

**THE HIGH COURT**

**[2013 No. 1438 SS]**

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS  
(SUPPLEMENTAL PROVISIONS) ACT 1961**

**BETWEEN**

**ENVIRONMENTAL PROTECTION AGENCY**

**PROSECUTOR/RESPONDENT**

**-AND-**

**MIDLAND SCRAP METAL COMPANY LIMITED**

**ACCUSED/APPELLANT**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 16th day of January 2015**

1. This is an appeal by way of case stated from Judge John O'Neill of the District Court pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961.

**Legal Issue:**

2. At a sitting of the District Court on 10th October 2012 Midland Scrap Metal Company Limited appeared to answer a summons on which it was charged with an offence contrary to Sections 39(1) and 39(9) of the Waste Management Acts 1996 to 2008 of disposing of or undertaking the recovery of waste at a facility other than in accordance with a waste licence granted under the said Act. At the conclusion of the hearing, Judge O'Neill in convicting the accused, was satisfied as to the following: "(a) of the facts alleged in the summons...(b) that the activity engaged in by the accused at the facility required a waste licence issued under the Waste Management Acts 1996-2008, and (c) that the accused did not hold such a licence at the material times."

3. The opinion of the High Court is sought as to whether the District Court was "correct in law in holding that a licence issued under the Waste Management Acts 1996-2008 to a person other than the accused in respect of the same facility was personal to that other person and did not amount to a defence available to the accused to the offence charged in the summons."

**Background:**

4. The background facts as found by the District Court are as follows:

"(a) A licence (register reference no. W0079-01) was issued to a limited liability company by the prosecutor in its capacity as a licensing authority on the 24th January 2000 for the processing of certain wastes at 41 Cookstown Industrial Estate, Tallaght, in the County of the City of Dublin (hereinafter referred to as "the facility"). That licence was transferred in accordance with law to Greenstar Materials Recovery Limited (hereinafter referred to as "Greenstar") on the 10th September 2004. Greenstar continued to hold the said licence at all material times and, in particular, throughout the period specified in the summons.

(b) The waste activities carried on at the facility by Greenstar in accordance with the licence ceased in 2006. An application was made by Greenstar to the prosecutor to surrender the licence in accordance with the statutory procedure in 2006. That application was not pursued and Greenstar remained at all material times the licensee entitled to conduct certain waste activities at the facility in accordance with the said licence.

(c) No waste activities occurred at the facility between the cessation of activity by Greenstar in 2006 and late 2008.

(d) In 2008 the accused entered into occupation of the facility and commenced waste activities. The waste activities conducted by the accused differ from those which were conducted at the premises by Greenstar. The activities carried out by Greenstar included the indoor sorting and transfer of construction and demolition waste and commercial and industrial waste; the accused handles metal waste only and its activities include outdoor processing. The waste activities conducted by the accused involve the sorting, shearing, baling and slicing of metal waste.

(e) The metal waste handled by the accused at the facility during the period specified in the summons consisted of assorted scrap metal, as appears from photographs proved before me in evidence. Copies of some of those photographs, which are illustrative of the waste handled at the facility by the accused and which form part of the case stated, are attached in annex 2.

(f) The waste activities carried on at the facility by the accused generate noise, dust and vibrations and adversely affect the enjoyment of neighbouring commercial premises by their occupiers.

(g) Prior to commencing waste activities at the facility, the accused brought new plant and equipment, different from that previously used by Greenstar, into the facility and erected a sign with its name and contact details on it at the entrance to the facility.

(h) During the period specified in the summons, the facility was visited by inspectors on behalf of the prosecutor. On those occasions, the accused was engaged in the disposal or recovery of waste at the premises.

(i) During the period specified in the summons, Greenstar continued to hold a waste licence for the facility. Greenstar accepted its responsibility, as licence holder, for the conduct of waste activities at the facility during the period specified in the summons.

