Neutral Citation: [2014] IEHC 243

THE HIGH COURT

[2012 3728 S]

BETWEEN

CORK COUNTY COUNCIL

PLAINTIFF

AND

VALENTINE O'DRISCOLL

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered on the 29th day of April 2014

1. In this case the plaintiff Cork County Council is seeking summary judgment in the amount of €1,934,208. That figure is made up of a principal sum of €1,208,880 alleged to be due on unpaid landfill levies plus interest thereon of €725,328 to the 1st August, 2012, and further interest. The defendant, Mr. Valentine O'Driscoll, for his part resists the application for summary judgment and urges that he should be given liberty to defend and for that purpose that the matter should be remitted to plenary hearing.

2. The legal principles applicable to proceedings in which summary judgment is sought are at this stage well known. Recent years have seen a surge in such applications. Indeed, as is pointed out in the preface to Barrett on *Summary Judgment in Ireland – Principles and Defences*, this has been a function of the economic climate that has prevailed in recent years. The result is that I do not detect any major disagreement between the parties as to what those principles are, but rather the area of disagreement centres on how those principles are to be applied.

3. In the leading case of *Aer Rianta v. Ryanair* [2001] 4 IR 607, Hardiman J. commented as follows:-

> "The fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants' affidavits fail to disclose even an arguable defence?"

4. As both sides pointed out in the course of written submissions, the principles applicable in this area have been very helpfully synthesised and summarised by McKechnie J. in *Harrisgrange v. Duncan* [2002] IEHC 14 in twelve numbered paragraphs at pp. 6 - 7 of his judgment.

5. In *Zurich v. McConnon* [2011] IEHC 75, I commented that while the jurisdiction to grant summary judgment and refuse leave to defend undoubtedly existed, that it was a jurisdiction to be exercised very sparingly indeed. I remain firmly of that view. Accordingly, I will seek to apply the test suggested by Hardiman J. and so only if I am satisfied that it is clear that Mr. O'Driscoll has no defence, not even one that could be described as arguable, would there be summary judgment. However, if that turns out to be the situation, then obviously I will enter judgment.

The Factual Background

6. The defendant is the owner of certain lands at Little Island, Co. Cork, comprised in folio CK67991F Co. Cork. The lands have been referred to throughout the proceedings as Ballinderrig Farm. The lands in question are and have been for quite a number of years now prone to flooding. The defendant believes that the flooding in question is linked to the construction of the Dunkettle/Carrigtowhill N25 Parkway. In that respect it is of note that the plaintiff had, in the past, compulsorily acquired lands adjoining those lands now held by the defendant from his late father. There was a dispute in relation to the impact of the road construction works on the retained lands between the plaintiff and the defendant's father which was compromised in 2001. The defendant complains that since 2001 the lands have continued to be flooded.

7. The defendant decided to raise the levels of his lands in order to eliminate or minimise the risk of further flooding. In order to raise land levels, the defendant decided to embark on a program of landfill. The intention was that the lands would be filled, built up and then graded from north to south towards the N25. The intention was that when the landfill exercise was completed that the lands in question would be returned to agricultural use, dairy farming or beef cattle rearing. Given the firm and settled intention to return the lands to agricultural use, the nature of the infill became very significant, as it was necessary to avoid contamination of the lands.

8. The defendant sought a waste permit from Cork County Council. On the 20th January, 2004, a waste permit was issued which was to expire on the 19th January, 2006. The waste permit had the potential to permit the defendant to accept inert materials onto Ballinderrig Farm. I use the phrase "had the potential to permit" because the situation is that while Mr. O'Driscoll undoubtedly commenced landfill activity there is a major issue between the parties as to whether Mr. O'Driscoll's activities were authorised or remained unauthorised. This is one of the central issues in the case. That is because, in broad terms the nature of the material that was brought on to Ballinderrig which was overwhelmingly inert material was such that if the landfill was authorised, it was exempt from landfill levies, whereas if the landfill was an unauthorised activity a levy was payable at the rate of €15 per tonne on deposited material. In passing I would observe that the rate per tonne was raised at one stage from €15 to €20, but in a situation where the plaintiff cannot say whether deposits occurred before or after the date changed, the initial rate has been applied throughout by the plaintiff. While there is an issue between the parties as to how any levy payable should be calculated or as to what methods of calculation are permissible suffice at this stage to note that based on the premise that the infill activity was not authorised, the plaintiff has calculated that the amount payable by way of levy was €1,208,880. Whereas calculations carried out on behalf of the defendant which took as its starting position that Ballinderrig Farm was not an unauthorised landfill, calculated that the total levy due was €6,044.40. The significance of whether what occurred was authorised or unauthorised will be immediately apparent.

