

**THE HIGH COURT**

**COMMERCIAL**

**[2013 No. 2793 P]**

**[2013 No. 46 COM]**

**BETWEEN**

**CLM PROPERTIES LIMITED**

**PLAINTIFF**

**AND**

**GREENSTAR HOLDINGS LIMITED, KTK LANDFILL LIMITED, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND  
DAVID CARSON**

**DEFENDANTS**

**JUDGMENT ON COSTS of Ms. Justice Finlay Geoghegan delivered on the 30th day of May, 2014.**

1. On 8th April, 2014, I delivered judgment on a preliminary issue directed to be tried in this action and a related action ([2014] IEHC 178). The plaintiff, CLM Properties Ltd., was the plaintiff on the issue and the Governor and Company of the Bank of Ireland ("the Bank"), the defendant.

2. The judgment determined at para. 63 that the preliminary issue should be answered in the following terms:

"Monies collected pursuant to s. 53A(1) of the Waste Management Act 1996, representing the amount determined to ensure the result specified in s. 53A(4)(c) of the 1996 Act is achieved, were not required by law to be used by the licensee solely for the purpose of paying for the closure, restoration, remediation and aftercare of the landfill to which they relate for a period of 30 years."

3. The Bank was successful in the dispute determined on the preliminary issue. Accordingly, it seeks its costs against the plaintiff. It submits that the Court, in exercising the discretion given it in accordance with O. 99 of the Rules of the Superior Courts should make an order in favour of the Bank against the plaintiff for the costs of the preliminary issue to include the costs of the additional hearing relating to the request to make a reference pursuant to Article 267 of the Treaty on the Functioning of the European Union.

4. The plaintiff submits that these are proceedings to which s. 3 of the Environment (Miscellaneous Provisions) Act 2011, applies, and that accordingly, each party should bear its own costs and that the Court should make no order for the costs of the preliminary issue.

**The Law**

5. Section 3(1) of the Environmental (Miscellaneous Provisions) Act 2011 ("the 2011 Act") provides:

"3.— (1) Notwithstanding anything contained in any other enactment or in—

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),

(b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or

(c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),

and subject to *subsections (2), (3) and (4)*, in proceedings to which this section applies, each party (including any notice party) shall bear its own costs."

Sub-sections (2), (3) and (4) are not relevant to the dispute between the parties as to the applicability of s. 3(1) of the 2011 Act.

6. Section 4 of the 2011 Act, insofar as relevant, provides:

"4.— (1) Section 3 applies to civil proceedings, other than proceedings referred to in *subsection (3)*, instituted by a person—

(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in *subsection (4)*, or

(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in *paragraph (a)*, or such contravention or failure to comply referred to in *paragraph (b)*, has caused, is causing, or is likely to cause, damage to the environment.

(2) . . .

(3) Section 3 shall not apply—

(a) to proceedings, or any part of proceedings, referred to in *subsection (1)* for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.”

7. The 2011 Act is intended to give effect to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25th June, 1998 (“the Aarhus Convention”). Section 8 of the 2011 Act provides that judicial notice shall be taken of the Aarhus Convention. That fact does not appear to require any special meaning to be given to s. 4 of the 2011 Act, which is at issue in this application.

#### Issue

8. The principal issue for determination is whether the proceedings instituted by the plaintiff are “for the purpose of ensuring compliance with or the enforcement of a statutory requirement . . . and . . . the failure to ensure such compliance with or enforcement of such statutory requirement . . . has caused, is causing or is likely to cause damage to the environment”.

9. It is not in dispute that the conditions imposed by the wording of s. 4(1) of the 2011 Act are cumulative. In *Rowan v. Kerry County Council* [2012] IEHC 544 at para. 6, Birmingham J., in considering a similar issue, observed that whilst the starting point for the consideration of the issue must be the proceedings actually initiated in the sense of the pleadings delivered, that it is also necessary “to consider whether, as a matter of reality and substance, the proceedings were designed to ensure compliance . . . because of concern that non-compliance will result in damage to the environment . . .”. The Bank submits that the Court should follow this approach. I respectfully agree with Birmingham J. that whilst the pleadings are the starting point for any consideration, the Court should look at the question as to whether, as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition. The plaintiff submits that the Court must consider the nature of the proceedings objectively, and insofar as part of the observation of Birmingham J. might imply that the Court should take into account the subjective intention of the plaintiff in issuing the proceedings, I would not propose following this approach. It does appear that the Court must consider objectively the purpose of the proceedings, and if the Court determines that their objective purpose is of ensuring compliance with or the enforcement of a statutory requirement or condition, then the Court must also consider, again, objectively on the facts before it, whether the alleged failure to comply or enforce has caused, is causing or likely to cause damage to the environment.