(j) Greenstar appeared before me to answer a complaint, the subject matter of a summons served upon it, alleging the disposal of waste at the facility in breach of conditions of the waste licence during the period when the accused was engaged in waste activities at the facility. On the 16th April 2012, Greenstar entered a plea of guilty to the offence alleged in that summons. A copy of the summons, which forms part of this case stated, is attached at annex 3. Greenstar was convicted and fined accordingly.

(k) Prior to the issue of the summons, the agency did not notify the accused that it was not entitled to operate a waste activity at the premises.

(l) The accused counts among its directors one Con Ward, who gave evidence before me, who has decades of experience in the metal waste business. The accused has engaged in waste activities in relation to metal waste elsewhere in the country at facilities in respect of which it holds or has held a permit issued to it by a local authority for such waste activities. The accused has also submitted an application to a local authority for a further waste permit in relation to metal waste.

(m) Throughout the period specified in the summons, during which it was engaged in the processing of metal waste at the facility, the accused did not hold a licence to engage in such activity at the facility."

5. The matter first came before this court on 28th July 2014 for hearing of a motion brought by the accused pursuant to s. 7 of the Summary Jurisdiction Act 1857 to have the case stated sent back to the District Court Judge for amendment or restatement. On that occasion the appellant claimed that the case stated by Judge John O'Neill did not adequately reflect what had occurred in the District Court. In that regard it was claimed that there was confusion as to the state of the facts as found by the District Court Judge and complaint was also raised that the case stated to the High Court was, in its entirety, the version contended for by the prosecutor. The motion was refused and the costs were awarded to the respondent.

#### **Submissions:**

6. The matter came on for full hearing on 15th December 2014. Counsel for the accused/appellant, Mr. Oisín Collins B.L. submitted that the net issue in the case was whether a waste licence is personal to the licensee, meaning that only the licensee can carry out the activities identified in the licence. He submitted that the waste licence regulates the activities identified therein. Consequently, his client, he says, committed no wrong by carrying out the activities identified in the licence because the respondent had permitted such activities to be carried out when it issued the licence.

7. Counsel notes that it is accepted that Greenstar held a licence in respect of the facility owned by them in Tallaght and further that the accused was purporting to operate under the said licence. In this regard, it is said that Greenstar remained the licensee and the licence was not transferred. As such, Greenstar was obliged to comply with the licence conditions and was liable for any breaches of the terms of the licence. It is stated that the appellant operated the facility by way of (private) licence from Greenstar and under Greenstar's waste licence.

8. Further, it is said to be relevant that Greenstar was prosecuted for carrying out waste activities other than in accordance with conditions of the licence, pleaded guilty to this offence and was convicted and fined. It is submitted that this conviction constitutes a recognition that the activities being carried out on the site were being carried out under the licence. In this regard it is contended that the conviction presumed that the activities were being carried out under the licence itself, albeit not in compliance with the conditions. It is submitted that in order for the conditions of the licence to have application to the activity, the licence itself must have application and as such it could not be argued by the respondent that the licence had no application to the activity being carried out by the appellant.

9. Counsel for the appellant raises the point that other waste facilities are being operated in a similar fashion whereby the person carrying out the activity on site was not the licence holder and that this is common in the industry. The appellant asserts that the licence holder remains responsible under the licence and is obliged to give effect to its terms and comply with its conditions. It is said that this is how the licence was operated in this case, a fact which is said to be confirmed by the conviction of Greenstar.

10. It is submitted that either the activity is licensed or not – if it is not licensed it is said that Greenstar could not be prosecuted, but if it is licensed it is said that the accused could not be prosecuted.

11. Counsel refers to the provisions of s. 39(1) of the Waste Management Act 1996 to support his proposition that it is the activity which is required to be licensed, not the person. Section 39(1) states:

"39.—(1) Subject to subsections (4) and (7), a person shall not dispose of or undertake the recovery of waste at a facility, on or after such date as may be prescribed, save under and in accordance with a licence under this Part (in this Act referred to as a "waste licence") that is in force in relation to the carrying on of the activity concerned at that facility."

