THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 370

Record Number: 2016/442

Peart J.
Irvine J.
Whelan J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 57 AND 58 OF THE WASTE MANAGEMENT ACTS 1996-201

BETWEEN:

KILDARE COUNTY COUNCIL

PLAINTIFF/RESPONDENT

- AND -

GERARD REID

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 29TH DAY OF NOVEMBER 2018

1. This an appeal against an order of the High Court (White J.) refusing an application for an adjournment of the hearing of a preliminary issue that had been directed by the President of the High Court to be heard as to the meaning of "waste" for the purposes of the Waste Management Acts 1996-2015.

2. The hearing of the preliminary issue had been fixed for some time. The defendant was not legally represented and appeared in person, accompanied by his daughter. She made an application on her father's behalf that the matter would not proceed on account of the fact that her father was not well enough to deal with the matter.

3. There was some medical evidence adduced in the form of a brief report from a clinical psychologist dated the 1st July 2016 indicating that Mr Reid suffered from developmental dyslexia which had led to from an early age to the development of post traumatic stress disorder which has remained untreated. The report stated that this condition had interfered with many aspects of his life, including his capacity to deal with legal matters, and to instruct a legal team. It went on to state that Mr Reid was "unable to competently instruct barristers and solicitors, to anticipate the potential events in a courtroom or to fluently give evidence on his own behalf".

4. It is not very clear from the transcript that Ms. Reid actually applied for an adjournment as such, or whether she simply wanted the entire proceedings stayed in some way until such time as her father was well enough to deal with the matter. She too was unfamiliar with the legal environment and its terminology. However, the trial judge clearly treated it as a last minute application for an adjournment, and that is what is reflected in the perfected court order. The application had not been flagged to the plaintiff counsel in advance, and neither had the medical certificate being relied upon been furnished in advance despite the fact that it had been obtained some ten days previously.

5. Having heard what was put forward by Ms. Reid and having heard counsel for the plaintiff, the trial judge refused to adjourn the matter. Immediately thereafter Ms Reid left the Courtroom accompanied by her father stating, according to the transcript "No disrespect – but there is no need for us to be here".

6. While the grounds of appeal are set out in some length, and to a large extent address matters not germane to the appeal against the refusal to adjourn the matter, the essential basis relied upon in the present appeal is that what followed was an unfair hearing which resulted from the trial judge determining the preliminary issue in the defendant's absence, in the face of the medical evidence to the effect that he is medically unfit to deal with the matter. The defendant asserts that the outcome of the preliminary issue would have been different if the defendant had been heard.

7. Before setting out some of the very protracted history of this case, I should note that on this appeal the defendant was represented by solicitor, as well as senior and junior counsel.

Background

8. These proceedings commenced in 2011 when the council brought an application for orders pursuant to ss 57 and 58 of the Waste Management Act, 1996 2015 the appellant to cease placing the waste on his lands, and to remediate the same. The waste activity complained of at the time this application was made comprised some 1,500 end of life motor vehicles, as well as scrap metal and construction and demolition waste. In a replying affidavit filed in February 2012and sworn on his behalf by an environmental consultant, it was stated that the appellant was "in the process of removing vehicles at the rate of 30 to 40 per week" and that he sought to retain "250 to 300 of the most valuable of the scrap vehicles on site" as a source of working capital for his future plans for the site. In relation to scrap metal, plastic and wood, this affidavit stated that it could be removed within six months on an agreed plan with Kildare County Council.

9. When the council's application came before the High Court on the 13th June 2012, at a time when the appellant was legally

represented, an order was made by consent which directed the appellant to:

> "remove all waste vehicles and other scrap metal from the site to authorised treatment facilities, at a rate of a minimum, 300 vehicles per month, and in any event before 13th November 2012, such removal to be evidenced by the provision by the respondent of Certificates of Destruction or, in respect of waste vehicles other than end of life vehicles, sufficient documentary evidence of collection and destruction."

10. In addition, the same order required the appellant to "discontinue holding construction and demolition waste" and to "excavate, screen and remove all construction and demolition waste from the site in a manner designed to prevent and/or limit environmental pollution".

11. Following the making of that order some progress was made by the appellant to comply by the 13th November 2012, but the council were not satisfied that sufficient efforts were being made. This led to the council serving a copy of the said order on the appellant which contained a penal endorsement, being a pre-requisite to any application the council might make to attach and commit the appellant for failure to comply with the said order. Service was affected on the 18th October 2012.

