THE HIGH COURT

COMMERCIAL

[2017 3203 P]

BETWEEN

MURPHY ENVIRONMENTAL HOLLYWOOD LTD, INTEGRATED MATERIALS SOLUTIONS PARTNERSHIP ACTING THROUGH ITS GENERAL PARTNER INTEGRATED MATERIALS GP LIMITED

PLAINTIFFS

AND

SPENCER PLACE DEVELOPMENT COMPANY LIMITED, P.J. HEGARTY AND SONS UNLIMITED COMPANY, BARNMORE DEMOLITION & CIVIL ENGINERING LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 21st day of December, 2017

1. On the 15th May, 2017 McGovern J. made an order for the inspection of the first named plaintiff's property at Hollywood Great, Nags Head, The Naul, County Dublin (the site) by the defendants' experts on or before the 26th May, 2017. He also ordered that the relevant experts were to meet to agree a protocol for inspection and the taking of samples for testing. He granted the parties liberty to apply in the event that there was a difficulty in agreeing a protocol. The parties could not agree a protocol and the plaintiffs brought a motion dated 19th July, 2017 directing that inspection of the site be conducted in accordance with s.6.0 of the report prepared by the plaintiffs' expert, Golder Associates, (Golder) dated 4th July, 2017. The defendants say that this protocol in effect amounts to an impermissible limitation of the original order of McGovern J. and they seek to inspect the site in accordance with a revised protocol prepared by Marron Environmental on behalf of all three defendants dated the 2nd August, 2017.

Background

2. The plaintiffs operate an inert landfill at the site which is licensed by the Environmental Protection Agency (EPA) to receive inert waste. The plaintiffs contend that *inter alia* the first named defendant either directly or through the second or third named defendants transferred non-inert waste soil including hazardous waste soil from its site at Spencer Dock, Dublin 1 to the site (the impugned waste). The plaintiffs plead that the defendants produced documents which misdescribed the waste as non-hazardous soil which was suitable for disposal at an inert landfill. On this basis the plaintiffs accepted approximately 6000 tons of waste from the defendants in or about February 2017.

3. In March 2017 it became apparent that the impugned waste was not inert waste and in accordance with instructions from the EPA the impugned waste was quarantined and is currently isolated in the location in which it was deposited within the site in an area known as Cell 4.

4. The plaintiffs retained Golder to advise in relation to the remediation of the site. The plaintiffs and the EPA agreed a remediation plan following an extensive site investigation, sampling and analysis exercise which was approved by the EPA.

5. On the 6th April, 2017 the plaintiffs commenced these proceedings and the proceedings were entered into the commercial list on the 24th April, 2017. Prior to that, on the 18th and 19th of April, 2017, an inspection of the material at Cell 4 was undertaken by the plaintiffs at which experts instructed on behalf of the defendants attended. The defendants were provided with split samples of the material for the purposes of their own testing.

Order for Inspection

6. The order of McGovern J. of 15 May 2017 was made pursuant to O.50 r.4 of the Rules of the Superior Courts. In *James Elliot Construction Ltd v. Lagan & Ors* [2015] IEHC 631 I summarised the principles applicable to an application under O.50 r.4 as follows:

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

7. It is clear that the right of a party to inspect and take samples of or from the property of another party to proceedings and, by extension, the scope of such inspection or sampling, is not dependent upon the Court being satisfied as to the strength of the case of the party seeking the inspection. It is rather to secure that party's constitutional right of access to the courts or, as was said by Ms Justice Murphy in *Ballymore Residential Ltd & Anor v. Roadstone Ltd & Ors* [2017] IEHC 539, to ensure equality of arms between the litigants.

8. Mr Justice Murphy in *Bula Ltd. v. Tara Mines Ltd (No. 1)* [1987] I.R. 85 held that it is impracticable and undesirable to attempt to evaluate the strength or weaknesses of the cases of either the plaintiff or the defendants on the hearing of such a motion. In the case of *Wymes v. Crowley* [1987] IEHC 68 the geologists for the plaintiffs and the defendants disagreed as to whether the proposed inspection would cause damage to the ore body which was sought to be inspected. The Court indicated that it could not resolve the conflict but that inspection should be facilitated if it could be achieved whilst at the same time protecting the interests of the defendants.

