Neutral Citation Number: [2009] IEHC 266

THE HIGH COURT

2008 648 SP

BETWEEN

JACKSON WAY PROPERTIES LIMITED

APPLICANT

AND

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 11th day of March, 2009.

In view of the fact that this matter has been in the Monday list on at least four occasions and seems to me to have the capacity to take up a lot of Court time unproductively, I have reviewed the papers with the object of setting out how I see the Court's involvement in the process, as it goes forward.

The background to these proceedings is that under South-Eastern Motorway Scheme (now the M50) the defendant compulsorily acquired lands of which the plaintiff was a registered owner on Folio 4940 County Dublin comprising 8.168 hectares (the subject lands). The sequence of relevant events in relation to the acquisition was as follows:

- On 14th June 2000, the defendant served notices to treat.

- On 17th September 2001, the defendant served notices of entry.

- On 18th October 2001, the defendant entered into possession of the lands.

- On 12th November 2003, Mr. John Shackleton, (the arbitrator) who had been appointed to assess the compensation to which the plaintiff was entitled for the acquisition of the lands for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919 (the Act of 1919) published his award, following a nineteen day oral hearing, awarding €12,860,700 by way of compensation to the plaintiff. The award was made on the basis of the claim of the plaintiff that it had a freehold interest with vacant possession in the subject lands subject to certain easements and wayleaves which were set out in the recitals to the award. There was no reference to the burdens which are registered at entry no. 3 (a right of way), entry no. 4 (a restrictive covenant) and entry no. 5 (the modification of the restrictive covenant) on part 3 of Folio 4940.

- Between 5th September 2002 and 29th March 2004 there was correspondence between the plaintiff's then solicitors, Miley & Miley, on the one hand, and the law agent of the defendant, on the other hand, addressing the title of the plaintiff to the subject lands and in particular whether the burdens at entries nos. 3, 4 and 5 still affected the lands. It seems that in March 2004 the correspondence fizzled out and was not re-opened until 7th July, 2008 when a new firm of solicitors, Delahunt, took over on behalf of the plaintiff. At that stage, broadly speaking, the defendant was not satisfied that the plaintiff had the title to the lands which it represented to the arbitrator. Title had not passed to the defendant and the compensation had not been paid to the plaintiff.

These proceedings were initiated by a special summons which issued on 21st July, 2008. The primary relief claimed on the special summons was an order pursuant to s. 41 of the Arbitration Act 1954 (the Act of 1954) for leave to enforce the award of the arbitrator and claiming judgment in the sum of €12,860,700. Interest was also claimed from 18th October, 2001. The special summons was grounded on an affidavit sworn on 30th July, 2008 by Alan Holland, a director of the plaintiff, which set out the events which I have outlined above, which I consider to be the relevant events, and other matters which I consider not to be relevant. One matter which is referred to in the affidavit, the significance of which I do not fully comprehend, is the fact that there is an appeal pending in the Supreme Court against an order made on 26th July, 2006 by this Court (Finnegan P.) at the suit of the Criminal Assets Bureau prohibiting the plaintiff, or any other person having notice of the order, from disposing or otherwise dealing with the lands comprised in Folio 494O. It is not clear to me whether the order in question prohibits the completion of the transaction involved in the compulsory acquisition of the subject lands by the defendant. If it does, then it seems to me that the plaintiff must take steps to have the subject lands excluded from the order. That is a matter which the plaintiff must address.

After an unsuccessful attempt to have the proceedings admitted to the Commercial Court, the special summons came into the Chancery No. 2 List on Monday, 24th November, 2008. I note that there is a transcript available of the proceedings on that occasion. The first issue which arose on that occasion was a procedural issue. Since 31st March, 2006, Order 56, rule 4 of the Rules of the Superior Courts 1986 (the Rules) provides that proceedings to enforce an arbitration award under the Act of 1954 must be initiated by an originating notice of motion. Counsel for the defendant, Mr. Flanagan, took a practical approach in relation to the procedural problem and indicated that the matter could proceed on the basis that it had come before the Court by way of an originating notice of motion.

However, Mr. Flanagan submitted that the matter could not be dealt with without going to plenary hearing. At that stage he raised both procedural and substantive objections. He contended that the plaintiff was not entitled to enforce a statutory award under the Act of 1919 by invoking s. 41 of the Act of 1954. He also submitted that the plaintiff was not entitled to enforce the award and receive payment on foot thereof because the plaintiff had failed to adduce the title it claimed before the arbitrator.

The outcome on 24th November, 2008 was that I indicated that I would deem the initiation of the proceedings as adequate by consent of the parties. I acceded to the defendant's application that the matter go to plenary hearing and I gave directions in relation to delivery of points of claim by the plaintiff and points of defence by the defendant and adjourned the matter to 12th January, 2009.

The plaintiff delivered points of claim on 10th December, 2008. In addition to the reliefs which had been sought in the special summons, the plaintiff claimed an order determining whether the restrictive covenant and the modification thereof (entries nos.4 and 5) were subsisting as affecting the interest of the plaintiff in the subject lands at the material time and any further or other question as to the plaintiff's title to the subject lands as it might be necessary to determine.

The matter was adjourned from time to time in the list.

