

THE HIGH COURT

2005 No. 15 MCA

BETWEEN

LAOIS COUNTY COUNCIL

APPLICANT

AND

RICHARD SCULLY, MICHAEL SCULLY, EILEEN SCULLY
SCULLY SKIPS LIMITED AND EDWARD BOYHAN

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 18th day of January 2006

1. The applicant seeks certain reliefs against the respondents on foot of the Notice of Motion issued herein on the 8th March 2005 pursuant to s. 57 of the Waste Management Acts 1996-2000, and s. 160 of the Planning and Development Act 2000.

2. By way of summary, these reliefs sought amount to requiring the respondents to cease the holding and/or disposal and/or recovery of waste at certain lands at Knockacrin, Timahoe, Co. Wicklow, to remove all such waste from the lands and deliver same to an authorised waste disposal or recovery facility, and to remediate the lands and any leachate-contaminated waters downstream therefrom, to the standard of normal agricultural land in the area. There is no need to set for these reliefs with more particularity.

3. The applicant seeks certain declaratory reliefs in addition to these substantive reliefs.

4. I will not set out the contents of the affidavits filed, since the essential background to the reliefs sought is not a matter of contest between the parties. The respondents accept that they are not the holders of a waste permit or waste licence such as would have entitled them to operate the land in question as they have done. They also accept that no such permit was applied for. The only matter in dispute really is the measures which must now be taken in order to remediate the lands. The applicant has set forth what in their view is necessary, but the respondents are of the view, and they have submitted some expert evidence which they say supports their view, that measures less than those required by the applicant, and therefore less costly and which they can afford, will be sufficient to remediate the lands. The applicant's proposals require the removal of all waste brought onto the lands to an authorised waste facility (such facility to be approved in advance by the Council), and for the land then to be filled and restored to the standard of normal agricultural land for the area. The respondents on the other hand say that these works will cost in the order of €1.5 million and that they cannot afford such a sum.

5. The proposal of the respondent would result in a sorting of waste. The proposal is described as follows in the affidavit of Eileen Scully sworn on the 24th May 2005 by reference to a report from Mr Andrew Woods, Consultant:

"...the most environmentally beneficial, sustainable and cost effective way to achieve the Council's stated objectives is for Scully's Skips to dig up the deposited material and screen the material through a trammel and picking line to remove and segregate this recyclable and waste fractions from the material."

6. The deponent goes on to state that in short what is recyclable could be sent off to site to be processed, and the balance of the inert soil, stones and gravel could be retained on site and simply filled in, and she agrees that this procedure would have to be carried out under the supervision of the Council and by adhering to a plan and timetable agreed by all the parties.

7. The Council's engineer, Mr Cobbe is not satisfied that such a proposal is satisfactory at all to resolve the problems of pollution posed by this site, since even recyclable material would now have been contaminated, and that no recyclable plant would accept the material in that state. He has other objections to the proposal as set forth in his replying affidavit.

8. He also makes the point that having brought in approximately ten thousand tonnes of waste onto the site – a figure not in dispute to any great extent – the respondents have operated a very profitable business, and that in accordance with the principle that 'the polluter must pay' it is inappropriate for the respondents to submit a proposal, especially one which does not achieve the objectives of the Waste Management Directive, and the legislation, so that they can retain as much as possible of the profits from their unauthorised and unlawful activity.

9. I am satisfied that the orders sought in the applicant's Notice of Motion should be granted. I am satisfied that the Council are entitled to hold the view in all the circumstances that the proposal put forward by the respondents is not one which will remediate the lands in the way best suited to achieve the objectives of the legislation. The fact that the Council's proposals will cost more than the proposal put forward by the respondents cannot be a factor against the former. I am satisfied that if "an equally satisfactory solution" can be achieved by less expenditure then the matter might give rise to different considerations, but in the present case I am satisfied that the solution put forward by the respondents is not one which can be reasonably regarded as providing an adequate solution to the task of removal and remediation of the lands.

10. Mr Justice O'Sullivan dealt with similar issues in his judgment in *Wicklow County Council v. Fenton* [2003] 1 ILRM 279 while I adopt his views generally as relevant to the issues in this case, I will set out one passage in relation to the matter dealt with in the preceding paragraph. It appears at p. 318 of the said judgment:

"I have given careful consideration to the submission on behalf of the respondents that a preliminary order should be made directing further investigation with a view in the light of the results thereof to making a final order later. It is submitted that there has been insufficient investigation to demonstrate conclusively that the wholesale removal of the entire contents of the landfill (whether 8000 tonnes or some lesser amount) is necessary and in fairness to the respondents if an equally satisfactory solution can be achieved on-site for less expenditure then the court should facilitate this by providing initially only for further investigation."

11. I would share the view that if there are two solutions put forward, one of which is more economic than the other, then the solution which places the lesser burden on the "payer" should be regarded as the appropriate one. But that cannot so unless the Court is satisfied that the less onerous solution is equally effective and satisfactory in order to fully achieve the objectives of the legislation. I am not satisfied in any way that the solution put forward by the respondents is sufficient, and there is no reason why the Court should countenance the less onerous proposal in such circumstances.

12. The Waste Management Acts were enacted in order to give effect to a number of EU instruments, but in particular Council

Directive 75/442/EEC, as amended by Council Directive 91/156/EEC ("the Waste Directive"). The Waste Directive has as a stated objective the protection of the environment and human health, and the achievement of a high level of protection based upon the principles that preventive action shall be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. The Oireachtas has given effect to the objectives of the Directive by the provisions of the Waste Management legislation in force and to which the Court has been referred. This Court cannot choose to impose a remedy, which, though in ease of the respondents, is not one which as a matter of probability will achieve the objectives of the Directive, where it is satisfied that there is another solution, such as that proposed by the applicants herein, which can achieve those objectives.

13. I am also satisfied that the appropriate orders in this case must be made not simply against the fourth named respondent, a limited liability company which caused the pollution and the unauthorised use, but, in accordance with principles set forth by O'Sullivan J. in *Wicklow County Council v. Fenton [supra]* that these orders should be made against the individual directors of that company, namely the first, second and third named respondents. In that regard the learned judge stated at p. 317:

"The domestic law in relation to limited liability of companies would, in my opinion, frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in circumstances where the company in question having first been directed by the court to comply with such orders was not in a position for financial or other reasons so to do. In my view in order to ensure the full application of the 'polluter pays' principle whereby those responsible even indirectly for causing environmental pollution should pay for it rather than leave it to an innocent party or community to do so, the court must be in a position to make orders directly against directors in such circumstances, and the domestic law of limited liability should be suspended and the veil of incorporation lifted in order to ensure the full application of this principle and other objectives of the European Waste Directives..."

14. There is no reason not to apply the above principle to the present case.

15. I will hear submissions as to whether any order is required against the fifth named respondent, who I understand is the owner of the lands in question, but who may have played no part in the activities which have given rise to this application.

16. In any event I will list the matter again before me so that I can be addressed as to the precise terms in which the order of the court should be made, and I bear in mind the necessity where the Court is making an order of this kind, that those whose duty it is to comply with the order should know what precisely is required of them in order to achieve compliance, to include precise detail of what has to be done and the time-frame within which any particular matter must be attended to within the overall time-frame. I would strongly urge the respondents to co-operate with the applicant in agreeing such a timetable of events, so that the terms of any order made by the Court can reflect such a consensus, but in the event that no such consensus is forthcoming the Court will make such order as it deems appropriate having heard submissions from all concerned.