



COURT OF APPEAL

Record No. 2015/100

**Peart J.
Irvine J.
Hogan J.**

BETWEEN/

ENVIRONMENTAL PROTECTION AGENCY.

RESPONDENT

- AND -

MIDLAND SCRAP METAL COMPANY LTD.

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of March 2016

1. This is an appeal by Midland Scrap Metal Co. Ltd. ("Midland Scrap") against the decision of MacEochaidh J. in the High Court delivered on 3rd March 2015: see *Midland Scrap Metal Co. Ltd. v. Environmental Protection Agency* [2015] IEHC 17. The decision of MacEochaidh J. was delivered in an appeal by way of a case stated from a decision of Judge John O'Neill of the District Court pursuant to s. 2 of the Summary Jurisdiction Act 1857 (as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961).

2. The essential issue arising in that case stated was whether a waste licence granted to a particular operator under the terms of the Waste Management Acts 1996 to 2008 is personal to that operator or whether another entity may be lawfully permitted by that licence to operate the waste facility in question. Following a thorough analysis of the relevant provisions of the 1996 Act, MacEochaidh J. held that the licence was indeed personal to the grantee of the licence and upheld the conviction of Midland Scrap for an offence contrary to s. 39(1) and s. 39(9) of the Waste Management Act 1996 ("the 1996 Act"). Midland Scrap contend that this conclusion was wrong as a matter of law and have accordingly appealed to this Court. The issue arises in the following way.

The District Court prosecution

3. Midland Scrap was charged at a sitting of the District Court on 10th October 2012 with an offence contrary to s. 39(1) and s. 39(9) of the 1996 Act of disposing of or undertaking the recovery of waste at a facility other than in accordance with a waste licence granted under the said Act. At the conclusion of the hearing Judge O'Neill convicted the accused and expressed himself satisfied as to the following:-

"(a) of the facts alleged in the summons...

(b) (b) that the activity engaged in by the accused at the facility required a waste licence issued under the Waste Management Acts 1996-2008, and

(c) that the accused did not hold such a licence at the material times."

4. The background facts which the District Court found were as follows:

"(a) A licence (register reference no. W0079-01) was issued to a limited liability company by the prosecutor in its capacity as a licensing authority on the 24th January 2000 for the processing of certain waste at 41 Cookstown Industrial Estate, Tallaght, in the County of the City of Dublin (hereinafter referred to as "the facility"). That licence was transferred in accordance with law to Greenstar Materials Recovery Limited (hereinafter referred to as "Greenstar") on the 10th September 2004. Greenstar continued to hold the said licence at all material times and, in particular, throughout the period specified in the summons.

(b) The waste activities carried on at the facility by Greenstar in accordance with the licence ceased in 2006. An application was made by Greenstar to the prosecutor to surrender the licence in accordance with the statutory procedure in 2006. That application was not pursued and Greenstar remained at all material times the licensee entitled to conduct certain waste activities at the facility in accordance with the said licence.

(c) No waste activities occurred at the facility between the cessation of activity by Greenstar in 2006 and late 2008.

(d) In 2008 the accused entered into occupation of the facility and commenced waste activities. The waste activities conducted by the accused differ from those which were conducted at the premises by Greenstar. The activities carried out by Greenstar included the indoor sorting and transfer of construction and demolition waste and commercial and industrial waste; the accused handles metal waste only and its activities include outdoor processing. The waste activities conducted by the accused involve the sorting, shearing, baling and slicing of metal waste.

(e) The metal waste handled by the accused at the facility during the period specified in the summons consisted of assorted scrap metal, as appears from photographs proved before me in evidence. Copies of some of those photographs, which are illustrative of the waste handled at the facility by the accused and which form part of the case stated, are attached in annex 2.

(f) The waste activities carried on at the facility by the accused generate noise, dust and vibrations and adversely affect the

enjoyment of neighbouring commercial premises by their occupiers.