The Statutory Framework.

9. Waste Management (Landfill Levy Regulations) SI No. 86/2002 and Waste Management Landfill Levy (Amendment)(Regulations) 2006 SI No. 402/2006 were made pursuant to the Waste Management Act 1996, and in particular pursuant to ss. 7, 18 and 73

thereof. Looking first to the 2002 Regulations, s. 3 of those regulations provides that subject to Article 5, there shall be chargeable, leviable and payable in respect of disposal of waste at a landfill facility, a landfill levy. By virtue of Article 3(2) the amount of the levy was fixed at €15 for each tonne of waste disposed of.

10. Article 5 makes provision for certain exemptions from the levy. It provides that Article 3 shall not apply in respect of the disposal by means of an authorised landfill activity of certain listed categories of waste, including non-hazardous waste from construction and demolition activity and excavation soil comprising clay, sand, gravel or stone used for landfill site engineering.

11. Article 6 deals with the determination of levy liability. Article 6(3) provides that in the case of an unauthorised landfill activity, the weight of waste disposed of shall be determined by the relevant local authority:-

> (a) By means of weighing any such waste that is removed from the facility concerned by or at the direction of the relevant local authority or the Agency, for the disposal elsewhere; and
>
> (b) In any other case by means of such methodology as is from time to time notified in writing to the relevant local authority by the Agency.

Article 6(4) states:-

> In proceedings for the recovery of levy payable under these Regulations or for an offence under the regulations, it shall be presumed, unless the contrary is proved, that a determination made by a local authority for the purpose of sub-article (3) is in accordance with the methodology approved for that purpose.

12. Article 6(3)(b) and Article 6(4) are of relevance to the present proceedings.

13. Article 9 makes provision for payments of a levy in respect of an unauthorised landfill activity. Article 9(1) and 9(2) provide as follows:-

> "(1) A relevant local authority may, by notice in writing, require a person referred to in article 4(c) to pay such amount of levy as may be determined by that authority to be payable in respect of the disposal of waste by means of an unauthorised landfill activity.
>
> (2) A person who receives a notice under sub-article (1) shall within a period of four weeks of the date of the said notice remit to the said local authority the amount of levy determined to be payable, in such form, or by such lodgement to such financial account, as shall be specified by that authority.

14. The provisions of Article 9(1) and (2) of the 2006 regulations are in similar terms with the important distinction that Article 9(1) now begins that a relevant Local Authority "*shall*".

15. Provision is made for Local Authorities on a monthly basis to pay into an Environmental Fund the amount collected by way of levies. Under the 2002 Regulations the Local Authority was permitted to deduct and retain up to 20% of the amount received for the purposes of defraying expenses. The amount permitted to be retained was increased to 80% under the 2006 Regulations which was to be used for waste enforcement purposes.

16. Article 14 provides for interest on unpaid levies from the date it became due and payable until payment. Article 15 provides that in the event of a default in paying a levy the amount due as well as interest shall be recoverable from the person concerned as a simple contract debt.

17. The schedule to the Regulation is headed "Calculation of Weight of Waste in the Absence of a Weighbridge". It is then stated that any of three methods listed may be used in the absence of a weighbridge, these involve:-

> 1. Maximum permitted weight of container,
>
> 2. A volume to weight conversion and
>
> 3. Weighing of waste prior to receipt at a landfill facility.

18. The 2006 Regulations to which I have been making reference came into force on the 28th July, 2006. Article 3 thereof amends Article 2 of the 2002 Regulations by substituting for the definition of "authorised landfill activity" and "unauthorised landfill activity" the following definitions:

> "authorised landfill facility" means a waste disposal site on which the disposal of waste has or is taking place with a waste licence.
>
> "unauthorised landfill facility" means a waste disposal site on which the disposal of waste has or is taking place without a waste licence.

