those lands. This in turn prompted the bringing of an application by the applicant in March, 2009 seeking the attachment and committal of the respondent and a number of its consultants and contractors for breaching the said Order.

DISCUSSION AND SUBMISSIONS

It is common case between the parties that, following its acquisition of a share in the ownership of the commonage lands, the respondent was thereafter free to enter upon the lands in question. It was also common case between the parties that the District Court only had jurisdiction to make an Order of the sort under specific statutory powers but not otherwise. The statutory powers in the instant case are those contained in s. 26 of the Act of 1976. As is conceded by the applicant in her written submissions:-

"It is pursuant to that Act that the Order prohibiting entry was made and the order does not prohibit entry for other purposes. The Order made was an Order arising from and related to the Respondent's powers granted under the 1976 Act. It was made in accordance with the statutory provisions which expressly allows for the purposes of that Act to prohibit entry onto the lands for all the purposes set out in the Act. The Order did not, on its face, prohibit entry absolutely as is set out in Section 5(b) (i.e. the second questions raised in the case stated) and indeed on its face only did so until such time as the provisions of that Act were complied with. It was open to the Respondent to make an application and comply with the provisions of the Gas Act and seek from the Court an Order authorising entry, but no such application in accordance with the Act was subsequently ever made."

In fact an Order vacating the Order made on the 14th November, 2007 was made by Judge Devins in the District Court on the 14th October, 2009. Given that the District Judge herself took the view that the purchase by the respondent of their share in the commonage lands rendered her Order of the 14th November, 2007 moot, it undeniably creates a certain sense of artificiality about these entire proceedings.

On behalf of the applicant, however, Mr. John Rogers S.C. submitted that this Court had a clear duty to uphold the solemnity of a Court Order made in the District Court the terms of which were clear on its face. That Order provided that no entry could be made on

to the lands identified in that Order until such time as the requirements of the Gas Act had been complied with. No party had sought to appeal that Order to the Circuit Court, nor did the respondent seek an order of certiorari to quash the decision of the Court, nor did they, as it had in the instant case, sought to appeal the matter by way of case stated. Mr. Rogers submitted that in effect the respondent was seeking to mount a collateral challenge to the Court's Order some two years later and should not be allowed to do so.

He submitted that the right to acquire land and the right to interfere with land is a right that has been held to be permissible notwithstanding the provisions of Article 40.3 and Article 43 of the Constitution, but such interference must be exercised in accordance with law and must be construed in the light of the constitutional protection afforded to an owner. Section 26 of the Act of 1976 conferred certain rights on owners in that regard. A respondent who sought to enter upon lands in defiance of the owner's wishes must show that the entrance is in accordance with law. The applicant having opposed such entry, the respondent could enter only pursuant to an Order of the Court made under the jurisdiction granted in s. 26 of the Gas Act, 1976. Not only was no such Order made authorising entry, but there was an Order made prohibiting entry. Mr. Rogers submitted that the respondent had entered on to the lands for purposes specifically identified within the provisions of s. 26 (4) of the Gas Act. He placed particular reliance on that portion of the case stated wherein District Judge Devins stated:-

"Subsequent to the purchase by the Respondent of a share in the Commonage Lands, servants or agents of the Respondent entered thereon and evidence in this regard was given to the Court on the 26th day of June 2009. On entering the Commonage Lands, as adduced in evidence, Representatives of the Respondent carried out surveys on the said Lands; including walking on the said Lands, carrying out observations of the flora and fauna thereon; and determining by means of test the peat depth and type."

These were actions consistent with the purposes identified by s. 26 of the Act of 1976 which had been specifically prohibited by the Order of the District Court made on the 14th day of November, 2007. Quite apart from the provisions of the Act of 1976, the respondents had no authority, without the consent of all co-owners, to undertake any kind of works on the site in question.