(g) Prior to commencing waste activities at the facility, the accused brought new plant and equipment, different from that previously used by Greenstar, into the facility and erected a sign with its name and contact details on it at the entrance to the facility.

(h) During the period specified in the summons, the facility was visited by inspectors on behalf of the prosecutor. On those occasions, the accused was engaged in the disposal or recovery of waste at the premises.

(i) During the period specified in the summons, Greenstar continued to hold a waste licence for the facility. Greenstar accepted its responsibility, as licence holder, for the conduct of waste activities at the facility during the period specified in the summons.

(j) Greenstar appeared before me to answer a complaint, the subject matter of a summons served upon it, alleging the disposal of waste at the facility in breach of conditions of the waste licence during the period when the accused was engaged in waste activities at the facility. On the 16th April 2012, Greenstar entered a plea of guilty to the offence alleged in that summons. A copy of the summons, which forms part of this case stated, is attached at annex 3. Greenstar was convicted and fined accordingly.

(k) Prior to the issue of the summons, the Agency did not notify the accused that it was not entitled to operate a waste activity at the premises.

(l) The accused counts among its directors one Con Ward, who gave evidence before me, who has decades of experience in the metal waste business. The accused has engaged in waste activities in relation to metal waste elsewhere in the country at facilities in respect of which it holds or has held a permit issued to it by a local authority for such waste activities. The accused has also submitted an application to a local authority for a further waste permit in relation to metal waste.

(m) Throughout the period specified in the summons, during which it was engaged in the processing of metal waste at the facility, the accused did not hold a licence to engage in such activity at the facility."

Section 39 of the 1961 Act

5. It is not in dispute that Greenstar held a licence in respect of the facility owned by it in Tallaght. It is equally agreed that Midland Scrap was purporting to operate under this licence. In this regard, Midland Scrap argue that Greenstar remained the licensee and the licence was not transferred. As such, Greenstar was obliged to comply with the licence conditions and was liable for any breaches of the terms of the licence. It is stated that the appellant operated the facility by way of (private) licence or agreement from Greenstar and under Greenstar's waste licence.

6. Midland Scrap further drew attention to the fact that Greenstar was prosecuted for carrying out waste activities other than in accordance with conditions of the licence, pleaded guilty to this offence and was convicted and fined. It is submitted that this conviction constitutes a recognition that the activities being carried out on the site were being carried out under the licence. It is accordingly contended that the conviction presupposed that the activities were being carried out under the licence itself, albeit not in compliance with the conditions.

7. This entire practice is said to be common within the industry. Midland Scrap thus maintain that the licence holder remains responsible under the licence and is obliged to give effect to its terms and comply with its conditions. It is said that this is how the licence was operated in this case, a fact which is said to be confirmed by the conviction of Greenstar. In effect, therefore, the entire case rests on the argument that it is the activity which is required to be licensed and not the individual operator.

8. As a matter of ordinary administrative law it can, of course, be said that most licences are personal to the holder and are not transferable to other persons. The reason is obvious enough, since any statutory system of licensing is generally designed to ensure that only fit and proper persons are permitted to engage in the regulated activity in question. There are exceptions, of course, but most of these exceptions relate to the licensing of things rather than activities and where the licence fee is simply a revenue raising mechanism: examples here include the licence fees payable in respect of dogs, motor vehicles and televisions.

9. There is, however, no invariable rule in this regard and everything turns on the actual wording of the relevant statutory provisions. In the present case s. 39(1) of the 1996 Act provides:

"(1) Subject to subsections (4) and (7), a person shall not dispose of or undertake the recovery of waste at a facility, on or after such date as may be prescribed, save under and in accordance with a licence under this Part (in this Act referred to as a "waste licence") that is in force in relation to the carrying on of the activity concerned at that facility."