12. In this regard, it is submitted that in order for an offence to be created, the nature of the offence must be clearly stated. It is submitted that there is nothing in s. 39(1) which imposes an obligation on a person to hold a licence but rather the obligation is to carry out the activity in accordance with a licence. The appellant refers to the provisions of s. 38 of the Road Traffic Act 1961 as a comparison to the above provisions. In that section it is stated that: "A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle." It is submitted that this provides a contrast to s. 39(1) of the 1996 Act and it is contended that if the Oireachtas had intended to require the licence to be personal they would have specified as such in the relevant legislation as they did in the Road Traffic Act 1961.

13. Counsel further supports this line of argument by reference to s. 40(12) of the 1996 Act which states:

"(12) It shall be a good defence—

(a) to a prosecution for an offence under any enactment other than this Part,

...

to prove that the act complained of is authorised by a waste licence granted under this Part."

14. It is claimed, therefore, that the defence is predicated on proving that the act complained of is authorised by a licence and that

it is the act which is authorised, not the actor. Counsel also refers to article 12 of the Waste Management (Licensing) Regulations 2004 which states:

"12. (1) Subject to sub-article (2), in the case of an application for a waste licence, the application shall -

(a) give the name, address and, where applicable, any telephone number and telefax number of the applicant (and, if different, the operator of the facility concerned), the address to which correspondence relating to the application should be sent and, if the applicant or operator is a body corporate, the address of its registered office or principal office"

15. It is claimed that this provision specifically recognises and provides for a situation where the operator of the facility may be different to the applicant for a licence.

16. Finally, it is submitted that having regard to the above, the conviction must be set aside as there is no requirement in law for the appellant to hold a licence. It is contended that the requirement is that the activity is licensed and that such activity was licensed in this case.

17. Counsel for the prosecutor/respondent, Mr. Sean Guerin S.C., submits that the issue in the case is whether a licence issued under the Waste Management Act 1996 is personal to the licensee. He notes that the accused was convicted of disposing of or undertaking the recovery of waste without a licence and argues that it was not a defence to that charge to rely upon a licence issued to another person. Such a defence could not succeed because an EPA licence is personal to the licensee. The statute permits a licence to be issued or transferred to a person only upon proof that the licensee or transferee is a fit and proper person to hold such licence. It is submitted that the appellant's view if correct would circumvent the clear and express statutory requirement.

18. The respondent argued, correctly in my view, that the licence in this case was personal to Greenstar and the appellant cannot claim to be entitled to carry on waste treatment activities "under" the licence of another. Support for this general proposition is to be found in *"Administrative Law in Ireland"* by Hogan and Morgan (4th Ed., Dublin, Round Hall, 2010) at pg. 345 where the learned authors say:

"As a general rule, a licence is personal to the holder, since it was only granted on proof of the applicant's suitability of character, skill, qualifications, etc. This is so even if it is not explicitly stated in the statute..."

19. The provisions of section 40 of the Waste Management Act 1996 require proof of the personal fitness of the proposed licensee and this requirement is at the heart of the respondent's case. The section is as follows:

"40.—(1) (a) On application being made in that behalf to it, the Agency may grant to the applicant a waste licence subject to, or without, conditions or refuse to grant to the applicant such a licence."

20. It is noted that s. 40(4) states that the Agency shall not grant a licence unless it is satisfied that:

"(d) if the applicant is not a local authority, the corporation of a borough that is not a county borough, or the council of an urban district, subject to subsection (8), he or she is a fit and proper person to hold a waste licence,"

21. The definition of 'fit and proper' is set out in s. 40(7):

"(7) For the purpose of this Part, a person shall be regarded as a fit and proper person if—

(a) neither that person nor any other relevant person has been convicted of an offence under this Act prescribed for the purposes of this subsection,

(b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him or her to direct or control the carrying on of the activity to which the waste licence will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the licence and the other requirements of this Act,

(c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers will be entered into or incurred by him or her in carrying on the activity to which the waste licence will relate in accordance with the terms thereof or in consequence of ceasing to carry on that activity."

