Neutral Citation [2015] IEHC 570

**THE HIGH COURT**

**[2001 No. 15389 P]**

**BETWEEN**

**ATLANTIC SHELLFISH LIMITED AND DAVID HUGH-JONES**

**PLAINTIFFS**

**AND**

**THE COUNTY COUNCIL OF THE COUNTY OF CORK, THE MINISTER FOR THE MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Gilligan delivered on the 1st day of May, 2015**

1. The plaintiffs bring this motion before the court seeking an order pursuant to O. 56A, r. 2 of the Rules of the Superior Courts inviting the defendants to mediation in relation to the within proceedings.

2. The relevant provisions of O. 56A of the Rules are as follows:-

> "1. In this Order:
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> "an ADR process" means mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration;
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> "party" includes the personal representative of a deceased party.
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> 2. (1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—
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> (i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or
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> (ii) where the parties consent, refer the proceedings or issue to such process,
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> and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify.
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> (2) Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process.
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> 3. An application by a party for an order under rule 2 shall be made by motion to the Court on notice to the opposing party or parties, and shall, unless the Court otherwise orders, be grounded upon an affidavit sworn by or on behalf of the moving party.
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> 4. Save where the Court for special reason to be recited in the Court's order allows, an application for an order under rule 2 shall not be made later than 28 days before the date on which the proceedings are first listed for hearing.
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> And
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> (ii) by the insertion immediately following rule 1A of Order 99 of the following:
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> 1(B) Notwithstanding sub-rules (3) and (4) of rule 1, the Supreme Court or the High Court, in considering the awarding of the costs of any appeal or of any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

3. The factual background aspect from the plaintiff's perspective as is set out in the plaintiff's position paper, is as follows:-

> "1. The first plaintiff is the owner of an oyster fishery, now closed, in Cork Harbour. The 2nd plaintiff is a shareholder and director of the first plaintiff. For ease of reference, for the purposes of this application, it is proposed to refer to the plaintiffs collectively, as the operators of the oyster fishery the subject matter of the proceedings. The plaintiffs' complaints stem from the contamination of the fishery, from 1988 onwards, arising from the discharge of untreated, or inadequately treated sewage, into the harbour in the immediate vicinity of the plaintiffs' established oyster beds.
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> 2. The oyster fishery is located in Cork Harbour near Rathcoursey, in a portion of the estuary which is near the town of Midleton. While the plaintiffs operated the fishery on foot of two Oyster Fishery Orders, of 1963 and 1970, respectively,

made by the 2nd named defendant, this part of Cork Harbour has traditionally produced oysters for many, many, hundreds, if not apparently thousands, of years. The plaintiffs operated the fishery from the 1970s onwards trading as Rossmore Oysters. By developing a high level of expertise, by hard work and investment, all of which was encouraged by various state agencies (including the defendants) the plaintiffs built the fishery into a very substantial business. By the late 1980s, (when problems with the defendants began in earnest) their oysters were so highly rated that they had secured the business of 90% of the top restaurants in London. They also developed a thriving export business to Hong Kong. The stage had been reached where the value of their production accounted for about one 3rd of the national production of native and Pacific oysters. Their breeding ponds for native oysters were the largest artificial breeding complex, for this type of oyster, in the world. For the 2nd plaintiff and for his entire family this had been a lifetime's work, not just the work of the business itself but a significant amount of scientific research work all of which has been of value not merely to their business but to the wider aquacultural world.

3. Prior to 1988 sewage for the town of Midleton discharged at various locations at the Ballinacurra Estuary, adjacent to the town, approximately 4.5km from the plaintiffs' oyster beds. In that year, despite strenuous, and lengthy, objection from the plaintiffs, a new sewage scheme came into operation involving the sewage from Midleton being piped down to Rathcoursey point, where it would be discharged into the sea. Rathcoursey is less than l km away from the plaintiffs' oyster beds.

