Neutral Citation Number [2007] IEHC 95

THE HIGH COURT

[1996 No. 6285P]

BETWEEN

UDARAS NA GAELTACHTA

PLAINTIFF

AND
UISCE GLAN TEORANTA

DEFENDANTS

Judgment of the Honourable Mr. Justice O'Neill delivered 13th day of March, 2007

1. In these proceedings the plaintiffs claim damages for negligence, breach of duty, breach of statutory duty, nuisance and breach of contract against the defendants arising out of damage to a factory premises let by the plaintiffs to the defendants. Although not specifically pleaded, in the trial the plaintiffs stated their claim for damages also, on the basis of a breach of the covenant to repair in the lease between the plaintiffs and the defendants.

2. The background to this matter is as follows. The plaintiffs by a lease of 25th February, 1985 let to the defendants ALL THAT part of the lands of Baile Liam in the Barony of Moycullen, County of Galway upon which stood portion of a factory premises and storage tanks for a term of 35 years from the 1st January, 1985 subject to the rent reserved and the covenants on the part of the defendants and the conditions contained in the lease. A further lease of the 3rd October, 1987 was made between the same parties for an additional part of these factory premises. That lease was for a term of 32 years and 8 months from the 30th April, 1987.

3. The defendants engaged in the business of manufacturing a substance known as aluminium sulphate better known as alum. This substance was used for the purification of water. For the purposes of the manufacture of this substance large quantities of sulphuric acid were used. The defendants stored large quantities of this acid in storage tanks on the leased premises. In 1987 as a result of complaints about leakages or discharges from the defendants premises the defendants requested the plaintiff to install a new a drainage system in the yard attached to the factory premises. The plaintiff's applied for planning permission for this, which they obtained, and they then proceeded to carry out the works in accordance with the planning permission. This involved removing the existing drainage system in the yard and installing a single drain for the purpose of draining spillages in the yard into a sump. The yard was re-slabbed with a concrete slab and the sulphuric acid storage tanks were surrounded by what is known as a "bund". In addition the yard itself was bunded. The purpose of these changes was to ensure that any spillages of sulphuric acid which might occur would be either safely contained within the bund or quickly discharged into the drain which went into the sump. From time to time the material in the sump was analysed and, if safe, was discharged into the normal drainage system.

4. Until 1993 the sulphuric acid in the storage tanks was pumped into the factory, into a reactor vessel by means of an automated pumping system which was controlled from within the factory. The acid passed through a pipe which was under the yard and when it reached the factory wall the pipe rose above ground, travelled up the inside of the outside factory wall and then travelled over ceiling height into the reactor vessel which was known as a "kettle".

5. Within the factor premises itself there was a large storage area for finished product. This was largely covered by a tiled floor, which the evidence established, to my satisfaction, was at all times during the occupation of the defendants in relatively poor condition. In particular there was never any grouting between the tiles.

6. Because of the nature of the operation carried on, significant quantities of finished dry alum would end up on the floor. This was cleaned away, initially by sweeping, and then by washing down and all of this cleaning was directed towards a sump installed for that purpose. The material accumulated in this sump was then recycled into the production process.

7. Towards the end of 1992, probably in October or early November, there occurred the events which gave rise to these proceedings.

8. In or about that time employees of the defendants noticed cracking developing in the walls in the factory and this process accelerated through November, December and into January, 1993, to such an extent that a concrete cross beam lifted off its supporting pillar. In addition it became apparent that the ground in a portion of the yard had risen. The speed of occurrence and the extent of the damage occasioned by this event, needless to say, caused alarm in the defendants and indeed the plaintiffs when brought to their attention.

9. In the spring of 1993 experts were brought on the scene and whilst initially some thought the problem was subsidence, it very quickly became clear that it was the very opposite was the problem, namely, the very rare occurrence known as "ground heave". Both plaintiffs and defendants engaged engineering architectural and scientific expertise to investigate and explain this occurrence and to prescribe remedial work. The plaintiffs in April of 1993 wrote to the defendants holding them liable for the damage that had occurred.

10. In due course it emerged that the essence of the plaintiffs complaint against the defendants is that the defendants had caused or permitted sulphuric acid to escape into the ground underneath the factory specifically in the area where the ground heave had occurred and this sulphuric acid had reacted with materials in the ground to form a compound known as calcium sulphate or otherwise known as gypsum, which they said was an expansionary substance and it was the expansion caused by this substance which gave rise to the "ground heave" which in turn pushed upwards a portion of the building causing the cracking and other damage.