12. On the 29th January 2013 the council issued a notice of motion seeking to have the appellant attached and brought before the High Court to answer for his contempt in respect of his failure to comply with the order made. On that application the appellant saw a replying affidavit which acknowledged that there had been delays in dealing with the waste vehicles, and set out the steps he was taking in respect of the construction and demolition waste.

13. Nevertheless, on the 20th of March 2013 an order was made by the High Court (Kearns P.) declaring that the appellant was guilty of contempt and providing that if the appellant had not substantially complied with the requirements of the original order by the 15th July 2013, the council was at liberty to issue an order of committal against him and have him imprisoned for a period of three months. The matter was adjourned until the 15th July 2013 in the circumstances. It appears that a number of further adjournments were granted in order to allow the appellant more time to comply. It appears that while certain steps were taken to remove end-of-life vehicles from the site, the appellant had continued his activities on the site and no steps had been taken to remove the construction and development waste.

14. On the 18th December 2013 a further contempt order was made in similar terms to the previous contempt order save that the appellant was required to comply with the original order by the 31st January 2014 in default of which the council was at liberty to issue an order of committal for the imprisonment of the appellant for a period of three months.

15. On the 30th January 2014 the appellant swore an affidavit referring to what he considered to be significant progress in removing waste vehicles from the site. He set out a list of the waste metal and the vehicles that remained on the site. While this affidavit indicated that the appellant "will have to dispose [of the waste], he asserted that it did not pose any pollution risk. He made no reference in that affidavit to the construction and development waste.

16. On the 4th February 2014 the Council was informed that the appellant had discharged to solicitors. On the 17th February 2014 the appellant swore an affidavit which was described by him as being "an affidavit of compliance". This affidavit set out that includes all waste vehicles under the scrap metal" had been removed from the site, and he also claimed that any remaining material on the site was "his machinery and containers for storage". the appellant went on to claim that any construction and demolition waste on the site had not been accepted by him, but rather had been dumped on the site, and that he intended to reuse that material for roads, and that, accordingly, it was not "waste" within the meaning of the Waste Management Acts. This was the first occasion since the making of the consent order back in June 2012 on which the appellant claimed that what was on the site did not constitute "waste".

17. Thereupon, the council sought to inspect the lands but found it necessary to first obtain a warrant from the District Court. On foot of this warrant, an inspection was conducted on the 3rd April 2014 which revealed that in excess of 100 scrap vehicles and machines or parts thereof were on the site, and that no attempt had been made to deal with the construction and demolition waste thereon.

18. On the 9th April 2014 the appellant issued his own motion seeking, *inter alia*, to have the contempt order dated the 18th December 2013 set aside, and for an order that he was in substantial compliance with the original order. On the 11th April 2014, the High Court made an order staying execution on foot of the second contempt order until after the 2nd May 2014. Around this time new solicitors commenced acting for the appellant. In addition, the appellant engaged a chartered engineer, Mr Searson who, in due course, swore an affidavit in which he offered to liaise with the council in relation to the remaining waste on the site. The council accepted this offer and a date for a joint inspection was agreed. On that basis, the High Court adjourned the matter from the 15th May 2014 to the 5th June 2014. A joint inspection occurred on the 13th May 2014. On that occasion nine trial boreholes were dug into the construction and development waste which revealed that it was builders' rubble interspersed with a large amount of construction and development waste.

19. Unfortunately, when the matter came back before the High Court on the 5th June 2014 the appellant's new solicitors indicated that they wished to come off record. An order in that regard was made on the 18th June 2014, and thereafter (until the hearing of this appeal), the appellant represented himself, assisted by Mr Percy Podger, a so-called 'McKenzie friend'.

20. The matter came back before the High Court on various dates thereafter in 2014. It became clear that the defendant's primary defence to applications made by the council was that what remained on the site was not "waste" within the meaning of the Acts. On the 7th October 2014 the President of the High Court directed legal submissions on that question, and also in relation to the impact on these proceedings of the decision of the Supreme Court in *Laois County Council v. Hanrahan*. The appellant lodged a notice of appeal against the making of that order.

21. That appeal led to further delay until the appeal could be determined by this court. When that appeal was before this court on the 15th January 2015 the appellant claimed that he was not well enough to attend court and furnished a medical certificate. Eventually a date for the hearing of that appeal was fixed for the 10th July 2015. In the meantime, the matters then before the High Court were adjourned generally with liberty to re-enter.