22. Thus a decision to grant a licence depends on a range of circumstances which are entirely personal to the applicant. It is the applicant's criminal history, expertise and financial resources which are of importance and the respondent correctly submits that these cannot reasonably be viewed as anything other than personal to the licensee.

23. The respondent is of the view that these personal requirements are consistent with the Waste Framework Directive (Directive 2008/98/EC) to which the Waste Management Acts 1996 - 2008 gives effect. In this regard, it is noted that article 23 of the Directive states:

"Member States shall require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority."

The first recital to the Directive also addresses this by referring to the

"essential requirements for the management of waste, notably an obligation for an establishment or undertaking carrying out waste management operations to have a permit or to be registered...."

I accept that the Directive requires Ireland to ensure that persons who carry out waste treatment activities must obtain a permit from the respondent and this requirement also gives rise to the requirement that Ireland must control the transfer of licences.

24. The respondent submits that provisions in respect of the transfer of a licence are consistent with the principle that a licence is personal to the licensee. I agree and as just indicated, it seems that the basis for these rules is to be found in the Directive though common sense suggests that a regime which did not control the transfer of licenses would be seriously deficient. In this regard, counsel refers to s. 40(10) and s. 47 of the 1996 Act which state:

"40. (10) A waste licence granted to a person under this Part may not be transferred to another person, other than under and in accordance with section 47."

"47.—(1) A waste licence may be transferred from the holder to another person in accordance with this section.

(2) Where the holder of a waste licence desires that the licence be transferred to another person (hereafter in this section referred to as "the proposed transferee"), the holder of the licence and the proposed transferee shall jointly make an application to the Agency requesting that such a transfer be effected by the Agency.

(3) An application under subsection (2) shall be made in such form and include such information as may be prescribed and shall be accompanied by such fee as may be prescribed under section 50 and the waste licence concerned.

(4) The Agency may require the provision of such further information by the holder of the licence or the proposed transferee as it considers appropriate for the purposes of dealing with an application made by them under this section.

(5) If, on consideration of an application under subsection (2), and any relevant information provided in respect thereof, the Agency is satisfied—

(a) that the proposed transferee would, if he or she were an applicant for the licence, be regarded by it as a fit and proper person to be granted under section 40 a like waste licence to the licence concerned,

(b) that the proposed transferee has complied with any requirements under section 53, and

(c) regarding such other matters as may be prescribed, it shall effect a transfer of the licence to the proposed transferee in such manner as may be prescribed.

(6) A person to whom a waste licence is transferred under this section shall be deemed to have assumed and accepted all liabilities, requirements and obligations provided for in or arising under the licence, regardless of how and in respect of what period, including a period prior to the transfer of the licence, they may arise."

25. I agree that the only possible reading of this section is that a licence is personal and that it is not simply the activity which is licensed, rather it is the identified activity to be carried out by the licensee which is licensed. Viewed in this light, the appellant's submissions in support of the legality of a person acting "under a licence" issued to a third party without having had such licence transferred to them via this section is plainly contrary to the statutory scheme.

26. The respondent is of the view that the position contended for the appellant would result in the separation of the licensee and the operator which would render the transfer provisions of the Act ineffective since anyone could thereby become the operator of a facility by agreement with the licensee and without control of the respondent. As a result, it is said that the 'fit and proper' test would become ineffective. This must be correct.

27. Counsel for the respondent submits that the appellant's position could result in a person who is not 'fit and proper' from operating a facility and as such frustrate the entire purpose of European waste policy as set out in the Directive. Further, it is argued that none of the specific provisions of the Waste Management Act 1996 as relied on by the appellant actually contradict the clear intent of the Oireachtas that a licence be personal. In his regard, counsel notes the provisions of s. 39 create a dual test and he states that a criminal offence is created to ensure that activities cannot be carried out save under and in accordance with a licence. In this respect, it is submitted that the only person who can act 'under' a licence is the licensee as that is the person who has been deemed 'fit and proper' to carry out the role by the respondent.