9. In *James Elliot Construction Ltd* at para. 21 I held that unless it could be shown that the information sought to be obtained from the sample that the party wished to take from its opponents property could have no bearing on the case as pleaded, I was of the opinion that it was not for the court to decide on a motion pursuant to O.50 r.4 to shut the party out from obtaining the information it sought. Similarly, in *Charleton v. Kenny* [2007] IEHC 308, Clarke J. (as he then was) controlled the process of obtaining the information sought by the plaintiff but he did not limit the information obtained once the plaintiff met the threshold for the granting of the order.

The Scope of the Order
10. Mr. Justice McGovern ordered: -

> *"that an inspection of the first named plaintiff's property at Hollywood Great, Nags Head, The Naul, County Dublin by the defendant's experts to take place on or before Friday the 16th day of May, 2017 and that the reports following the inspection be completed and exchanged within one week thereafter (on or before Friday the 2nd day of June, 2017),*
>
> *And…that the relevant experts do meet by Thursday of this week (the 18th day of May, 2017) to agree a protocol for the inspection and taking of samples for testing and if there is any difficulty in agreeing a protocol then the court doth grant the parties liberty to apply."*

11. It is thus clear that the scope of the order is for inspection of the entire site and it is not confined to the area where the impugned material is or was deposited and the sole matter for agreement between the parties was the protocol for the inspection and the taking of samples for testing from the site.

12. The plaintiffs say that the protocol should be confined to the inspection and testing of material from in or around Cell 4. This took place in August 2017, so in effect there should be no further inspection of the site. On the other hand the defendants argue that the protocol is to control the process whereby inspection and testing is to take place and it is not to limit the scope of the order. They urge strongly that the order is not confined to that portion of the site known as Cell 4 and the protocol should not limit them in a manner which is inconsistent with the terms of the order of the 15th May, 2017.

13. The inspection sought by the defendants was not confined to inspecting solely the impugned material. They sought inspection and testing of (i) the impugned material, (ii) the area and material adjacent to the impugned material and (iii) samples from the site not directly impacted by the impugned material. Initially the emphasis in the submissions to court was on inspecting the impugned material, as the parties wished to ascertain whether the impugned material was from Spencer Dock or whether it had been contaminated by other waste soil on the site. However, the application was never confined or limited solely to the impugned material or the material in its immediate environs. The notice of motion of 10th May, 2017 sought an order for the inspection and testing of the site **and** the waste material the subject matter of the proceedings. The order made was for inspection of the entire site and was not confined to the impugned material.

Attempts to Agree a Protocol
14. The defendants' proposed protocol of the 2nd May, 2017 was for the independent testing of the facility and presented a process "for the assessment **of the site**" (emphasis added). The document stated:

> *"The requirement for additional testing at the site is presented in the context of an overall risk assessment and remedial option assessment **for the site**." (emphasis added)*

The protocol specification was not confined to the remediation of the site. It referred to a staged approach to the assessment and investigations and included an assessment to determine if leachate from the impugned material posed a potential impact to groundwater. In order to carry out the assessment certain information was key, including baseline groundwater and surface water monitoring for the site, a review of exceedances in EPA licence and the seepage quality for other waste at the site based on soil quality results.

15. On the 17th May, 2017 the experts instructed by all of the parties met to try to agree a protocol for inspection and testing at the site in accordance with the order of the 15th May, 2017. The plan proposed by the defendants included sampling materials outside of the area where the impugned waste was stockpiled. Mr. Conor Tonra on behalf of Golder informed the attendees of the meeting that all plans for intrusive works on the site would have to be agreed with the EPA. The defendants' experts were to put forward a documented plan for approval by the EPA to include sampling and other testing locations, sampling methodology, analytical suite, sample depth depths, reasons for sampling and characterisation and health and safety considerations. The parties agreed that a non-intrusive site inspection could be carried out prior to intrusive investigations to allow the defendants to prepare a more robust plan.