22. On the 10th July 2015, being the date fixed for the hearing of the appeal, the appellant failed to appear. Neither was he legally represented. His appeal was struck at and he was ordered to pay the costs of the appeal, to be taxed in default of agreement. The appellant sought leave to appeal that order to the Supreme Court. That application was refused by the Supreme Court on the 8th March 2016.

23. Thereafter, the preliminary issue as to the meaning of "waste" for the purposes of the Waste Management Acts, which had been directed by the President of the High Court on the 12th September 2014 came before Mr Justice White on the 11th July 2016 for hearing. On that occasion, as already outlined, the appellant appeared in person, accompanied by his daughter, resort on his behalf to have matters not proceed due to his medical condition as outlined in the medical report produced, and to which I have already referred. As I have already stated, the trial judge refused to adjourn the matter before him, at which point the appellant and his daughter left the court. In their absence, the preliminary issue regarding the meaning of "waste" was determined. The court determined that the materials listed in the schedule to the order were deemed to be "waste" within the meaning of Waste Management Act 1996 (as amended).

24. I believe the above to be a sufficient, though not comprehensive, outline of the general background to the present appeal, and the appellant's contention that the hearing that took place before Mr Justice White on the 11th July 2016 was an unfair hearing in view of the absence of the appellant, following the refusal of his application to have the matter put back in the light of his medical condition.

25. On this appeal, counsel for the appellant has submitted that the trial judge could have acted differently when the appellant and his daughter sought to have the matter adjourned because of the appellant's medical condition, particularly given the lengthy and protracted background to the case. It is suggested, for example, that the trial judge could have explored with the council the possibility that some form of mediation might have been possible so that it could have some meaningful engagement with the appellant in order to arrive at a consensual solution to the problem facing the council in relation to the site.

26. Counsel has submitted that the manner in which the application to adjourn the hearing was dealt with indicates that the trial judge placed too much emphasis on the delays that occurred up to that point, and the complicated procedural background and interests of justice. It is submitted therefore that the application for an adjournment was not considered appropriately in accordance with law in the light of the fact that the appellant is clearly a vulnerable person with a disability (dyslexia etc).

27. Counsel accepted, as she must of course, that the case cannot simply be adjourned ad nauseam. However, counsel emphasises the importance to the appellant of the issue that was required to be determined by the High Court on the 11th July 2016 mandated that very careful consideration should have been given to the medical evidence, and to adjourning the matter until such time as the appellant was in a position to deal with the matter.

28. It has been submitted that while any adjournment is a matter within the discretion of the court, that discretion must nevertheless be exercised in a manner consistent with fair procedures, and the overall interests of justice.

29. It is submitted that by refusing to grant the adjournment sought, the trial judge failed to strike the correct balance between any urgency in the case and the adoption of fair procedures. In that regard, counsel has referred to the decision of Geoghegan J. in *A and B v. Eastern Health Board* [1998] 1 IR 464. Other authorities were referred to.

30. On behalf of the council it is submitted that the lengthy and protracted history of the case is relevant when considering whether the trial judge was entitled to exercise his discretion by refusing the application to adjourn the case, as well as the last minute nature of the application. Counsel referred to much of the procedural history which I have outlined above. She has referred also to the fact that on different occasions the appellant has been able to instruct lawyers to act for him, and has discharged those solicitors when he appears not to have been inclined to accept their advices. Much emphasis has been placed also on the fact that the defence being now made by the appellant to the applications to have him attached and committed for contempt, namely that what material remains on the site is not "waste" within the meaning of the Acts is something new, and not contended for at the time he consented to the original order as far back as the 13th June 2012. It is submitted that the Court is entitled to have regard to the fact that when that order was made by consent the appellant must be taken to have accepted that what was on the site constituted "waste".

31. As for the submission now made by the appellant that the trial judge should have suggested to the parties that they engage in some form of mediation, and should have put the matter back to enable that route to a consensual solution to be explored, it is submitted that the background already described would suggest that there is no possibility of a successful outcome to any such mediation. In particular counsel refers to the engagement by the appellant of Mr Searson already referred to, and to the fact that the Council was glad to liaise with Mr Searson in order to agree a plan for the remediation of the site and the removal of the waste materials, but that the appellant discharged both Mr Searson and his legal team shortly thereafter. Counsel has referred also to the history of adjournments which provided the appellant with many opportunities to address the matter of his compliance with the original order that was made on consent in June 2013, and at a time when he had legal representation, and therefore legal advice available to him. She has referred also to the fact that despite what is stated in the medical evidence submitted, the appellant has in the past been well able to instruct lawyers to act for him, and to decide to discharge them from time to time, and has clearly been able to engage in the legal process.