11. The defendants through their experts vehemently contested the scientific basis of the plaintiffs explanation of the occurrence, contending that there was no discharge or leakage of sulphuric acid into the ground, that the presence of sulphates in the ground did not indicate a discharge of sulphuric acid but rather the presence of sulphate from the process of manufacture and some sulphuric acid in a very dilute form as a result of the reaction of sulphate from the manufacturing process with water in the ground. In either event it was contended that the levels of dilute sulphuric acid and any formation of gypsum could not have caused the damage which has occurred because it could not have, having regard to the nature of that substance, generated a kind of pressure which would have been necessary to cause the heave that had occurred. It was further contended that a potential explanation of the occurrence was water pressure resulting from a very high water table, very wet weather at the time, and the discharge into the site through an ESB ducting pipe of water from higher ground. In this regard it was contended that the site had been carved out of granite and had a bowl configuration, so that it naturally tended to retain water.

12. The first issue to be confronted is whether or not the evidence establishes the probability of discharge of sulphuric acid by the defendants into the ground.

13. The evidence which was not contradicted was that the defendants stored large quantities of sulphuric acid in storage tanks and that from 1987 onwards these tanks were surrounded by "bunds" which were designed to confine any spillage or leakage from these tanks within the bunds. There was also evidence of the use of a stainless steal tank to catch any leakages during the process of delivery of sulphuric acid. From 1987 onwards the drainage in the yard was reconfigured so as to drain any spillages into a single drain and from there to a sump. All of the expert evidence was that this drain was intact and functioning properly.

14. The pipe which carried the acid underground across the yard to the factory building was excavated, when this problem arose in 1993, and it was agreed that the pipe was in good condition and with no signs of any leaks from it. There was no evidence of any leakages from the continuance of this pipe inside the building. I am satisfied on the evidence that this did pipe did rise vertically inside the building, travelling up the inside of the outer wall and across above ceiling height to the reactor vessel. Thus it was plainly visible at all times. There was no evidence of any leakages of sulphuric acid in the area of the reactor vessel inside the factory.

15. I am satisfied from the evidence that it is highly unlikely that there was any significant discharge or leakage of sulphuric acid into the ground. That being so I am of opinion that as a matter of probability the explanation of the defendants experts and in particular Mr. O'Flaherty, namely that the low ph was associated with the presence of sulphates in the grounds and specifically a reaction between the sulphates and the water in the ground causing the formation of sulphuric acid in a dilute form, is more likely to be correct. I am also of the view that such formation of gypsum, that might have occurred, having regard to the very high water table in the area as evidence by the photographs put in evidence, and that the reaction of this compound with water, would be very unlikely to have generated the kind of pressure needed to create the ground heave that occurred.

16. The presence of sulphates in the soil is in my view convincingly explained as an inevitable consequence of the process of manufacturing carried on by the defendants, where large quantities of aluminium sulphate were manufactured. I accept the evidence that this substance is essentially inert and harmless save to the extent that in water it reacts to form a dilute form of sulphuric acid.

17. As a matter of probability in my view the alum got in to the ground by a gradual process of percolation down through the floor in the storage area, having regard to the poor condition of this floor.

18. Having considered all of the evidence offered in this case by the experts called on both sides, it is my view that this evidence falls short of explaining the ground heave on the basis of a balance of probability.

19. I am quite satisfied that the plaintiffs theory to the effect that it was caused by sulphuric acid discharged by the defendants into the ground has not been proven on the balance of probabilities and I am also satisfied that the alternative theory of water pressure likewise has not been established to that standard either.

20. As mentioned earlier the plaintiff's claim damages in respect of a variety of causes of action.

21. The first of these is negligence and the basis of the claim here is that in essence the defendants caused or permitted this dangerous substance to be discharged into the ground or failed to take adequate precautions to ensure that this did not happen. Having concluded that in fact this did not happen I am satisfied that there was no negligence on the part of the defendants in this regard.

22. The plaintiffs also claim damages in nuisance and rely upon the rule in the case of *Rylands v. Fletcher*, claiming that the defendants permitted the escape of a dangerous substance. In the first place I am satisfied that the defendants did not cause or permit the escape of a dangerous substance i.e. sulphuric acid but in any event the evidence clearly established that there was no escape beyond the boundaries of the leased premises and hence in my view for that reason alone the cause of action in nuisance fails and the reliance upon the rule in *Rylands v. Fletcher* is misplaced.

