

BETWEEN

WICKLOW COUNTY COUNCIL

PLAINTIFF

**AND
JOHN O'REILLY
BROWNFIELD RESTORATION IRELAND LIMITED
RAYMOND STOKES
ANNE STOKES
SWALCLIFFE LIMITED TRADING AS DUBLIN WASTE
LOUIS MORIARTY
EILEEN MORIARTY
A1 ENVIRONMENTAL MANAGEMENT LIMITED
WILLIAM JOHN CAMPBELL
ANTHONY DEAN
UNA DEAN**

DEFENDANTS

Judgment of Mr Justice Clarke given on the 8th day of February, 2006.

Plaintiff's claims

1. The plaintiff, ("the County Council"), brings these proceedings for the purposes of seeking orders designed to remediate or mitigate alleged environmental pollution at Whitestown, County Wicklow. These applications concern the 8th to 11th named defendants and others who are sought to be joined in substitution for such defendants. All of those parties are connected. The County Council seeks to add Dean Waste Company Limited, (Dean Waste), or to substitute that company for the 8th named defendant, ("A1"). The County Council also seeks to add Samuel Stears as a further defendant. In a separate application the 8th to 11th named defendants seek that they be struck out as parties either on the basis that the proceedings disclose no reasonable cause of action against them or alternatively that the proceedings are unsustainable and bound to fail.

2. The circumstances leading to both applications are not in dispute. It would appear that extensive inspections of lands at Whitestown were carried out by Environmental Consultants who were retained on behalf of the County Council to coordinate an investigation of the lands concerned to ascertain the identity of persons likely to have been responsible for unlawfully disposing of waste on the lands. Investigations in an area of the lands, which for the purposes of the investigation became known as Landfill No 4, revealed the presence of waste material which had been dumped in plastic sacks with the legend "A1 Waste" on same. Investigations carried out by the County Council at the Companies Office and of the Business Names Register revealed that there were a number of A1 Waste names listed either as companies or as business names involved in the waste disposal/environmental management field. These included the following business names: A1 Waste Recycling, A1 Environmental Management and A1 Management, all of which were trading names of Dean Waste.

3. The Companies Office searches at that time also revealed the existence of the company A1. The registered offices of both Dean Waste and A1 are located at the same address. It would appear that the Council believed that the 9th and 10th named defendants were directors of both companies. In addition it would appear that Samuel Stears is also now a director of Dean Waste. However, it is now accepted that A1 was not incorporated at the time when the events which give rise to these proceedings occurred. It is suggested that there was a genuine and bona fide mistake on the part of the Council as to the correct identity of what it describes as the "A1 Waste" defendants. Due to the number of similar business names registered to the same address under the directorship of the same or similar parties, it is suggested that the correct "A1 Waste" defendants should in fact have been Dean Waste on the basis that all "A1 Waste" trading names, which the Council has traced, can be identified as being owned by Dean Waste, and that at least one of the trading names so discovered, A1 Waste Management, was registered as a business name of Dean Waste in 1996, and the investigations of Landfill No. 4 indicate waste dumped there from about 1997 onwards. In this regard, reliance is placed on evidence that the telephone number on the "A1 Waste" black refuse sacks discovered in Landfill No. 4 is the telephone number for "A1 Waste."

4. Finally the County Council rely on the fact that they wrote to A1 prior to the institution of proceedings in relation to the matters with which I am concerned and received no response of any kind from that defendant or its advisers to that letter.

5. At the hearing before me a further complication concerning the directors of both A1 and Dean Waste emerged. This in part stems from the fact that it would appear that there are two Anthony Deans, father and son, of the same address. While the County Council does not appear to have been aware until the hearing of the existence of the two Mr Deans, it seems that it was Mr Dean Senior who was in fact served with the proceedings.

6. It is now clear that so far as Dean Waste is concerned, Anthony Dean Senior is and at all material times was a director. Una Dean was a director at the time of the events the subject matter of these proceedings occurred but is no longer in office. So far as A1 is concerned, Anthony Dean Junior and Una Dean are and at all material times were directors. Samuel Stears became a director of both companies in January 2005. Finally, John Campbell is Company Secretary of both companies but would not appear to have ever been a director of either. Against that factual background it is now necessary to turn to the legal principles.

