Neutral Citation Number: [2010] IEHC 265

THE HIGH COURT

2004 18616 P

BETWEEN

MARY CURLEY

PLAINTIFF

AND

HIBERNIAN WIND POWER LIMITED, SAORGUS ENERGY LIMITED

AND COILLTE TEORANTA

DEFENDANTS

Judgment of Mr. Justice de Valera delivered on the 20th day of May, 2010.

This matter arises out of a landslide, or more correctly bogslide, which began on the 16th October, 2003 coming to a halt on the 19th October, 2003 on the plaintiff's farm at Glanmore, Derrybrien, Loughrea, County Galway.

It is common case between the parties that this bogslide and the material it contained have damaged the plaintiff's farm (and the buildings thereon) and that this damage is the fault and the responsibility of the defendants.

The matter is therefore one for the assessment of damages only.

I think it is fair to represent the difference between the plaintiff and the defendants, on the following basis:

> (a) The plaintiff contends that the proper measure of damages is the cost of restoration of the farm to its pre-landslide condition.
>
> (b) The defendants contend that the proper measure of damages is the diminution in the open market value of the farm from its pre-bogslide value to its post-bogslide value.

Both parties accept that the law to be applied in assessing damages in this matter is as set out in the Supreme Court decision *Munnelly v. Calcon Ltd*. [1978] I.R. 387.

In this case Henchy J. held that:

> (i) The damages to be awarded shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred.
>
> (ii) The damages to be awarded are to be reasonable. Reasonable that is as between the plaintiff on the one hand and the defendant on the other.

The learned Judge then continued:

> "I accept those two principles as being basic to, although not necessarily exhaustive of, the concept of *restitutio in integrum* on which the law of damages rests in cases such as this. It is in the application of those principles that difficulty may arise, for a court, in endeavouring to award a sum which will be both compensatory and reasonable, will be called on to give consideration, with emphasis varying from case to case, to matters such as the nature of the property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act and the pecuniary, economic or other relevant implications or consequences of reinstatement damages as compared with diminished-value damages."

Again Henchy J. in the *Munnelly* case goes on to say:

> "The true principle is that the owner of a building is entitled to the diminution in value between the building as it was before the wrong and after it, unless he establishes that he intends to or has reasonably rebuilt the structure damaged or destroyed **and** that his is an exceptional case which justice requires that he should be paid the cost of restoration. … In my opinion the owner is entitled to the diminution in value between the building as it was before the wrong and after it, unless he establishes that he intends to spend the restoration costs … on re-building and that his is an exceptional case which justifies departure from the test of diminution in value."

From the *Munnelly* case and from the other authorities cited to me by both the plaintiff and the defendants, I am satisfied that the proper measure of damages in cases such as this is as stated by Kenny J. (in the aforementioned *Munnelly* case) where he states, at p. 407, that:

> "the true principle is that the owner of a building is entitled to the diminution in value between the building as it was before the wrong and after it, unless he establishes that he intends to or has reasonably rebuilt the structure damage that was destroyed and that his is an exceptional case in which justice requires that he should be paid the cost of restoration."

This in matters where the restoration cost is comprehensively larger than the diminution in value.

I must then approach this matter on the above basis and decide whether the proper measure of damages is the diminution in value of

the farm at Glanmore between its pre-bogslide and post-bogslide condition or is the proper measure the restitution of the farm, insofar as is possible, to its pre-bogslide condition.

If I am to adopt the latter proposition it appears to me that I must accept that the plaintiff's is an exceptional case in which justice requires that she should be paid the cost of restoration and that she is not acting unreasonably.

Evidence was heard from a considerable number of witnesses but the only evidence directly touching on the exceptional nature of the plaintiff's situation was given by Mary Curley, her husband, James Curley, and their son, James Curley, Junior. Their evidence established that the farm at Derrybrien had been in the family for at least three generations and that the last occupant of the farm was Mrs. Curley's uncle. Mrs. Curley and her husband had always intended that their son James would have the use and benefit of the land and that through him it would continue in family ownership. James Junior gave evidence that it had been his intention, always, to occupy and farm the land in addition to his work as a mechanic. None of this evidence was contested by the calling of contrary witnesses or evidence.