Eventually on 23rd January, 2009 the defendant delivered points of objection, defence and counter-claim. In its objections the defendant asserted that –

> (1) proceedings to enforce the arbitrator's award in pursuance of s. 41 are inapt and/or misconceived, insofar as the plaintiff requires determination of issues as to whether the burdens at entries nos.4 and 5 existed at the material time,
>
> (2) because of the issues in relation to the restrictive covenant, the plaintiff is precluded from seeking enforcement pursuant to s. 41,
>
> (3) section 41 cannot be invoked to enforce an award under the Act of 1919, and
>
> (4) these proceedings cannot determine whether the restrictive covenant was subsisting as affecting the interest of the plaintiff in the subject lands at the material time or any other questions in relation to the plaintiff's title.

In its defence, the defendant traversed pleas made by the plaintiff in respect of the restrictive covenant and its modification. The defendant denied that a contract existed based on the C.P.O. and the arbitrator's award. It further denied that the plaintiff had furnished evidence of its title to the subject lands to the defendant or evidence that the restrictive covenant and its modification did not affect the title to the subject lands. In its counter-claim the defendant invoked Order 56 of the Rules and counter-claimed for an order setting aside the award or, alternatively, an order remitting the award to the arbitrator under the Act of 1919. One of the grounds pleaded for seeking such relief was that third parties, Mr. and Mrs. T. K. Smith, have at all material times maintained and continue to maintain a claim to the benefit of the restrictive covenant and the modification thereof and had intimated that they were submitting a claim for compensation in respect thereof. On that point, when the matter was before the Court on Monday last, 9th March, 2009, counsel for the defendant put before the Court a formal notice of intention to claim compensation dated 13th January, 2009 served by Mr. and Mrs. Smith on the defendant claiming monetary compensation in respect of their interest in the restrictive covenant.

Points of reply and defence to counter-claim were delivered on 13th February, 2009 by the plaintiff.

Two matters were before the Court on 9th March, 2009: the substantive proceedings and a notice of motion which the plaintiff issued on 9th February, 2009 returnable for 16th February, 2009.

The relief claimed on the notice of motion can be subsumed under two broad headings.

The first is an application by the plaintiff for leave to amend its pleadings. The plaintiff invoked Order 28, rule 1 of the Rules, seeking permission to deliver amended points of claim, and also invoked Order 20, rules 1, 6 and 7 as authorising an extension of the pleas contained in the special summons. I have considered the proposed amendments to the points of claim as set out in the draft amended points of claim exhibited in the grounding affidavit of Alan Holland sworn on 9th February, 2009. Two additional reliefs are claimed by the plaintiff: a declaration that the construction of the M50 on the subject lands and the user of the subject lands as a motorway does not breach the restrictive covenant, the motorway not being the erection of any 'building'; and a consequential declaration that, if the restrictive covenant was subsisting at the relevant date, compensation payable to the plaintiff is not to be reduced thereby. Counsel for the plaintiff invoked the decision of the Supreme Court in Croke v. Waterford Crystal Limited [2005] 1 I.L.R.M. 321, in which Geoghegan J. stated that Order 28, rule 1 is intended to be a liberal rule.

I am satisfied that the amendment sought by the plaintiff meets the primary criterion which the Supreme Court reiterated in the Croke case, namely, that the amendment is necessary so that the real issues and controversy between the parties may be determined. I propose giving the plaintiff leave to deliver an amended points of claim as per the draft exhibited. I appreciate that that creates a dilemma for the defendant, in that the defendant has a claim for compensation from Mr. and Mrs. Smith which is premised on the fact that the restrictive covenant still subsists and the construction of the motorway is in breach of it. However, it is a matter for the defendant to decide how the proceedings should proceed in a manner which enables the Court to adjudicate on the dispute in relation to the restrictive covenant as between the real proponents, namely, the plaintiff and Mr. and Mrs. Smith, as the plaintiff is not prepared to address the difficulty.

The second element in the notice of motion is that the plaintiff seeks directions in respect of the objections raised by the defendant. Mr. Flanagan submitted that the plaintiff is in "intellectual denial" as to the significance of the defendant's objections to the form and substance of these proceedings. Mr. Brady, in his oral submissions, did not indicate the nature of the directions he was seeking.

In my view, the trial of the action is the proper venue for the determination by the Court of the validity or otherwise of the objections raised by the defendant. The plaintiff has decided to adopt a particular course. The defendant has decided

to defend on the basis that the plaintiff has not adopted a proper course, either procedurally or substantively. The issues raised by the objections, which are fundamental issues, cannot be determined on an interlocutory motion. Both the plaintiff and the defendant have adopted a particular course and each is on the hazard until such time as the issues are determined at the trial of the action.

Having heard the views of the parties, I will fix a timescale for delivery of amended pleadings. I suggest that it would be simpler if the amended points of claim were described as an amended statement of claim and the usual terminology of defence and counter-claim and so forth were adopted in future, so that there is no misunderstanding as to the nature of this process. When the pleadings are closed, notice of trial should be served and the matter set down in the ordinary way by the plaintiff. Once certified by counsel for the plaintiff as being ready for trial, the matter can go into a list of fixed dates.

In view of the fact that I have had to familiarise myself with this matter in some depth, I will give the parties leave to bring any further motions in the Chancery No. 2 List.