

THE HIGH COURT

Record Number: 2012 No. 371 JR

Between:

Michael Duffy

Applicant

And

Clare County Council, Limerick County Council, the Environmental Protection Agency and The Minister for the Environment,
Community and Local Government

Respondents

Judgment of Mr Justice Michael Peart delivered on the 8th day of February 2012:

On this application the applicant seeks leave to seek reliefs by way of judicial review. When he first moved his application I decided that it would be helpful to the Court to have the application made on notice to the proposed respondents, and in due course that occurred. Even though the application has been made therefore on notice, the threshold of arguable grounds nevertheless is the appropriate threshold for the granting of leave. I have been assisted greatly by the parties' submissions, both written and oral. I have considered carefully the applicant's submissions which he made in a very capable and clear fashion despite having no legal representation.

The applicant has resided with his family in Kilfenora, County Clare since 1993 when he built a house there. He resides about 7 miles from Liscannor, and about 15 miles from the small village of Quilty. He is a Chartered Civil Engineer by profession with a specialist knowledge in relation to wastewater treatment.

In relation to his own domestic water supply to his house he was required to sink a well for his water supply because of over capacity in his area. However, he found the well water to be polluted almost immediately, and following tests being conducted he was instructed not to use that water supply, and was given what at the time was to be a temporary connection to the municipal water supply. In fact it has remained in situ ever since. At that time the applicant suspected that the pollution was not simply emanating from farm pollution, and so it turned out. It has transpired that there are significant problems in the general area with regard to waste water treatment, and this is not really contradicted by Clare County Council. What is contradicted is that they are not doing anything about it and/or that they are in breach of any regulations. Quite apart from the fact that the Clare County Council is submitting that in fact there are no arguable grounds at all for the reliefs which the applicant seeks in these proceedings, it submits that in any event the applicant is either out of time for the present application, has no *locus standi* to seek the reliefs, or is simply not as a matter of law entitled to the reliefs which he is seeking.

To put it at its mildest, the applicant has concerns about the manner of wastewater disposal in County Clare but in particular at Kilfenora, Liscannor and Quilty. He has discovered for example that the Council had allowed a housing development at Liscannor with a private wastewater treatment system was permitted to be illegally connected to an already overloaded municipal works. He says that this required a discharge to sewer licence but that the Council does not have one. He also believes that there was a preferable solution available at the time which was not availed of.

In addition, he and his teenage daughter enjoy swimming and snorkelling in water adjacent to Liscannor Harbour. But since becoming aware that untreated sewage is discharging into that water he and his daughter no longer swim there in the interests of their health.

He was aware that under S.I. 684/2007 Clare County Council was required to make application to the Environment Protection Agency ("EPA") for discharge licences or certificates for all municipal wastewater works within its administrative area. He became aware in mid-January 2012 that a waste water discharge licence had been granted to Clare County Council by the EPA for the agglomeration of Liscannor. He was aware of issues relating to water discharge in that area and was of the view that they were such that no licence could be properly granted for Liscannor and some other areas.

Having discovered that a licence had been granted for Liscannor he set about investigating matters. In due course he made contact with staff at the EPA and brought his concerns to their attention and suggested that the EPA review the issue of the licence. He suggested that alternatively since in his view the Council was in breach of many conditions of the licence the EPA could revoke the licence. He apparently indicated that he wanted to give the EPA an opportunity of dealing with his concerns if they wished before he might take the matter elsewhere. He has stated also that the Council has admitted that it cannot comply with the conditions under which the licence was granted.

In relation to Kilfenora he states that the plant there cannot be licensed because it discharges directly to ground water. He has made submissions about this but to no avail apparently.

Limerick County Council is the co-ordinating body for the areas at play in these proceedings for the purposes of the Water Framework Directive 2000/60EC, and under s. 17 of S.I. 272/2009 – European Communities Environmental Objectives (Surface Waters) Regulations 2009 – it has, along with the Minister for the Environment and the EPA, power to prosecute an offence under these Regulations.

The applicant has discovered that Clare County Council does not have foreshore licences required under s. 13 (1) of the Foreshore Act 1933 for most of the discharges to coastal or tidal waters in its administrative area. The applicant states that all discharges to coastal or tidal waters passing through the foreshore require such licences under the Foreshore Act, 1933, and that these are quite separate from discharge licences.