#### Conclusion

10. My conclusion is that these proceedings, instituted by the plaintiff, are not proceedings for the purpose of ensuring compliance with or the enforcement of a statutory requirement or condition within the meaning of s. 4(1)(a) of the 2011 Act. In reality and substance, the purpose of the proceedings is to obtain payment to the plaintiff of the monies allegedly due to it by the first and second named defendants for work done by the plaintiff at specified landfill sites operated by the first and second named defendants.

11. The plaintiff was aware at the time of commencement of the proceedings that the first and second named defendants were insolvent and that the Bank had appointed the fourth named defendant as Receiver and Manager over the first named defendant and other companies within its Group. In its proceedings, the plaintiff pleads and relies upon alleged obligations of the first and second named defendants pursuant to s. 53A of the Waste Management Act 1996, and alleged breaches thereof, so as to maintain a claim that the alleged liabilities of the first and second named defendants to the plaintiff should be discharged out of monies previously held in an account of Greenstar Ltd. which was appropriated by the Bank pursuant to security held by it.

12. In such circumstances, it appears to me that the proceedings cannot be considered as being for the purpose of ensuring compliance with a statutory requirement or condition. The purpose of the proceedings is the recovery of money allegedly due to the plaintiff by the first and second named defendants. The alleged statutory obligations of the first and second named defendants and failure to comply form part of the legal basis of plaintiff’s claim to be entitled to recover the sums allegedly due by the first and second named defendants out of monies now held by the Bank.

13. Having regard to this conclusion, it is unnecessary for me to consider whether a failure to ensure such compliance has caused, is causing or is likely to cause damage to the environment. If it were necessary for me to do so, I would also reach a negative conclusion on that issue.

14. Accordingly, my decision is that s. 3(1) of the 2011 Act does not apply to the present proceedings. That being so, the Court must exercise its discretion in accordance with O. 99, r.1(4) of the Rules of the Superior Court and the starting point is that costs of the preliminary issue follow the event.

15. It was submitted on behalf of the plaintiff that the Court should have regard to the fact that the plaintiff played a relatively small part in the joint hearing of the preliminary issue herein and in the proceedings brought by the *Environmental Protection Agency v. Greenstar Holdings Ltd. (Partly in Receivership) & Ors* [Record No. 1682P of 2013]. It is a matter to be taken into account but, of itself, does not, in my judgment, justify the making of no order as to costs. Notwithstanding that the same preliminary issue was set down for determination in both sets of proceedings, it was, as pointed out by counsel for the Bank, open to the plaintiff in these proceedings not to participate in the preliminary issue and it could have simply have determined to await the outcome of the determination of the preliminary issue in the proceedings brought by the EPA. It chose to participate.

16. I have concluded that the Court should, in the exercise of its discretion, now make an order that the plaintiff do pay to the third named defendant, the Bank, the costs of the preliminary issue (such costs to include the costs of the hearing and written submissions in respect of the application for a reference to the CJEU pursuant to Article 267 of the TFEU) upon the basis that such preliminary issue was heard and determined simultaneously with the preliminary issue in the related matter [Record No. 1682P of 2013] *The Environmental Protection Agency (plaintiff) v. Greenstar Holdings Ltd. (Partly in Receivership) & Ors. including the Governor and Company of the Bank of Ireland* as defendants such costs to be taxed in default of agreement. Whilst the quantum of the allowable costs is a matter for the taxing Master as the trial judge it may be of assistance that I indicate that the participation of the plaintiff in these proceedings was secondary to that of the Environmental Protection Agency as plaintiff in the related proceedings in the joint trial of the preliminary issues.