23. Finally the plaintiff's claim damages for breach of contract. In the course of the hearing this was explicitly fleshed out to be damages for breach of the covenant to repair and indeed other covenants in the lease.

24. The relevant covenants relied upon where as follow;

> "2(3) To repair and keep in good and substantial repair and condition using suitable materials of good quality the whole of the demised premises and every part thereof and the lessor fixtures therein and such parts of the drains, pipes, wires and sanitary apparatus serving the demised premises as are situated within same and from time to time as required and in any event in every fifth year of the term and in the last year thereof to paint in colour all of the outside and inside parts of the demised premises as are usually painted and coloured and all additions thereto in proper and workman like manner and with suitable materials of their several kinds…
>
> 2(10) Not to use the demised premises or suffer or permit the same to be used for any offensive noisy or dangerous trade, business manufacture occupation or for any purpose or in manner which may be a nuisance to the lessor or the owners or occupiers of neighbouring adjacent premises provided that the carrying on in a proper manner and in such way as to cause as little nuisance to the lessor or the owners or occupiers of neighbouring or adjacent premises as is reasonably possible of the trade or business as in herein before in sub paragraph (9) of this clause provided for, shall not be deemed to be in breach of this covenant…
>
> 2(12) To take such measure as may be necessary to ensure that any effluent discharged into the drains or sewers which belong to or are used for the demised premises in common with other premises will not be corrosive or in any way harmful to the said drains or sewers or cause any obstruction or deposit therein and to obtain such licences, authorisations and consents as may be required by law for the discharge and disposal of such effluence."

25. I am quite satisfied that there was no evidence of any breach of covenants 2(10) and 2(12). There was no evidence whatever that the carrying on by the defendants of their trade in these premises was a source of nuisance to the plaintiffs or occupiers of adjacent premises which could have been avoided by the defendants. Likewise there was no evidence of any injury or damage to drains by corrosive substances discharged by the defendants into these drains or sewers.

26. The plaintiff based its claim for breach of covenant 2(3) on two bases. The first of these was the escape of alum through the floor in the storage area resulting in a build up sulphate in the soil. It was submitted that the defendants breached their obligation to repair in failing to have repaired the floor of this storage area so as to prevent this escape.

27. I am satisfied from the evidence that the floor in this area was in a poor conditions when the defendants went into occupation of

these premises. They were not in my view obliged under the covenant to repair, to carry out work to in fact improve the floor. These cases of *Lister v. Lane and Neshan* [1893] 2 QB 212, *and Norah Whelan and Others v. Patrick Madigan* [1978] I.L.R.M. 136, *Chaloner v. Broughton Irish Jurist Vol XI* [1865/6] and *Sotheby v. Grundy*, [1947] 2 A.E.R. 761 in my view established the principle that a lessee under a covenant to repair does not have to rebuild or carry out works to improve the premises beyond the state of repair of the premises upon the demise.

28. That being so in my view the defendants were not obliged to have carried out work to this floor so have to rendered it non-porous thereby prevent the percolation of alum through the floor into the ground beneath and surrounding areas.

29. In any event I am satisfied that the percolation of this material into the ground was not the probable cause of the ground heave and hence the damages claimed for breach of covenant.

30. The second basis upon which the plaintiff claims that there has been breach of the covenant to repair is that notwithstanding the cause of the ground heave, that the mere occurrence of this ground heave and the damage which it caused to the demise premises, was sufficient to impose a liability on the defendants, under the covenant to repair.

31. I am quite satisfied that this submission is ill founded. The right to recover damages for a breach of the covenant repair arises out of a breach of that covenant. The occurrence of the ground heave and the ensuing damage in my view was not caused by any breach of the covenant to repair, in the sense of a failure on the part of the defendants to have kept the demised premises in good repair. Thus in my opinion the damage occasioned by the ground heave not having been caused by any failure to repair on the part of the defendant is outside the ambit of covenant 2(3) and the plaintiff is not entitled to recover damages for any breach of it.

32. I have come to the conclusion that the plaintiff has failed to establish any of the several causes of action advanced and accordingly I must dismiss the plaintiffs claim