28. With regard to the appellant's contention that article 12 of the Waste Management (Licensing) Regulations 2004 envisages a scenario in which the 'operator' is different to the licensee, counsel notes that the Waste Management Act 1996 does not generally use the term 'operator' but that it occurs in the definition of "person in charge" in s. 5 which states: "'person in charge" includes, in relation to any premises, the occupier of the premises or a manager, supervisor or operator of an activity relating to the holding, disposal or recovery of waste which is carried on at the premises;". It is submitted that this simply requires an applicant to set out who will be the de facto person in charge if it is not the applicant but it remains that the licence is granted to the licensee. It is further recalled that under s. 4 of the 1996 Act, "activity includes operation" and as the licence must be "in force in relation to the carrying on of the activity" it thus must be "in force in relation to the carrying on of the operation" and as such Art. 12 leaves it open to the respondent to require (in the case where an application was made nominating an operator as being different from the applicant for the licence) that the operator apply for a licence.

29. Finally, it is submitted that the appellant's assertion that the conviction of both Greenstar and the appellant is logically impossible is misconceived. In this regard it is submitted that both entities may be criminally liable in respect of the same waste activity. Counsel cites the dicta of Charleton J. in *Brady v. Environmental Protection Agency* [2007] 3 I.R. 232 to the effect that "Multiple criminal liability in respect of the one activity is a common feature of many diverse criminal statutes. The penalisation of different parties under different enactments is also common." It is noted that in this instance Greenstar admitted its guilt on a charge of disposing of waste otherwise than in accordance with specified conditions of the licence issued to it. The appellant also admitted carrying on what is a waste treatment activity and that it did not have a licence issued to it or transferred to it for such waste treatment activity. As such, it is submitted that both were properly convicted of the appropriate offence. I note this argument but I do not think it is necessary for me to address it in order to deal with the matter in respect of which the opinion of the High Court is sought.

#### **Findings:**

30. I am satisfied that the respondent's arguments and the conclusions of the learned trial judge are correct. In particular, I am persuaded that the clear intention of the Oireachtas and of the European legislators was to ensure that only persons or entities vetted in advance by a regulator could carry out certain waste treatment activities. A licence holder cannot alienate the permission to carry out the activity to a third party without regulatory involvement because this would comprehensively undermine the purpose of the licensing regime. If the appellant's submission were correct, the regulation of disposal and recovery of waste would be set at naught. The consequence of the appellant's position would be that the operator of a waste treatment facility could claim that the conditions of the licence did not apply to him/her because he/she was not the licensee but was nonetheless entitled to operate the facility because of an agreement with the licensee, while the licensee could claim not to be liable for the breach of the licence not being the actual operator of the facility.

31. That article 12 of the Waste Management (Licensing) Regulations 2004 refers to the existence of an operator does not establish that such a person may be selected by the licensee to carry out the activity identified in the licence and assume the responsibilities and liabilities of the person identified by the respondent as peculiarly suitable for that role. I accept the argument of the respondent that the reference to 'operator' in the regulations reflects the practicalities of the licence holder being assisted by staff in operating the licence.

32. My view is that although section 39 of the Act does not expressly require a person disposing of or recovering waste to hold a licence, other provisions of the Act, in particular those provisions governing inquiry as to the character of the proposed licensee or proposed transferee of a licence, make it plain that such was indeed the legislative intent.

33. My conclusion is that the District Court correctly decided that a licence issued under the Waste Management Acts 1996-2008 to a person other than the accused was personal to that other person and the existence of that licence did not provide a defence to the charge addressed to the accused of recovering or disposing of waste without a licence.