16. There was a disagreement in the absence of the perfected court order as to the scope of the order. The minutes of the meeting recorded that the extent to which intrusive investigations were permitted or appropriate outside the impugned materials was unclear.

17. On the 22nd June, 2017 RPS (the expert instructed by the second named defendant) prepared a protocol for inspection and testing at the site on behalf of the defendants. They proposed sampling the impugned material and non-impugned material at the site. Background sampling of the non-impugned material was to determine waste quality prior to the placement of the impugned material. They proposed a Photoionization Detector (PID) spike survey at 60 points around the site including parts of the site which were capped. It was also proposed that fifteen site investigation points (trial pits) outside of the impugned material would be excavated.

18. The plaintiffs objected strongly to the protocol by email dated 1st June, 2017 and on the 2nd August, 2017, after the return date for the plaintiffs' motion, Marron Environmental on behalf of the defendants proposed a revised protocol for inspection and testing at the site. The scope of the proposed works remained the same. The defendants still sought soil samples outside the impugned material and water and leachate sampling. However, alternative, less intrusive procedures were proposed.

19. There would be no PID spike survey at the site in order to accommodate the concerns raised by Golder that the process may be detrimental to the integrity of the clay cap *in situ* in closed areas of the site. They said that it was necessary to obtain soil and

leachate samples from across the entire site to confirm that other areas of the site are not contributing to ground water, surface water or leachate contamination. It was therefore proposed to collect fifteen samples from areas up gradient of and removed from the stock pile of impugned waste and Cell 4 and to have a total of 22 soil sampling locations outside the stock pile of impugned waste. The proposal stated that the exact number and location of the proposed samples would be confirmed after the site inspection and topographic survey.

20. In relation to water and leachate sampling, it was proposed to collect surface water, groundwater and leachate samples at the site. They expected to collect four surface water samples from local drainage network, including one sample upstream and up to three samples downstream from the site. Depending on the location of existing boreholes, Marron Environmental recommended that two or three groundwater samples be collected to include one sample up gradient of the impugned waste and one or two samples down gradient (if available). It was proposed to sample four existing leachate monitoring points shown on maps provided by the plaintiffs.

The Plaintiffs' Objections to the Defendants' Proposed Protocol.
21. The initial objections were to the proposed PID spike survey at 60 points on the site at locations that were a significant distance from Cell 4 and physically isolated from the impugned material. It was said that this was unnecessarily intrusive and that no appropriate methodology for restoration of the site had been proposed. As the defendants no longer intend to seek a PID spike survey this objection falls away.

22. The plaintiff said that the defendants' proposals would interfere with areas of the site which had been capped and this would potentially cause further environmental damage and had an increased potential to generate leachates.

23. Mr. Cian O'Hora on behalf of the first named plaintiff expressed concern that trial pits would cause a number of soft spots due to different settlement of material over time which could lead to water logging. He said his main concern was the integrity of the cap which is threatened if the defendants carried out the PID spike survey or excavated trial pits.

24. Mr. O'Hora also emphasised that the facility was regulated by the EPA and the proposed works would give rise to regulatory issues with the EPA.

25. The primary objection was on the basis that the proposed inspection was unnecessary and there was no scientific basis for the proposed testing. The impugned material is entirely within the confines of Cell 4. The existing test results from the site and the Spencer Dock site show that the impugned material was not inert but had high levels of contamination and was hazardous which could not be explained by co-mingling of the impugned waste with third party material present on the site. Furthermore, the impugned waste was quarantined and covered in early March 2017 to prevent cross contamination between the impugned waste and other soils at the site.

26. The wastes outside Cell 4 are inert landfill. The facility has operated since 2003 within the confines of its EPA licence. The site has never been found by the EPA to have operated outside the bounds of its remit and in the circumstances it was wholly unnecessary to implement a protocol which had the potential to cause further damage to the site by undertaking unnecessary interventions and testing in order to establish something which can be established from readily available existing data. There was no need to take samples outside Cell 4 as these are historical wastes that have been capped and sealed, in some areas more than ten years ago. The groundwater and leachates from these areas have been monitored since 2003 in accordance with the requirements of the EPA. There was no need to establish a baseline status of areas of the site other than Cell 4 where the impugned waste is situate by means of the inspection and sampling proposed by the defendants. A large bank of leachate and ground water monitoring data dating back to 2003 exists and will be made available to the defendants.