4. The susceptibility of shellfish, including oysters, to adulteration by waters polluted by sewage, is well known. Despite having a more or less blameless record for the condition of their production for many years prior to these discharges the plaintiffs subsequently received a significant number of complaints of people becoming ill having consumed their oysters. As was stated by Budd J., in an extensive judgement concerning discovery, in these proceedings: *"Looking at [a] map with an inexpert eye one can only wonder why an inland tidal area with shellfish beds was chosen"* for the location of the discharge point. From 1998 onwards there was a dramatic increase in the number of complaints from customers of illness following the consumption of the plaintiffs' oysters. This caused appalling damage to the plaintiffs business and to the reputation of their oysters.

5. The plaintiffs issued proceedings against the defendants in 1992. They claimed that the foreshore licence should not have been granted by the Minister to the first named defendant and that it was ultra vires. They also claimed that the operation of the sewage scheme constituted negligence, breach of statutory duty and nuisance on the part of the first defendant and the Minister. Those proceedings came on for hearing in 1996, and were settled on terms set out in a consent executed by the parties on that date. The plaintiffs received IR£500,000 in compensation from the defendants, along with an undertaking from the first defendant to bring into operation a secondary waste water treatment plant (SWWTP) incorporating ultra-violet disinfection facilities for the town of Midleton on or before the 20th June, 2000.

6. On 14 July 1997, the Minister for the Environment certified the works necessary for the Treatment Plant pursuant to Part IX of the 1994 Planning Regulations subject to certain modifications. The Minister granted the second foreshore licence on the 22nd September, 1999.

7. Despite the conditions imposed by the Consent, the SWWTP was not brought into operation in June 2000. The SWWTP was only brought into partial operation on that date and was not operating as required pursuant to the Consent. During this time, illnesses from people who had consumed the plaintiffs' oysters continued to rise and the fishery was closed from the 8th January 2001 to the 27th July 2001.

8. Despite the installation of the SWWTP, the plaintiffs' oyster beds continued to be affected by pollution from sewage discharge at Rathcoursey. In December 2001, even though the sewage scheme was supposedly fully operational the plaintiffs continued to experience very high levels of bacteriological indicators in the oysters. These remained dangerously high up to February 2002, at which time 27 people had been reported ill in the UK and there had been a serious outbreak of illness in Hong Kong.

9. On the 20th February 2002, the plaintiffs were directed by the Minister and the Food Safety Authority to immediately cease harvesting oysters from Cork Harbour. On the 20 March 2002, the first defendant admitted that there were massive overflows of untreated effluent into the estuary. Between January and March 2002, there were overflows every single day, and 18 of these overflows exceeded in a single day the total annual overflows envisaged by the licence conditions. During this same period, 70% of all oyster samples tested positive for norovirus. The oyster fishery was closed until April 2002 (the end of the season). As a result of heavy rainfall in May 2002 and more reports of illnesses in London, the fishery was closed again in June 2002. The fishery closed permanently in October 2002 and has remained closed to date.

10. Arising out of the closure of the once hugely successful and thriving business, directly as a result of the pollution from the operation of the outfall at Rathcoursey and the Midleton Sewage Scheme, the plaintiffs losses going into the future are substantial and run into the millions. The plaintiffs' property has been permanently adversely affected as a result of the defendants' wrongful actions, as particularised in the Statement of Claim. The first named defendant is sued as the Sanitary Authority responsible for the operation of the offending sewage scheme at Midleton. The State defendants are pursued as the entities responsible for the granting of the relevant foreshore licences for the placing of and the piping of the sewage and for ensuring compliance with the conditions subject to which those licenses to discharge for granted.

11. Although the causes of action underpinning these proceedings are themselves not particularly controversial, arising as they do out of basic tort and contract law, the factual and evidential matrix of these proceedings makes them hugely complex. From the plaintiffs' perspective there will be a substantial amount of complex expert evidence, ranging from specialist Engineering evidence to experts in Hydrology and Virology. The sheer scale and timeframe of evidence which will have to be processed by the court will also add both the length of time the trial will take and its overall complexity. An impression of the proportions involved will be evident from the extended hearings required for the interlocutory applications in these proceedings to date; in the case of the discovery application the judgment runs to nearly 200 pages and in the case of the "shorter" application for the determination of the preliminary issue, there is a written judgement extending to 25 pages."