In response Mr. Denis McDonald S.C. submitted that the respondents did not enter upon the said lands purporting to rely on powers provided for under s. 26 of the Act of 1976. They had entered on to the lands in reliance on their rights of part ownership. These rights could not be abrogated by any Order of the District Court. This contention was reinforced, he submitted, by a consideration of the provisions of s. 26. Section 26 subsection 4 states that a Judge can *"either wholly prohibit the entry or specify conditions to be observed by the authorised person making the entry"* (emphasis added) – that entry was and could only be an entry under s. 26 of the Gas Act and nothing else. The provisions of s. 26 refer repeatedly to an entry *"under subsection (1)"* and specifically provide that *"where a justice of the District Court prohibits under this section a proposed entry on land, it shall not be lawful for any person to enter under subsection (1) of this section on the land"* and further provides that where a person who enters land *"under the said subsection (1)"* shall observe any conditions specified.

There was no evidence to sustain any suggestion that the respondents had carried out works of drilling, boring, probing or excavation and the case stated contained no such findings. Furthermore, the questions posed by the learned District Judge were strictly confined to questions relating to "entry" on to the said lands only. In fact she specifically ruled out any consideration of whether or not the acquisition of commonage rights allowed the respondent to carry out works on the lands.

Mr. McDonald submitted that it must be presumed that the learned District Judge did not intend to act ultra vires by making an order which had the effect of prohibiting any entry by the respondent on the commonage lands and, to the extent that there was any ambiguity in her Order in this regard, the Order had to be interpreted as prohibiting the specific proposed entry to which the application related only. He submitted that it was clear that a certain inconsistency arose in the approach of the learned District Judge in that she took the view herself that her Order had been rendered moot by the purchase by the respondent of a share in the lands.

Mr. McDonald further submitted that the decision of McKechnie J. in *Competition Authority v. Licensed Vintners Association* [2010] 1 I.L.R.M. 374 made it clear that in Order for the learned Judge to make a finding that the respondent was guilty of civil contempt by reason of any breach of her Order of 14th November, 2007, she had to be satisfied beyond reasonable doubt not just that the respondent had entered on to the commonage lands after she had made that Order but that such entry was a breach of her Order.

DECISION

I am quite satisfied that the answer to both questions posed by the learned District Court Judge should be answered in the negative.

It is perhaps easier to deal with the second question first. Both sides are agreed that the Order made on the 14th November, 2007 did not absolutely prohibit any entry whatsoever on to the commonage lands by the respondent so it seems clear that that question requires no further consideration in this judgment.

In relation to the first question, I am quite satisfied that the Order made by the Learned District Judge pursuant to s. 26(4) of the Gas Act, 1976 (as amended) was not one which could prohibit entry by the respondent on to the said lands after the respondent had acquired its co-ownership interest in those lands.

This is not a case where the evidence before the Court indicated that the respondents carried out works of the sort prohibited by the Order. There is a complete dearth of evidence to that effect and I do not accept that the passage in the case stated which appears at para. 3(i) of the Case Stated supports the far-ranging interpretation suggested by Mr. Rogers. At best, the portions relied upon by Mr. Rogers suggests that something other than "walking" or "observation" may have taken place but I am satisfied no other definitive findings emerged from a consideration of the case stated. It might have been a quite different proposition had there been evidence of excavations or pipe laying activities or clear findings of fact to that or similar effect. Thus, to the extent that the evidence and findings are unclear, it seems to me that, having regard to the penal nature of the contempt remedy, the Court would have to have been satisfied beyond reasonable doubt both on the facts and the law before finding that a breach of its Order had been committed.

In the case of *Competition Authority v. Licensed Vintners Association*, the plaintiff contended that a joint press release issued by the respondent breached the terms of its undertaking given by it as part of the settlement of earlier proceedings and that the respondent was thereby guilty of contempt. It was common case that the standard of proof to be applied by the Court on the application for enforcement of the undertaking was proof beyond a reasonable doubt but there was disagreement as to whether the standard applied to proof of the facts only or whether the Court had to be satisfied beyond reasonable doubt, both on the facts and the law, that a breach of the Order had been committed.