In relation to the village of Quilty, there is a new Waste Water Treatment Plant which has been commissioned about five years ago. The applicant says that he received a reply from Clare County Council which indicated that a foreshore licence has been granted for

this plant. However, he has made inquiries with the Department of the Environment which issues the licence, and it appears that the Department could not confirm that such a licence was granted. The applicant has also attended at the Council's offices in June 2012 to inspect the public file in the matter. On that occasion he was informed that a foreshore licence had been applied for. He believes therefore that the plant operating at Quilty is therefore an unlawful plant in the absence of such a licence. He apparently also made enquiries of the EPA about this waste water treatment plant, and that body had at the time of that inquiry not even received notification of its existence. They were unaware of it.

Those are the grounds as set forth in the Statement of Grounds and first grounding affidavit on which the applicant seeks the reliefs as set forth therein. He has filed other affidavits, and after I directed that his leave application be brought on notice to the various respondents, those parties have filed affidavits in reply and the applicant has responded to those also.

The reliefs which the applicant seeks are as follows:

As against Clare County Council:

Six orders of Mandamus are sought against **Clare County Council**:

1. To disconnect an (allegedly) illegal connection of waste water arising from a private housing estate of approximately 50 houses to Municipal Wastewater Works of the **Liscannor** agglomeration.
2. To cease the discharging untreated municipal wastewater from the agglomeration of **Liscannor** into Liscannor Bay.
3. To require Clare County Council to consider existing alternative solutions to actually treat wastewater arising from the agglomeration of **Liscannor**.
4. To cease the illegal unlicensed discharge of partially treated municipal wastewater directly to groundwater from the agglomeration of **Kilfenora**.
5. To cease discharges to coastal and tidal waters by way of infrastructure requiring the benefit of a foreshore licence as prescribed by the Foreshore Act, 1933 and which do not benefit from such a licence.
6. To cease discharging effluent from its wastewater plant in **Quilty**, County Clare which is (allegedly) operating unknown to the Environment Protection Agency and without a discharge licence as prescribed by the Waste Water Discharge (Authorization) Regulations 2007 - S.I. No. 684/2007.
7. A declaration that the applicant's constitutional right to swim in unpolluted water is infringed by Clare County Council by its causing and facilitating the pollution of bathing waters adjacent to Liscannor Harbour in Liscannor Bay.

Reliefs (1),(2) and (3), relate to problems which the applicant alleges exist and which emanate from the agglomeration at Liscannor.

As for (1) above, Clare County Council has stated in an affidavit by Mr Ward that it permitted a connection from the agglomeration at Liscannor to the municipal sewage system in circumstances where the only alternative was to permit untreated sewage to flow down the main street of Liscannor. It appears from that affidavit also that while central government funding in order to upgrade the sewage system in the town had been expected to be provided, that has not come to pass in the present dire state of the country's economy, and that the upgrade therefore cannot occur until such funding is provided. The permission to connect into the public system was given in August 2009, and it was given in the interests of public health. It appears also that the Council initiated a prosecution against the company in question, but the financial circumstances of that company were such that the Council felt that the only viable solution was to permit the connection into the municipal system. Mr Ward disputes that any licence was required in this regard under Section 16 of the Local Government (Water Pollution) Act 1977 as the effluent in question is of a domestic nature.

In so far as the applicant seeks an order of Mandamus requiring that connection to be disconnected, the applicant is clearly out of time by a long way given that it was authorised in August 2009. In any event, I am not satisfied that this Court could possibly interfere with the bona fide exercise of a discretion by the Council as to how to manage the crisis that presented itself and which was solved by the permitted connection into the municipal system. The Council clearly want to manage the problem better by an upgrade of the system, but the fact is that public funding has not been made available in the current climate despite earlier indications that it might be. The Court has no power to direct how public resources should be allocated by the Executive.

I am satisfied firstly that the applicant is out of time to seek any relief under this heading, and that in any event it is not arguable that the Court should grant such an order as sought.

As for (2) above, the evidence provided by the Council is that the EPA granted it a licence in October 2011 which permits it to discharge into Liscannor Bay>there are procedures to be adhered to by an applicant such as the Council for such a licence from the EPA, and the Council went through the procedure provided for in the Waste Water Discharge (Authorisation) Regulations 2007. This involved public notices and the availability of the application documents for public inspection and the ability of concerned persons to make submissions, it appears that no submissions were received from the applicant, according to the affidavit of Mr Ward for the Council. The point is made nonetheless that the applicant is in any event considerably out of time for seeking reliefs in relation to what the Council does on foot of the licence granted by the EPA, it having been in existence since 20th October 2011.