Legal principles

7. Reference was made at the hearing to *In Re Southern Mineral Oil Limited* [1999] 1 I.R. 237, where Shanley J had to consider an application to add or substitute parties. It is clear that the application in that case was based on two separate rules, that is to say Order 15, rule 2 and Order 15, rule 13. The application under Order 15, rule 13 failed because the cause of action against the proposed added defendants would have been statute barred. In that regard Shanley J followed the decision of the Supreme Court in *O'Reilly v Granville*. On the separate reliance on Order 15, rule 2, Shanley J said:

"As to O. 15, r. 2, of the Rules of the Superior Courts there is a similar, but not identical, rule in the English Rules of the Supreme Court; O. 20, r. 5(1), (2) and (3) provide as follows:-

'(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make an amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2), notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.'

The effect of these rules was considered in the English case of *Evans Ltd. v. Charrington & Co. Ltd.* [1983] Q.B. 810, where Donaldson L.J., in the Court of Appeal said at p. 821:-

'In applying O. 20, r. 5(3), it is in my judgment important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of, and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B.

The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances.'

In the more recent case of *Re: Probe Data Systems* [1989] B.C.L.C. 561, the Secretary of State for Trade and Industry in England and Wales applied to the court under the Rules of the Superior Courts, O. 20, r. 5(3) for leave to amend an originating summons to substitute himself as applicant instead of the official receiver. Millet J., refusing the application, said at p. 563:-

'At first sight it may appear that in order to substitute a new plaintiff there are only two requirements which must be satisfied. First, that the mistake sought to be corrected was a genuine mistake; and second, that it was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff. That is not the case, for not every mistake can be corrected by amendment under O. 20, r. 5(3). The mistake must have been a mistake as to the name or identity of the intended party'."

8. On the basis of those authorities it seems clear to me that Order 15, rule 2 and its English near equivalent is concerned with an amendment to the name of a party, even if this would have the effect of substituting another party. Such an order would only be made where there has been a bona fide mistake of the type identified in the example cited in *Evans*. In such special circumstances the Statute of Limitations will not apply. However, where the more general jurisdiction under Order 15, rule 13 is relied on, it is not necessary to establish such a bona fide mistake, but the Statute of Limitations will apply, with the action only commencing as against the joined party as at the date of joinder.

9. There is no issue under the statute in this case. Therefore this application falls to be considered under Order 15, rule 13. In those circumstances it is not necessary to establish a bona fide mistake such as would justify an amendment of the name of a defendant rather than a removal and replacement. In those circumstances I should follow the ordinary principle: that all necessary parties should be joined and that any consequences of their joinder at this stage can be dealt with by appropriate directions or in relation to the costs incurred by their original non-joinder.

Orders

10. I will therefore make the following orders:-

(1) I will dismiss the proceedings as against A1 on the grounds that they have no reasonable prospect of success. I will however add Dean Waste as a defendant. I am satisfied that there is sufficient evidence to warrant the joinder of that company at this stage.

(2) I will add Samuel Stears as a defendant on the basis that there is authority for the making of so-called "fallback" orders against the directors of a corporate defendant in cases such as this. See *Wicklow County Council v Fenton No. 2* [2002] 4 I.R. 44 and *Cork County Council v O'Regan & Ors*, (unreported, High Court, Clarke J, 17/06/2005). On that basis I am satisfied that there are sufficient grounds for adding Mr Stears as a director of Dean Waste.

(3) I will make no order in relation to Una Dean. The authorities to which I have referred indicate that it may be necessary, if possible, to interpret domestic law in a manner sufficient to allow for the proper enforcement of EU environmental law. On that basis the fallback orders against directors were made in both cases. I am satisfied that there are arguable grounds for the view that such an approach to interpretation may extend to persons who were at a material time, but no longer are, directors.

(4) I will dismiss the proceedings against Mr Campbell. Even a generous interpretation of the authorities and the underlying EU law could not in my view extend the jurisdiction to the making of orders against a company secretary as secretary. In that capacity the person concerned has no role of control or management over the company's affairs. On the facts of this case, there is currently no evidence put forward to suggest any other involvement on the part of Mr Campbell which would justify making any order against him. If such evidence becomes available in the future, an application can be made to join Mr Campbell at that stage.

(5) For the avoidance of doubt, I will note that the Anthony Dean who is a party to these proceedings is Anthony Dean Senior and not Anthony Dean Junior. For reasons similar to those which I have addressed earlier in the course of this judgment, I believe that Mr Anthony Dean Senior is an appropriate continuing party to these proceedings.