McKechnie J. reviewed the relevant authorities referring with approval to the decision of Keane J. in *National Irish Bank v. Graham*

[1994] 1 I.R. 215 who considered the leading English authority of *Re Bramblevale Limited* [1970] Ch 128 and stated:-

"It is clear that before the court takes the serious step of depriving a person of his or her liberty for failure to comply with an order of the court, it must be satisfied beyond reasonable doubt that he or she has in fact committed the alleged contempt."

McKechnie J. declined to follow the English decision of *Chelsea Man plc. v. Chelsea Girl Limited* [1988] F.S.R. 217 which suggested that the standard of proof of beyond a reasonable doubt applied only to findings of fact, noting that this decision had been criticised in *Arlidge Eady & Smith On Contempt* (3rd ed., 2005) para. 12-53.

The Learned Judge stated his conclusions on this issue as follows:-

"26. With regards to the standard of proof, it is not suggested that the appropriate principles should differ simply because of the competition context in which the application arises. Therefore the ordinary rules should apply. That being so, I respectfully agree with the position adopted by Keane J., as he then was, in National Irish Bank Ltd v Graham [1994] 1 I.R. 215. There is little doubt in my mind that in proceedings of a criminal or quasi-criminal nature the standard must be that of beyond reasonable doubt. Contempt, either civil or criminal, is a misdemeanour, and on a committal application, a person can be deprived of his liberty, in some situations for as long as it takes to achieve compliance. The imposition of a fine is an option as well as the forcible taking of possessions. In serious cases substantial penalties are available. Therefore it is of no surprise that the courts view such matters with concern and insist upon the safeguard of the higher standard being met."

27. The overwhelming preponderance of case law is to this effect: Re Bramblevale Ltd is a clear-cut example espousing the higher standard: National Irish Bank Ltd is a clear-cut example of the application of this standard in practice; Keane J., as he then was, despite very strong circumstantial evidence of a breach, refused to attach as the required matters had not been established beyond a reasonable doubt. The only contrary view of note is Millett J.'s decision in Chelsea Man plc, where the standard of "degree and impression" is suggested. If that view cannot be explained by reference to its own facts, and if the citation of Bramblevale and Dean to the court would have made no difference, then respectfully I would have to prefer the alternative view. I believe that the criticism offered of that decision by Arlidge, Eady & Smith is sound and accords with established practice. Moreover, I have to say that even if this area had not been touched by authority, I would have come to the same conclusion on first principles."

28. I therefore reject the arguments of counsel for the Authority that this court can sever issues of fact and law in the way suggested; so that a lower standard of proof applies to the latter as opposed to the former. The entirety of the claim as alleged must be proven beyond reasonable doubt."

It necessarily follows from the application of the standard of proof beyond a reasonable doubt to an allegation of civil contempt that, if a reasonable doubt arises as to the scope or proper interpretation of an Order, this must be resolved in favour of the person who is alleged to have breached the Order. As explained by Jenkins J. in *Redwing Limited v. Redwing Forest Products Limited* [1947] 64 R.P.C. 67:

"A Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."

That passage was quoted with approval by McKechnie J. in the *Licensed Vintners Association* case who held that the process of considering the construction of the undertaking at issue had to be carried out "with any benefit of the doubt accruing to the defendants" which meant that "if there are two interpretations reasonably open then that most favourable to the defendants should be applied".

It is clear beyond doubt that the District Judge in this case was herself to a certain degree uncertain as to the lie of the land when expressing the view that her own Order had been rendered moot by the purchase by the respondent of a share in the commonage lands. It is clear that she did not intend by her Order to prohibit entry on to the lands in all circumstances.

It is notable that the Learned District Judge did not make any finding that she was satisfied beyond a reasonable doubt that the respondent had breached her Order and committed contempt. She merely found that the entry of the respondent on to the commonage lands had been proved beyond a reasonable doubt. She made no finding that the respondents had executed works or had entered upon the lands for purposes which were in specific breach of the terms of her Order, or certainly she did not do so in terms which make the matter clear beyond reasonable doubt.

Thus I am satisfied, both as regards the facts and the law, that the matter was not brought home to the requisite legal standard such as would justify a finding by the District Judge that the respondent was guilty of civil contempt.

I am therefore satisfied that the first question raised in the case stated should also be answered in the negative.