The equivalent 2002 definitions had been "authorised landfill activity", meaning a landfill activity specified in paras. (a) and (b) of Article 4 and "unauthorised landfill activity", meaning a landfill activity specified in para. (c) of Article 4. Article 4 provides that for the purposes of s. 73(5) of the Act, the levy shall be payable:-

> "(a) In the case of a landfill activity at a facility in respect of which there is in force a waste licence, by the holder of the said licence;
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> (b) in the case of a landfill activity at a facility which is deemed not to contravene the provisions of Part V of the Act by virtue of compliance with the requirements of section 39(3) of the Act, by the applicant for the relevant licence;
>
> (c) in the case of a landfill activity other than one to which paragraphs (a) and (b) relate, by
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> (i) the person who carried or carries on the activity concerned, or

(ii) where that person is not identified, or cannot for whatever reason discharge the levy liability, by the owner of the facility concerned."

19. The Waste Management (Landfill Levy) Regulations 2008 came into operation on the 1st July, 2008. These regulations fixed the amount of the levy at €20 per tonne. However, for the reason to which I have referred this increase is not directly relevant in the context of the present case.

20. Of note is that Article 20 of the 2008 Regulations revoked the 2002 and 2006 Regulations. There was no saver and transitional provisions. The 2008 regulations were themselves revoked by the Waste Management (Landfill Levy) Regulations 2011. However, of some interest is that on this occasion, unlike in 2008, there was a saver provision. Article 19 of the 2011 Regulations is in theses terms:-

"19(1) Subject to paragraph (2), the Regulations of 2008 are revoked.

(2) Notwithstanding the Revocation of the Regulations of 2008, those Regulations shall continue to apply to any levy chargeable, leviable and payable under the Regulations of 2008 immediately before the coming into operation of these Regulations."

Waste Permit

21. A waste permit (CK(S)79/03) was issued by Cork County Council under the Waste Management Act 1996, and the Waste Management Regulations 1998. The permit which was issued on the 20th day of January, 2004, expired on the 19th January, 2006.

22. In the context of the present proceedings and the arguments that have been advanced by the parties, attention is drawn to the following provisions of the permit:-

"1.3 The waste activities shall take place only as specified under the conditions of this permit. No change in the type of waste accepted and the type of activities undertaken shall be made without prior written approval from Cork County Council.

1.6 Where Cork County Council considers that non-compliance with the conditions of this permit has occurred, it may serve Notice on the permit holder stating;

(a) the nature of the non compliance;

(b) the remediation procedure(s) required;

(c) the timeframe to undertake the remediation works."

When the notice has been complied with, the permit holder shall provide written evidence to Cork County Council confirming that the requirements of the notice have been carried out. No waste shall be accepted at the facility until written confirmation is received from Cork County Council that the notice is withdrawn.

The plaintiff attaches particular significance to the provisions of condition 10. That condition is in these terms:

Condition 10: Additional Statutory Requirements

10.1 The granting of this permit, and any condition imposed by it, does not exempt the holder of the permit from complying with the statutory obligations of any relevant legislation, including:

1. Water pollution,
2. Health and Safety,
3. Air pollution,
4. Waste and litter,
5. Planning legislation.

10.2 Note that these lands are part of the Great Island candidate Special Area of Conversation (cSAC) and as such works may not commence at the site until such time as there is complete agreement with the National Parks and Wildlife Service as to the size, scale and nature of the operation. A copy of this permit has been furnished to the National Parks and Wildlife Service for comment. Therefore, there may be additional conditions added by Cork County Council under instruction from the National Parks and Wildlife Service.

Central is the present proceedings is the contention by the plaintiff that the defendant is in breach of conditions 1.3 and more specifically conditions 10.1 and 10.2 of the permit.

Service of a Notice

23. On the 30th June, 2008, a notice of writing was issued requiring the defendant to pay a landfill levy within four weeks in the sum of €1,208,880. The notice was purportedly issued pursuant to s. 7, 18 and 73 of the Waste Management Act 1996, and Waste Management Landfill Levy Regulations 2002 as amended by the Waste Management (Landfill Levy) Amendment Regulations 2006.

Calculation

24. In calculating the amount now claimed the plaintiff has taken as its starting point that what took place at Ballinderrig was unauthorised. So far as the arithmetical calculations are concerned, the plaintiff relies on the report of an expert commissioned by the defendant, the Cuthbert Report of the 1st April, 2007, carried out in accordance with the relevant Environmental Protection Agency Code of Practice. Appendix 3 of that Code deals with calculation of landfill levies for the purposes of Article 6(3). Of relevance here is the provision of Article 6(4) which created a presumption that unless the contrary is proved that a determination made by a Local Authority is in accordance with the methodology approved applies.