32. The point is made also that at no stage was the trial judge asked to adjourn the matter for the purpose of exploring the possibility of mediation, or exploring some other method of reaching a consensual solution.

33. Counsel has also emphasised the obligations of the council under EU law in relation to the environment, and therefore on the onus to ensure that the Waste Management Acts are complied with.

Conclusions

34. I am not at all satisfied on the evidence that has been produced to this Court, or from that which was available in the High Court that the appellant is a vulnerable man who suffers from a disability of such a nature that he cannot engage with the legal process, and look after his affairs. I accept, of course, that he has been diagnosed as having developmental dyslexia, and that he has suffered stress, and PTSD. But there is no evidence that he is so incapable of managing his affairs as would warrant him being, for example, being made a ward of court. Indeed, I notice from the transcript that the trial judge even inquired if any steps had been taken in that regard, given the way in which his abilities were being described on the adjournment application. In fact, there is clear evidence that he has at all times been well able to instruct lawyers and an engineer when he was willing to do so. He was also well able to discharge those professionals when he chose to do so. He was well able to understand and swear affidavits from time to time. There has never been any suggestion to the contrary.

35. It has to be said also that such medical evidence as was produced falls short of being adequate to justify an adjournment. There is for example no indication of what period of time was needed so as to enable the appellant to recover to a point of being once again able to deal with these matters. What was being contended for appears to have been an adjournment of indefinite duration with no indication of when the matter could be concluded. There was no indication in the report of what, if any treatment, the appellant intended to seek or be provided with, bar a reference in the medical report dated the 1st July 2016 to a need for professional help "to

help him overcome the many symptoms of his PTSD and to help him to a better quality of life".

36. The trial judge approached the adjournment application with care. He was aware of the lengthy background of the case before him, and the issue that needed to be determined. He considered the medical evidence. There is no basis for considering that the trial judge acted arbitrarily by refusing the adjournment requested.

37. It must be remembered also that the trial judge would not have been aware that upon refusal the appellant would decide to leave the Court, thereby permitting the matter to proceed in his absence. In my view, the trial judge was not obliged to reconsider whether the hearing should continue, simply because the appellant made the unilateral decision to leave the court, saying, through his daughter, that there was no need for him to remain.

38. The decision whether or not to accede to an application for an adjournment is always a matter of discretion by the trial judge. As such there is a wide margin of appreciation to be allowed to the trial judge in what decision is made. For this court on appeal, a central question is whether in all the circumstances the trial judge acted fairly having regard to the interests of all the parties, and not simply the party seeking the adjournment. The Court on an appeal should be slow to interfere with the manner in which the discretion was exercised, and should do so only where a clear error is manifest.

39. In all the circumstances, the refusal to adjourn was a fair, reasonable and just exercise of the wide discretion by the trial judge, as was the fact that he proceeded to determine the issue before him in the absence of the appellant. The medical evidence was not strong. That evidence had not been provided in advance to the council, and indeed no forewarning of the application was given by the appellant. No indication was given by the appellant, or contained in the medical evidence, as to how long an adjournment would be required in order to enable the appellant to deal with the matter.

40. The council is under an obligation to have cases under the Waste Management Acts dealt with as expeditiously as possible. In that regard I would refer to what is stated by Clarke J. (as he then was) in *Wicklow County Council v. O'Reilly & ors* [2006] 3 I.R. 273. That case involved an application by the council for an order under s. 58 of the Waste Management Act, 1996, as amended in connection with an alleged holding, recovery or disposal of waste on lands. At issue in the case was a question whether those civil proceedings should be adjourned pending the outcome of criminal proceedings arising from the facts. Having considering whether the civil proceedings should be adjourned, Clarke J. stated at p. 635:

> "For the reasons which I have analysed in some detail above I am satisfied that a high weight needs to be attached to the importance of permitting a plaintiff charged with the enforcement of the civil regime for remedying environmental pollution to be able to obtain, in a timely fashion, whatever orders might be justified on the facts of an individual case. What needs to be weighed against those considerations are the contentions on the part of [the defendants] as to the prejudice which might arise in respect of the criminal proceedings in the event that these civil proceedings are allowed to progress." [Emphasis provided]

41. I find no error in the decision of the trial judge to refuse to adjourn the hearing of the preliminary issue directed to be determined, and to proceed with the hearing even though the defendant had decided to allow the matter to proceed in his absence. I would therefore dismiss the appeal.