The Council acknowledges through Mr Ward's affidavit that "certain elements of the licence do not accurately recognise the situation on the ground". That seems to be a euphemism for saying that the conditions of the licence are not being complied with. However his affidavit sets out that the Council have been in communication with the EPA about these matters preliminary to a review by the EPA. The parties have met and have been in correspondence and a report was requested. I mention these matters as they are mentioned by Mr Ward as indicating the efforts which are ongoing between the Council and the EPA regarding a matter which clearly is of concern locally and not just to the applicant. The applicant has sworn other affidavits in which he takes issue with a lot of what is stated by Mr Ward. I am not overlooking that fact.

But the fact of the matter is that one way or another the applicant is considerably out of time for seeking any relief in relation to ceasing the discharge of untreated municipal wastewater from the agglomeration of Liscannor into Liscannor Bay. I must reject his application for relief under this heading for that reason alone. I see no basis for extending the time for bringing this application after so long.

As for (3) it is not arguable that this Court can direct Clare County Council as to the manner in which it carries out its statutory

function in this regard. The Council has powers, but has a discretion as to how it addresses problems of any particular kind and as to what solutions it permits. In this case, there is a dysfunctional private wastewater treatment plant at Liscannor. According to the applicant the plant soon fell into disrepair, but the developer had gone away at that stage and it could not be repaired. It fell to the Council to provide a solution. That solution was to permit a sewer connection from the 50 houses in question, and some industrial units, to the main public sewer. This apparently occurred in 2010 according to the applicant. One of the points which the applicant makes is that because there is a connection into the municipal sewer from some industrial units, a discharge to sewer licence is required. He says that there is no such licence in existence. James Connolly SC for Clare county Council has submitted that the applicant has never made any demand of the Council to consider any particular alternative solutions, but in any event that the applicant is considerably out of time for making any such complaint since he has known that this connection was permitted as far back as late 2010. That in fact does not appear to be in dispute between the parties. The applicant has been aware of these matters since that date. He is therefore hopelessly out of time to seek these reliefs. He has explained delay on the basis that he is a personal litigant and it has taken him a great deal of time to conduct inquiries and research into what has happened and that he moved his application as soon as it was reasonably possible for him to do so.

In that regard, the Court must of course consider the position of a personal litigant who does not have the benefit of solicitor and Counsel to help him to formulate his claim and prepare the necessary documentation. But there must be some limit to that tolerance, as otherwise it has the effect of providing different rules to different litigants depending on whether or not they have legal representation. That is not permissible. Mr Connolly's submission in this regard is correct and the applicant must be deemed to be out of time and with no justification shown for an extension of time in that regard. But even if time was not an issue, it would require exceptional circumstances of neglect and failure on the part of the Council before this Court could consider interfering with the Council's decision-making in relation to the solution that appears to have been the only viable solution at the time. It obtained a licence from the EPA. It has acted responsibly, and even though there are still issues arising between the Council and the EPA these are being addressed, even if not entirely to the applicant's satisfaction. I do not believe that it is arguable that the applicant, time issue apart, as a private citizen, could seek the sort of relief he is seeking under this heading.

As for (4) above in which the applicant seeks an order to cease the illegal unlicensed discharge of partially treated municipal wastewater directly to groundwater from the agglomeration of **Kilfenora**, the applicant submits that the Council was obliged to have a licence for such discharges by the 20th June 2011 pursuant to the Waste Water Discharge (Authorisation) Regulations, 2007. The applicant states that no such licence yet exists, and that in these circumstances seeks leave to seek an order requiring that such discharges cease. Mr Ward's affidavit has disclosed that the Council in fact applied to the EPA for such a licence and has exhibited correspondence in that regard. It appears that various issues have been raised by the EPA which stand in the way of such a licence issuing. Further information has been requested. But these issues are being addressed albeit that it is taking time. The Council has for some years been concerned about the discharges to groundwater at Kilfenora. It had been hoped that central funding would be made available for an upgraded sewage scheme for the village of Kilfenora, but that particular scheme has been omitted from the Minister's 2010-2012 Water Services Investment Programme, despite representations. The Council is continuing to pursue adequate solutions to this difficulty of discharging directly into groundwater. It has an identified limited amount of funding to pursue a solution, and Mr Ward's affidavit states that the EPA's support and advice has been sought in relation to this.