In the absence of such contest and bearing in mind the age old attachment of the Irish man (and Irish woman) for the land and particularly in the absence of any evidence to the contrary, I am satisfied that the Curleys did intend that the farm would remain in family ownership, would devolve in due course to James Junior and that the plaintiff, Mrs. Curley, has made an exceptional case in which the justice of the situation requires that she should be paid the cost of restoration as she is not acting unreasonably in seeking to maintain the family connection with the farm.

The plaintiff's proposal for the restoration of the affected lands requires the removal of the spoil carried down by the bogslide and the ancillary repair and renewal work associated with this removal. I accept this as being the proper and most effective method of restoration.

The defendants propose a different method of restoration which, again without going into detail, would require rotavating the surface peat back into the soil. I am satisfied on the evidence that this would not be an appropriate procedure.

The plaintiff's evidence of the cost of restoration based on the calculations of Mr. Tom O'Brien is as follows:
(1) Peat removal €186,475 (€186,475)
(2) Drainage-stream €35,230 (€35,230)
(3) Top soil rotavate and re-seed €118,515 (€75,000)
(4) House re-roof and dry line €18,500 (€10,000)
(5) Bridge €4,000 (€4,000)
(6) Fuel and general store €41,100 (€20,000)
(7) Berm €11,400 (€11,400)
(8) New roadway to house €9,600 (€5,000)
(9) Fencing €9,000 (deleted)

_____
TOTAL: €433,820 (€347,105)
VAT @ 13.5% €58,565 (€46,859)
Professional fees @ 10% €43,382 (€34,710)
VAT @ 21% €9,327 (€7,289)

_____
TOTAL: €545,094 (€435,963)
_____

The figures in brackets above represent the actual amounts that I am prepared to allow in this matter. To a certain extant these alterations are arbitrary as I have what I consider to be insufficient evidence but I am satisfied that in some instances the figures calculated by Mr. O'Brien are excessive and, in one instance, irrecoverable.

Under the heading "top soil rotavate and re-seed" I am satisfied that this is an item which is excessive and had the farm not been damaged would have been a required maintenance procedure. Similarly, the re-roofing and dry lining of the dwelling at No. 4 above would have been required at some stage in the future in any event and only part of this cost should be recoverable. The same applies to the fuel and general store at No. 6 and to the new roadway to the house at No. 8. Fencing on a farm such as this is a continuous maintenance requirement and would have had to be provided on a wear and tear basis in any event over the relevant period.

No alternatives have been proposed to the costings as set forth by the plaintiff, the only contest being by way of cross-examination, with the exception of the conflict between the amount of peat and spoil on the land. Mr. Tom O'Brien on behalf of the plaintiff with the assistance of Mr. Richard Lindsay calculated that 7,459 cubic metres of peat required to be removed. The defendants' calculation carried out by Mr. John Richardson calculates the peat spoil to be 5,000 cubic metres. Having heard the evidence and in particular the methods of calculation, I prefer the plaintiff's figure.

Both parties accept that for a period of five years it will not be possible to derive any income from the land and I do not consider that this figure has been properly quantified in the plaintiff's evidence.

I am satisfied therefore that the restoration cost for the plaintiff's farm at Derrybrien amounts to €435,963.

However, it is quite clear that when these restoration works are carried out the plaintiff will have a property of greatly enhanced value and this is a matter which I believe I should take into consideration when assessing the total damages figure. In doing this the only useful evidence which I have to guide me is the valuation on the Derrybrien farm placed on it by the plaintiff herself which was just under €320,000.

In the absence of any specific evidence as to the improved value of the plaintiff's lands after restoration I must assess a figure, as best I can, on the basis of the various valuations before me and this I estimate to be €100,000.

I have also been asked to consider the question of aggravated and exemplary damages. Taking into consideration the behaviour of both parties to this action over the relevant period, that is from October 2003 to the date of trial, May 2009, and bearing in mind the considerable difference between the cost of restitution and differential value, I am satisfied that no finding for aggravated or exemplary damages would be appropriate.

Therefore, I award the plaintiff the sum of €335,963.