27. The plaintiffs say that the waste in the rest of the site is completely isolated and separated from Cell 4 by constructed clay barrier systems and therefore any baseline data required by the defendants need only be obtained from Cell 4 and not from samples from the rest of the site. They criticised as incredible the suggestion that problems with the material in Cell 4 could be attributed to cross contamination of the impugned waste from other wastes on the site. This is because of the nature of the contamination revealed by the testing of material at Spencer Dock and the impugned waste, the levels of contamination and the fact that there are no pathways permitting cross contamination of the impugned waste where it is isolated in Cell 4.

28. The plaintiffs argue that they did not agree to inspection and testing of the site in the manner now sought in the protocols proposed by the defendants. They proceeded on a misapprehension, induced by the defendants, that the inspection sought was confined to the material in Cell 4. Accordingly there was no argument before the High Court in relation to the scope of the order. They say that what the defendants seek is excessively onerous and unduly burdensome to the plaintiffs. They will have to apply to the EPA to approve the proposed works and this will inevitably lead to delay in the litigation. The works are invasive and will cause damage and it may not be possible to reinstate the site in a satisfactory manner. They emphasise the fact that the plaintiffs are the licensees-not the defendants-and that they are required to satisfy the EPA in relation to hazards on the site.

29. The fundamental objection is that the scope of the inspection and testing is not necessary based upon the justifications put forward by the defendants. They point to the fact that the defendants have not said why 15 years of data collecting and recording groundwater and leachate from the site is not sufficient to establish the baseline for the site. They say that this data is in fact better than the data that could be obtained by the sampling proposed by the defendants. They also complain that the inspection is directed towards a peripheral aspect of the case: post remediation the site will be monitored to ensure that there is no further environmental contamination. In the event that further damage to the environment ensues, the defendants may be held liable for this further damage and further remediation. They complain that inspection was sought before the defendants delivered their defences and therefore before the issues in the case have been joined.

Discussion
30. It has been clear from the beginning that it would be necessary to obtain the consent of the EPA to the proposed works which the defendants would carry out as part of the inspection and sampling of the site. It is recorded in the minutes of the meeting of the 17th May, 2017 which I have referred to above. Nothing has changed in the meantime save that the parties are now seven months removed from that date. Therefore this ground of objection to the particular protocol proposed by the defendants is disingenuous and without merit. There was no reason why the protocol proposed by the defendants could not have been submitted to the EPA to ascertain whether as a matter of principle they had any objection to what was proposed. If the EPA indicated any objections, it could have been possible to consider how to satisfy these objections while still affording the defendants the opportunity to inspect the site in accordance with the court order.

31. Likewise, the argument that the inspection is premature is unpersuasive. The plaintiffs never raised the point when the issue of inspection was raised before Mr Justice McGovern and I see no reason why it should now become a relevant criterion in assessing

which of two protocols for inspection should be authorised by the court.

32. The defendants have revised their proposed protocol with a view to accommodating concerns raised by the plaintiffs regarding the integrity of the cap on the closed areas of the site. They are no longer proposing to proceed with 60 PID spike holes. Furthermore, they now propose sampling by means of drill holes approximately 150 mm in diameter instead of trial pits. They also propose back filling the drill holes with bentonite from the base up to the ground surface. Bentonite is an inert and impermeable substance that expands after emplacement and, according to Mr. Marron, will provide a thorough impermeable seal at each of the sample areas. The affidavits sworn in response by the plaintiffs do not engage with the revised protocol or consider the effectiveness of back filling the drill holes with bentonite.

33. The court cannot attempt to reconcile the disputes on affidavits between the experts as to whether it is possible to reinstate the site following the proposed inspection and sampling in a manner which will not lead to or give rise to a risk of further environmental damage resulting from the inspection and reinstatement. Murphy J. was faced with precisely this difficulty in *Wymes v. Crowley* but nonetheless he permitted a limited form of inspection to proceed.