4. As indicated by Ricky Kelly, the plaintiff's solicitor, in the grounding affidavit at para. 9 thereof "suffice to say the evidential and legal issues in the case are exceedingly complex and when the case comes on for trial it will take a substantial amount of time and will involve significant legal costs for the plaintiff and for the defendants, and in these circumstances the plaintiff's consider that the parties would benefit from mediation".

5. The plaintiffs have already initiated an application to the defendants directed to leading to mediation of the dispute, or at least achieving some of the benefits of mediation in relation to the future management of the dispute between the parties, but it has not been possible to come to a mutually satisfactory resolution of the plaintiff's application.

6. The first named defendant, in essence, states that provided Irish Water is involved in the process, then if the court is minded to make an order inviting the parties to mediation, Cork County Council confirm that it intends to have Irish Water representatives in its team.

7. The second, third and fourth named defendants take the view that the claims against the state defendants raise public law issues, the implications of which extend far beyond the parameters of this case. They contend that ultimately the trial judge will be asked to adjudicate, *inter alia*, on the correct interpretation of the Foreshore Acts, the question of whether the foreshore licenses were *ultra vires* the Minister and the question of whether in granting a foreshore license the Minister owes a duty of care to third parties who may be affected by the operation of the licenses and, if so, how far that duty extends.

8. In particular the state defendants do not oppose mediation or alternative dispute resolution as a matter of principle, and accept that clearly in the right case there is enormous merit in seeking to have disputes resolved in the most cost efficient and non-adversarial manner achievable, but that the particular circumstances of this case do not lend themselves to resolution by way of mediation particularly since liability is emphatically denied by the state defendants.

9. The state defendants also contend that at an earlier preliminary hearing, this Court (Laffoy J.) directed in her judgment of 20th May, 2010, that the parties determine the issue of liability first and leave the issue of quantum pending a decision on liability, and that it is therefore extraordinary that after a period of approximately four years and eight months the plaintiffs, rather than bringing the issue of liability to the fore, are further delaying the proceedings in taking up court time and resources seeking to engage the parties in a process of mediation that is not accepted by the state defendants, and it is further contended that the approach of the plaintiffs will only further exacerbate the significant delay and expense that these proceedings have endured to date.

10. The state defendants contend that the reality of the situation is that the plaintiffs appear to accept that the case will not be successfully resolved by mediation and that, in essence, they want an order to be made pursuant to O. 56A so that if appropriate, they can trigger at the conclusion of the proceedings an application in respect of costs pursuant to O. 99, r. 1(b).

11. Accordingly, the state defendants contend that the court, on this application, is being asked to engage in an extraordinary exercise of asking the parties to consider mediation in the knowledge that the invitation will be respectfully declined solely to ensure that in the event that the plaintiffs, if they lose the case, can bring forward an argument that they should not have to bear the full costs of the proceedings and in these circumstances the plaintiffs application is inefficient, self-serving and otiose and accordingly, the application should be refused.

12. It is quite clear whether foreseen or not, that a strict interpretation of O. 56A of the Rules of the Superior Courts including the amendment of r. 1(a) of O. 99, brings about a situation that the Superior Courts, in considering the awarding of the costs of any appeal or of any action may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any alternative dispute resolution process as referred to in O. 56A, r. 1 where an order has been made under r. 2 of that order in the proceedings.

13. It appears that this in fact is the first, or one of the very few known applications to the court pursuant to O. 56A, r. 2(1).

14. In this particular application the plaintiffs seek the order relevant to mediation and the order (as it only can be) that is sought is that the court invites the parties in this instance to use mediation to settle or determine the proceedings or issues as between them.

15. The process of mediation is well known and appreciated by this Court and many seemingly intractable disputes having been referred to mediation are resolved.

16. The benefits include the ability of the parties to choose the mediator and the venue, that the mediation is conducted in private, the maintenance of confidentiality, the ability to agree or not agree, the savings on costs, expenses and time, the absence of the stress of an actual court case and the benefits to the parties particularly in commercial situations, to continue to do business after a successful conclusion to the mediation process.