25. The plaintiff points to the fact that the operation did not have planning permission, but rather on two occasions permission was refused. Emphasis is laid on the fact that in the case of one application 05.3375, the refusal was specifically related to the cSPA designation and was based on the fact that the proposed development would damage the habitat for birds.

26. The plaintiff also points out that no specific or formal agreement was reached and recorded with the National Parks and Wildlife Service.

An Arguable Defence
27. The defendant has put forward a number of arguments which he says individually and collectively see the case across the threshold required for leave to defend to be given.

28. The defences identified are as follows:

> (i) That Ballinderrig Farm was not an unauthorised facility.
>
> (ii) That the proceedings are statute barred. Reference is made here to a District Court prosecution where the offence in question was stated to have occurred on the 18th May, 2006, more than six years before the summary summons issued on the 1st October, 2012.
>
> (iii) The letter of demand of the 2nd October, 2012, came after the summary summons was issued and contained a reference to a notice of the 30th July, 2008, when there was no such notice, the only notice being the one dated the 30th June, 2008. It is also said that the notice of June 2008, was itself defective in that it did not contain a recital that the landfill was unauthorised or any reference to this fact.
>
> (iv) There is no extant legal basis for the claim. This is a reference to the fact that the 2002 and 2006 Regulations were revoked by the 2008 Regulations and that there was no saver provision. The notice of the 30th June, 2008, had not crystallised or expired when the earlier regulations were revoked and no sum had become due when the earlier regulations were revoked.
>
> (v) The plaintiff's claim was instituted as a tactic to block or frustrate proceedings in relation to flooding commenced by the defendant.

29. I propose to consider only two of these arguments in any detail, being the arguments which received most attention, namely the question of whether this was an authorised or unauthorised landfill site, and whether a legal basis for the proceedings survived the revocation of the 2002 and 2006 Regulations in 2008.

30. On behalf of the defendant it is argued that there was a permit in existence which permitted the defendant to carry on the waste activity there listed which involved the receipt of waste other than hazardous waste. The waste permit was granted for a period not exceeding two years from the date of issue and waste activities were to take place only in accordance with the conditions of the permit. A notice was served on the 12th November, 2005, alleging a breach of clause 10.1.

31. The plaintiff for its part has contended that compliance with clause 10.1 and 10.2 were condition precedents and that unless and until a planning permission was obtained and an agreement was reached with the National Parks and Wildlife Service that no activity could take place. Absent planning permission any activity that occurred was not authorised and indeed was unauthorised.

32. I am bound to say that at this stage, I find the arguments advanced by the plaintiff to be particularly cogent. However, while that is so, the actual language of s. 10.1 does not in terms require the permit holder to apply for, obtain and comply with the planning permission. Indeed, in one reading clause 10.1 is superfluous as it merely states that the permit does not exempt the holder from compliance with various statutory provisions, including planning legislation. If clause 10.1 had never been included there would still have been an obligation to comply with planning legislation, to say nothing of water pollution, health and safety, air pollution, waste and litter regulations.

33. The argument of the plaintiff grounded on clause 10.2 has particular force, in that on this occasion there is a specific statement that work may not commence until a particular state of affairs is achieved. However, while that is so, and is a point of major substance, it remains the case that the permit was furnished to the National Parks and Wildlife Service and that it did not communicate any particular requirement to the defendant nor were any additional conditions to be included suggested to Cork County Council by the NPWS.

34. The plaintiff's position is further strengthened by the terms of the covering letter which forwarded the permit. That letter included the following comments:-

> "Please note that it is very important to read your permit carefully and I would like to particularly draw your attention to Condition No. 10.1.
>
> As these lands are part of the Great Island candidate Special Area of Conservation (cSAC), you require written consent from the National Parks and Wildlife Service before works commence.
>
> Planning Permission will be required before works are commenced on site."

35. At this stage, while cognisant of the force and cogency of the arguments on behalf of the plaintiff, but reminding myself, as I must do that the threshold is not a defence that will probably succeed or even a defence whose success is not improbable, I cannot go so far as to say that it is clear that the defendant has no defence.