34. In this regard it is useful to note that whichever protocol is adopted it will be scrutinised by the EPA as the EPA must approve the works involved. If the EPA has concerns that environmental damage may be caused by the proposed inspection and testing it would be open to the EPA to seek whatever appropriate variations or assurances are required or possibly to refuse some or all of the proposed works if this is necessary. In effect it will act as a neutral arbiter with regard to the concerns the plaintiffs raise regarding potential damage to the environment.

35. Furthermore, as Murphy J. pointed out in *Ballymore Residential Ltd*, a litigant has within reason, and subject to the rules of evidence, the right to present his case as he considers appropriate so that even if the Court considers that the case might be presented in a different manner, that of itself would not act as a bar to an order for inspection. It is not for the Court or for the plaintiffs in this case to direct the information which the defendants may gather and the evidence which they may lead at the trial of the action. It is to be borne in mind that in *Bula v. Tara* the Court was of the opinion that the plaintiff's allegations were extraordinarily improbable but the strength or weakness of the case a party wished to advance was not the relevant consideration for a court determining whether or not to grant an order for inspection.

36. It follows that the plaintiffs' arguments based on the alleged improbability of the defendants' contentions or the fact that alternative and possibly more useful evidence may be available to them (the data relating to groundwater and leachate monitoring dating back to 2003) does not afford a reason to restrict inspection of the site in the manner advocated by the plaintiffs. Likewise arguments about the necessity for the inspection of the site are largely not on point.

37. The question asked by Murphy J. in *Ballymore Residential Ltd* was: what was the least intrusive inspection which would satisfy the plaintiff's need and entitlement to obtain evidence necessary to permit it to pursue its claim, while interfering to the least possible extent with the rights of others? The plaintiffs emphasised the necessity to obtain the evidence referred to in this question and urged that no further inspection was required in this case because in effect there was alternative, better evidence available to the defendants. However, this argument ignores the observation earlier in her judgment that a litigant has the right to present his case as he considers appropriate even if the court considered that the case might be presented in a different manner, *a fortiori*, an opponent seeking to resist an order for inspection. The effect of the plaintiffs' arguments that the inspection is not necessary is that the defendants would be obliged to rely upon alternative evidence rather than the evidence they wish to obtain by inspecting the site and taking appropriate samples. In my opinion this submission is incorrect as a matter of principle and does not provide a reason to refuse the defendants' inspection upon the terms of the protocol they have proposed.

38. The only relevant issue raised by the plaintiffs in opposition to the defendants' protocol for inspection is the potential for environmental damage resulting from the proposed inspection and sampling. I am satisfied that the inspection to be carried out on the site in accordance with the proposed protocol of the 2nd August, 2017 is in accordance with the principles I set out in the case of *James Elliot Construction Ltd.* The revised protocol takes account of the concerns raised by the plaintiffs' experts. They have abandoned the proposed PID spike survey entirely and making trial pits. Instead they are seeking 22 drill holes of a maximum diameter of 150 mm from a site which holds circa 2 million tons of waste soil and occupies an area of approximately 57 acres. In my opinion this sampling amounts to the least intrusive inspection and sampling of the plaintiffs' site which will satisfy the defendants' requirements. The back filling is to be with bentonite rather than soil which should secure an impermeable reinstatement. In addition to this, it is important to note that all of the works must receive the prior approval of the EPA. I am therefore satisfied that while facilitating the defendants' entitlements, the plaintiffs' interests as the owner of the site and the operator of the facility are interfered with to the least possible extent.

Decision

39. I refuse to direct that inspection of the site be conducted in accordance s.6.0 of the report of Golder dated 4th July, 2017. Instead I direct that it shall be in accordance with the proposal of Marron Environmental dated 2nd August, 2017 subject to any variations, restrictions or amendments which the EPA may in its independent discretion impose if it authorises the carrying out of the works. If there is any difficulty arising from the terms of the order or from the involvement of the EPA in approving the proposed works, the parties shall have liberty to apply to the court.

40. In light of my judgment, it was not necessary to consider whether or not to vary the order of McGovern J. of the 15th May, 2017 and therefore I make no order in that regard.