However, as far as the reliefs which the applicant seeks in this regard, the Council submits that since the Regulations came into existence on the 27th January 2010, and in such circumstances, it is submitted that the applicant has had since that date to bring an application such as the present one, and that there is no sufficient reason to grant any extension of time for commencing his application.

I agree that the applicant is out of time to apply for this relief and that there is no basis for extending the period. However, having considered the matters deposed to by both sides I am satisfied that there is no arguable basis on which this Court could make an order of mandamus requiring the Council to cease this discharge. It is clear that the EPA is involved in the process. It has power to grant a licence, and the application for such a licence is ongoing and is being attended to. It also has powers of enforcement which it can exercise. It has a discretion in that respect and it would not be appropriate to interfere with the exercise of that discretion. It would be clearly impermissible to make an order of Mandamus against the Council to cease the discharges in question at this point in such circumstances.

As for (5) above, the applicant submits that quite separate from any required discharge licence in respect of discharges into coastal waters, the applicant submits that the Council also require a Foreshore Licence under the Foreshore Act, 1933. He has stated in his Statement of Grounds that he has made inquiry of the Council about whether it has a foreshore licences for its discharges, and that it was confirmed to him that there were no such licences for most of its discharges, including Liscannor. However, in his second affidavit, Mr Ward on behalf of the Council and having made inquiries of the Council's staff has confirmed that in fact the Council does have a foreshore licence in respect of Liscannor since 1st March 1972, and he has exhibited a copy of that document. There is also a foreshore licence in existence for Quilty since 25th August 2006, and a copy of that document has been exhibited. These licences may be terminated by the Minister in the event of any breach of any conditions of the licence granted. In such circumstances, regardless of any time arguments or arguments as to the standing of the applicant, there is no arguable basis for granting leave to seek any relief under this heading.

As for (6) above, I am satisfied that the applicant has no locus standi to seek relief in relation to the area of Quilty. He live 15 miles from that village and cannot claim any personal interest in the relief he is seeking and cannot show that he is especially affected by anything about which he complains in that location. I appreciate that he is a conscientious and concerned citizen and that he pursues these matters out of a bona fide concern for the public interest, but the fact is that he does not have standing in relation to this complaint, whatever its merits.

As for (7) the applicant has in my view no constitutionally right to swim in unpolluted water at any particular location. In fact it has been explained on affidavit on this application that the waters at Liscannor harbour are not even a designated swimming area. But even if it was I would not consider that it is arguable that the desirable pastime of swimming in a particular area can be elevated to a constitutional right under Article 40.3.1 of the Constitution. Leave cannot be granted for that relief.

As against Limerick County Council:

Three orders of Mandamus are sought against or, (in respect of 3 below) affecting, **Limerick County Council**:

1. A Declaration that Limerick County Council has breached the applicant's constitutional right under Article 40.3.1 of the Constitution to enjoy the amenity of swimming in unpolluted waters, by failing to prosecute Clare County Council for causing pollution in breach of the European Communities Environmental Objectives (Surface Water) Regulations 2009 S.I. 272/2009.

2. An order instructing Limerick County Council to prosecute inter alios Clare County Council for failing to comply with Waste Water Discharge (Authorisation) Regulations 2007 S.I. No. 684/2007, and European Communities Environmental Objectives (Surface Water) Regulations 2009 S.I. 272/2009 at Kilfenora and at Quilty.

3. An order requiring the Minister for the Environment to prosecute inter alios Limerick County Council for failing to prosecute Clare County Council.

As for (1) above, I refuse leave to seek this relief for the same reason which I have stated in respect of (7) above against Clare County Council.

As for reliefs (2) and (3) above, each of these reliefs seeks to require this Court to direct a person, body or authority, which is statutorily charged with prosecuting offenders under the Regulations, to do so. It is not in my view arguable that this Court can so order. The authority is the body which is empowered to decide whether or not a particular offence has been committed, and if so, whether or not to prosecute it. The applicant cannot decide that any particular alleged set of facts should be investigated and prosecuted by the authority, and this Court cannot interfere with that function. These reliefs are not in my view arguable and the applicant is not entitled to leave to argue them. In addition, in relation to complaints about any situation arising in Quilty, I cannot be satisfied that the applicant has any *locus standi* given its lack of proximity to where he himself lives.