10. The argument here is that there is nothing in the sub-section which imposes an obligation on a person to hold a licence but the obligation is rather instead to carry out the activity in accordance with a licence. The appellant refers to the provisions of s. 38 of the 1961 by way of comparison and contrast with the terms of s. 39 of the 1961 Act, since the former provision stipulates in express terms that the licence is personal to the holder in a way that the latter does not. Section 38 of the 1961 Act provides that:

"A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle."

11. The appellant further points to the terms of s. 40(12) of the 1996 Act which state:

"(12) It shall be a good defence:-

(a) to a prosecution for an offence under any enactment other than this Part,...

to prove that the act complained of is authorised by a waste licence granted under this Part."

12. It is said, therefore, that the defence is predicated on proving that the act complained of is authorised by a licence and that it is the act which is authorised, not the actor. Midland Scrap also point to Article 12 of the Waste Management (Licensing) Regulations 2004 which states:

"(12)(1) Subject to sub-article (2), in the case of an application for a waste licence, the application shall -

(a) give the name, address and, where applicable, any telephone number and telefax number of the applicant (and, if different, the operator of the facility concerned), the address to which correspondence relating to the application should be sent and, if the applicant or operator is a body

corporate, the address of its registered office or principal office.”

13. The contention here is that this provision specifically recognises and provides for a situation where the operator of the facility may be different to the applicant for a licence.

Licences under s. 39 of the 1996 Act are personal to the holder

14. For all of the arguments advanced by Midland Scrap it is nonetheless difficult to avoid the conclusion that any licence issued under s. 39 of the 1996 Act is personal to the holder. It is true that s. 39 of the 1996 Act does not use the same explicit language as is found in the case of driving licences in s. 38 of the 1961 Act. But these provisions are not *in pari materia* and no proper inference can be drawn from the fact that this express language was not used in the case of licences granted under s. 39 of the 1996 Act.

15. For all that, it is, I think, clear from the terms of both s. 39 when viewed in isolation and the entire Act when the legislation is looked at as a whole that the licence is personal to the holder and is not transferable. I reach this conclusion for three fundamental reasons.

16. First, s. 39(1) of the 1996 Act is careful to use the language that no person may engage in waste recovery at a facility “save under and in accordance with a licence under this Part... that is in force in relation to the carrying on of the activity concerned at that facility.” The words “under and in accordance with” presuppose that the licence has been awarded to that particular entity by the Environmental Protection Agency. If that licence could be transferred unilaterally by Firm A to Firm B, it would be hard to say that Firm B was operating “under and in accordance with” that licence since it had never been awarded to Firm B in the first place.

17. Second, this analysis of the language of s. 39 of the 1996 Act is underscored by reference to an analysis of s. 40, as these provisions require proof of the personal fitness of the proposed licensee. Section 40 thus provides:

“(1)(a) On application being made in that behalf to it, the Agency may grant to the applicant a waste licence subject to, or without, conditions or refuse to grant to the applicant such a licence.”

18. Section 40(4) further provides that the Agency shall not grant a licence unless it is satisfied that:

“(d) if the applicant is not a local authority, the corporation of a borough that is not a county borough, or the council of an urban district, subject to subsection (8), he or she is a fit and proper person to hold a waste licence....”

19. Section 40(7) then addresses the definition of what constitutes a “fit and proper person”:

“For the purpose of this Part, a person shall be regarded as a fit and proper person if:-

(a) neither that person nor any other relevant person has been convicted of an offence under this Act prescribed for the purposes of this subsection,

(b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him or her to direct or control the carrying on of the activity to which the waste licence will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the licence and the other requirements of this Act,

(c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers will be entered into or incurred by him or her in carrying on the activity to which the waste licence will relate in accordance with the terms thereof or in consequence of ceasing to carry on that activity.”

20. Accordingly, the Oireachtas clearly took the view that only certain types of persons – whether in terms of previous convictions under this Act, technical expertise and knowledge and financial resources – should be permitted to operate waste facilities. It is thus necessarily implicit from the terms of s. 40 of the 1996 Act that the licence is personal to the holder. If it were otherwise, the existence of this section could be readily circumvented through the expedient of some form of private licensing system as between the holder of the licence and its delegate.