36. So far as the second point which I am minded to consider in some detail is concerned – the affect of the revocation of the 2002

and 2006 regulations without a specific saver provision – on behalf of the defendant it is said that the period provided for payment had not expired at the time that the plaintiff had sought to initiate proceedings grounded on provisions which had been repealed. Reference was made to cases such as *Start Mortgages v. Gunn* [2011] IEHC 275, and *McAteer and Bank of Ireland Mortgage Bank v. Sheehan* [2013] IEHC 417.

37. In response, the plaintiff argues that the notice served requires payment and that the obligation to pay arises immediately on service of the notice, even though a period during which payment may be made is allowed. The plaintiff says that using the language of *Start Mortgages v. Gunn*, the right at issue had become vested by the date of repeal, and so can be enforced notwithstanding the repeal. It is said that clear support for the plaintiff's position is provided by s. 27 of the Interpretation Act 2005, which so far as material is in these terms:-

> "(1) Where an enactment is repealed, the repeal does not -
>
> . . .
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
>
> (c) affect any . . . obligation or liability acquired, accrued or incurred under the enactment
>
> (2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a . . . obligation or liability acquired, accrued or incurred under . . .may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

38. It seems to me that the defendant will struggle to establish that the right to payment had not become vested at the time of service of the notice or to establish that following service that there was not an obligation or liability which was not affected by the subsequent repeal of the regulations. However, again, I must remind myself that this is not a question of predicting probable outcomes and again I do not believe that I can go quite so far as to say that it is very clear that the defendant has no defence.

39. The two suggested defences to which I have referred both involve clearly defined legal issues, which have been the subject of focused legal argument and in relation to which I have had the benefit of oral and written legal submissions. That raises the question whether I ought to decide the legal issues here and now. In the case of *Danske Bank v. Durkan New Homes* [2009] IEHC 278, in the High Court, Charleton J. had commented as follows:-

> "To the last paragraph of the judgment of Clarke J. just quoted [para. 3.5 of *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203] I would add this qualification. If the addition of evidence can assist in any material way in the construction of a document then, I agree, the matter should be put for plenary hearing. If, on the other hand the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion."

40. In para. 3.5 of *McGrath v. O'Driscoll*, to which reference was made Clarke J. had stated:-

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

41. However, on an appeal from Charleton J. the Supreme Court held per Denham J. (as she then was):-

> "While a court may resolve questions of law there is no obligation to do so. The test, as stated previously, is whether the appellants have established an arguable defence."

42. In deciding whether it is appropriate to decide the legal issues that have been identified now or whether the matter should go forward for plenary hearing, I feel entitled to have some regard to the context in which the present motion comes before me. The defendant has said, and it seems to me that at this stage, I should proceed on the basis that this is so, that in order to assist Cork County Council and the National Roads Authority, he agreed to elevate his lands so as to avoid a repetition of flooding and to do so through landfill and that the lands would then be returned to agricultural use as soon as possible. As we have seen on the 20th January, 2004, a waste permit was issued which was to expire on the 19th January, 2006. In 2004, proceedings issued against the plaintiff and the National Roads Authority. However, these proceedings have still not been brought on for hearing. The failure to bring these proceedings on does not reflect well on the defendant. It suggests a lack of clarity and perhaps even a lack of confidence on the part of the defendant as to his litigation strategy. However, the delay in that regard is partly balanced by the delay on the plaintiff's side in not issuing a summary summons until the 1st October, 2012.

43. The defendant has contended that the plaintiff's claim has been prompted by the proceedings initiated by him against it. That is something that is firmly rejected by the plaintiff. However, whatever the rights and wrongs of that dispute and again it is proper at this stage to take the defendant's case as its high watermark, it certainly seems that the proceedings in their present state do not provide anything like the full picture. There is the potential for a fuller and more complex picture to emerge at a plenary hearing.

44. All in all, it seems to me that the background to the proceedings, the fact that the defendant claims to have been adversely affected by the actions and inactions of the plaintiff over many years, combined with the fact that the defendant has identified legal arguments which, though they cannot be said that they are likely to succeed, I cannot dismiss as bound to fail, means that it is appropriate that the matter should go to plenary hearing.

45. I have referred to the delays that have occurred on both sides and I would be anxious that further delay be avoided and I will be glad to hear any suggestions that counsel may have in that regard, whether in terms of case management or otherwise.