As against the Environmental Protection Agency ("EPA"):

1. To require the EPA to consider existing alternative solutions to actually treat wastewater arising in the agglomeration of Liscannor.
2. To require the EPA to revoke the waste water licence D0430-01 issued to Clare County Council on the 20th October 2011 on the ground that the Council has not complied with the conditions therein.
3. A Declaration that the applicant's constitutional right to swim in unpolluted waters is infringed by the actions, inter alios, the EPA by causing and facilitating pollution of bathing waters adjacent to Liscannor Harbour.
4. To require the EPA to prosecute Clare County Council for failing to comply with a number of specified Regulations in relation to Kilfenora and Quilty.
5. Damages.

As for (1) above, as I have already concluded in relation to a similar relief sought in relation to Clare County Council, the order which the applicant would ask this Court to make in the event of leave being granted is one whereby the EPA would be required to exercise its discretion as to review and enforcement in a particular manner i.e. to require Clare County Council to consider either or both of two alternative facilities for treatment of wastewater arising from the agglomeration of Liscannor. One of those facilities appears to be one which services an hotel in Main Street, Liscannor, and the other appears to be proposed waste water treatment system for which a private company has been granted a planning permission. That latter plant has not yet been built. There is no doubt that the EPA enjoys powers of review and of enforcement in relation to a licence. The EPA has a clear discretion as to whether to carry out such a review and in the manner of enforcement within its powers under the Act. But in my view this Court cannot trespass upon that discretion by making any order which, in effect, would be requiring the EPA to act in a particular manner at the behest of the applicant. In my view that is not arguable for the purpose of granting leave to seek such an order of Mandamus. In any event, as pointed out by Ms. Butler for the EPA no demand was ever made by the applicant that they act in that particular, and neither has he ever identified any duty imposed on the EPA the performance of which is not a matter for the EPA's discretion.

As for (2) above, I am satisfied for the reasons set forth in the submissions provided by the EPA that this body has no power to revoke such a licence once granted. It has powers to enforce compliance with conditions under which a licence is granted, including a power to prosecute bodies and persons which it believes have committed offences, but the statutory framework does not include within the panoply of enforcement powers a power to revoke a licence. In such circumstances where an authority is not required or even empowered to revoke a licence, it is not arguable that the applicant can seek an order of Mandamus requiring that it do so.

As for (3) and (4) above, I refuse leave in respect of these reliefs for the same reasons that I have stated in respect of the same reliefs sought against Limerick County Council above.

As for (5) it is not arguable that damages can be recovered in the absence of leave being granted for any of the other reliefs.

As against The Minister for the Environment Community and Local Government ("the Minister"):

1. To require the Minister to prosecute Clare County Council, Limerick County Council and the EPA and certain individuals in these bodies, who facilitated ongoing pollution of coastal waters (surface waters) and groundwater in accordance with powers vested in him by European Communities Environmental Objectives (Surface Water) Regulations 2009, S.I. 272/2009, and European Communities Environmental Objectives (Surface Water) Regulations 2010, S.I. 9/2010.
2. To require the Minister to prosecute Clare County Council for failing to comply with S.I. No. 684/2007 – Waste Water Discharge (Authorization) Regulations 2007, and European Communities Environmental Objectives (Surface Water) Regulations 2009, S.I. 272/2009 and European Communities Environmental Objectives (Surface Water) Regulations 2010, S.I. 9/2010.

Each of these reliefs seeks to require this Court to direct a person, body or authority, which is statutorily charged with prosecuting offenders under the Regulations, to do so. It is not in my view arguable that this Court can so order. The authority is the body which is empowered to decide whether or not a particular offence has been committed, and if so, whether or not to prosecute it. The applicant cannot decide that any particular alleged set of facts should be investigated and prosecuted by the authority, and this Court cannot interfere with that function. These reliefs are not in my view arguable and the applicant is not entitled to leave to argue them.

For all the reasons appearing above, I refuse the applicant leave to seek any of the reliefs set forth in his Statement of Grounds.