21. Third, it should be noted that the 1996 Act does indeed envisage the transfer of the licence to another person or entity, but only by means of a statutory procedure which itself involves a review of the proposed transferee’s fitness and suitability. Thus, s. 40(10) of the 1996 Act states explicitly that:

“A waste licence granted to a person under this Part may not be transferred to another person, other than under and in accordance with section 47.”

22. Section 47 then deals with the transfer process:

“(1) A waste licence may be transferred from the holder to another person in accordance with this section.

(2) Where the holder of a waste licence desires that the licence be transferred to another person (hereafter in this section referred to as “the proposed transferee”), the holder of the licence and the proposed transferee shall jointly make an application to the Agency requesting that such a transfer be effected by the Agency.

(3) An application under subsection (2) shall be made in such form and include such information as may be prescribed and shall be accompanied by such fee as may be prescribed under section 50 and the waste licence concerned.

(4) The Agency may require the provision of such further information by the holder of the licence or the proposed transferee as it considers appropriate for the purposes of dealing with an application made by them under this section.

(5) If, on consideration of an application under subsection (2), and any relevant information provided in respect thereof, the Agency is satisfied:-

(a) that the proposed transferee would, if he or she were an applicant for the licence, be regarded by it as a fit and proper person to be granted under section 40 a like waste licence to the licence concerned,

(b) that the proposed transferee has complied with any requirements under section 53, and

(c) regarding such other matters as may be prescribed, it shall effect a transfer of the licence to the proposed transferee in such manner as may be prescribed.

(6) A person to whom a waste licence is transferred under this section shall be deemed to have assumed and accepted all liabilities, requirements and obligations provided for in or arising under the licence, regardless of how and in respect of what period, including a period prior to the transfer of the licence, they may arise."

23. In the High Court MacEochaidh J. considered that so far as s. 47 is concerned:

"The only possible reading of this section is that a licence is personal and that it is not simply the activity which is licensed, rather it is the identified activity to be carried out by the licensee which is licensed."

24. I can only concur with this analysis. Moreover, the fact that the Oireachtas provided for a scheme of statutory transfer of the licence which itself requires an assessment by the Agency of the suitability of the proposed transferee (s. 47(5)(a)) excludes by necessary implication a purely private arrangement between the holder of the licence and a proposed transferee. Section 47 thus provides further support – if such was required – for the proposition that the licence is personal to the holder.

25. If it were otherwise, then key features of the licensing system envisaged by the 1996 Act would be circumvented and thereby rendered unworkable. If Midland Scrap's argument were correct, it would mean, for example, that a waste facility could be lawfully operated by a person who was not a "fit and proper person" within the meaning of either s. 40 or s. 47, thus setting at naught the entire system of statutory supervision. All of this is just another way of saying that a person cannot be operating "under" a licence which has been issued to a third party without having had such licence transferred to them via the requirements of s. 47 itself.

Conclusions

26. This review of the relevant provisions of ss. 39, 40 and 47 of the 1996 Act is sufficient to make clear that while there may be no express prohibition on the private assignment or transfer of licences as between the licensed holder and third parties, the effect of these provisions is that such a private transfer is, if not impliedly prohibited, at least rendered ineffective in law. Any other conclusion would undermine the entire objectives and scheme of the 1996 Act which, in common with most licensing regimes of this kind, necessarily envisages that the grant of any statutory licence will be personal to the holder.

27. In summary, therefore, I believe that the District Court correctly decided that a licence issued under the 1996 Act to a person other than the accused was personal to that other person and the existence of that licence did not provide a defence to the charge addressed to the accused of recovering or disposing of waste without such a licence.

28. In these circumstances, I would affirm the decision of the High Court and dismiss the appeal.