17. It is of significant importance to consider the judgment of MacMenamin J. in *Fitzpatrick v. the Board of Management of St. Mary's Touraneena National School and the Minister for Education and Science* [2013] IESC 62 wherein at para. 11 he stated:-

> "In any litigation process inevitably there will be winners and losers. The range of possible outcomes is necessarily limited by law. Litigation can be stressful. Lawyers frequently strive to keep their clients out of court or go to court as a last resort. The parties here were fully legally advised. Their respective interests were fully vindicated by their lawyers in the High Court and here on appeal. One is nonetheless left with a regret that some person did not shout "stop" and initiate a conciliation process at an earlier time which could have avoided months of correspondence, days of litigation, the stress such litigation brings to the parties and the risk of substantial legal costs."

18. The reality of the situation with regard to mediation is that it is a two way process between willing parties who agree to and participate in the mediation process with a willingness to reach a compromise, otherwise it becomes some other form of alternative dispute resolution. No party should be forced to attend mediation, as the bedrock of the procedure is to bring together the willing participants who wish to try to mediate a solution to the dispute that separates them. The emphasis is on participants in a dispute such as the present matter before the court to at least consider the benefits of mediation and in the particular circumstances of the present application, with regard to the consideration of any award of costs, the trial judge, or a higher court may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any alternative dispute resolution process and as O. 56A, r. 1 states, where the order has been made under r.2, which is the application presently before the court.

19. The plaintiffs have already invited the defendants herein to consider referring the dispute to mediation and the first named defendants have indicated their general willingness, subject to representatives from Irish Water being present in the process, and the remaining state defendants have indicated that in principle they are not opposed to disputes being referred to mediation but that in the particular circumstances of this case for the reasons as set out, they do not consider that it is possible to resolve the issues.

20. It is accordingly reasonably clear that if the court makes the order that is sought, the same responses are going to be received and possibly at some future date, a court will have to decide as to whether or not the failure to consider mediation was made for

good reason. At this stage I am not in a position to come to any conclusion as to whether or not the reasons advanced by any party are good or otherwise, and only the trial judge will be in a position to assess the merits of any application that may be brought pursuant to the appropriate criteria.

21. The reality is that the plaintiffs know that the state defendants are not agreeable to mediation for the reasons as set out.

22. Order 56A(2)(i) makes it clear that the court can of its own motion invite the parties to use an alternative dispute resolution process to settle or determine the proceedings or issue, and also where it considers it appropriate and having regard to all the circumstances of the case, order that the proceedings or any issue therein be adjourned for such time as the court considers just and convenient, and invite the parties to use an alternative dispute resolution process to settle or determine the proceedings or issue.

23. It is clear from a reading of the section that the court has a discretion to exercise in that it may invite the parties to use an ADR process to settle or determine the proceedings or issue and further, that the court would have to consider it appropriate having regard to all the circumstances of the case to make the order as sought.

24. In my view, in the particular circumstances of this case, it is clear that the plaintiffs have invited all the defendants to effectively participate in a mediation process and the State defendants, for the reasons as set out, have declined because they do not consider that it would be possible to successfully mediate the dispute that exists between the parties. It is my view that the sole purpose of this application is artificial and that, in effect, the plaintiff is attempting to, as it sees it, copper fasten its position with regard to a future application for costs on the basis of having an order of this Court pursuant to O. 562A to invite the parties to consider mediation when, in fact, this has already been done and the plaintiff effectively knows that a mediation process is not going to happen for the reasons as set out by the State defendants.

25. In my view, this is not a borderline situation and if a party, having been invited to consider mediation, sets out *bona fide* reasons why a mediation process envisaged may not be suitable to the particular circumstances of a case, it would be inappropriate for the court to make an order inviting the parties to further consider mediation. There could well be different circumstances if the reasons as set out for declining to consider the mediation process were not considered to be *bona fide* or there was a borderline situation which, perhaps, was still capable of being resolved if the order as sought pursuant to O. 56A(2)(i) was made. Furthermore, there could be other case specific particular circumstances that arise in any given case which would have to be considered by the court on the basis of an application for an order pursuant to O. 56A(2)(ii), but in my view none of these circumstances arise on this application and accordingly, I decline the relief as sought by the plaintiffs herein.