Neutral Citation Number: [2006] IEHC 268

THE HIGH COURT

RECORD NO. 2005 840 P

BETWEEN

SHELL E AND P IRELAND LIMITED

PLAINTIFF

AND

PHILIP McGRATH, JAMES B. PHILBIN, WILLY CORDUFF, MONICA MULLER, BRÍD McGARRY, PETER SWEETMAN

DEFENDANTS

Judgment of Ms. Justice Laffoy dated 31st July, 2006.

Introduction

1. This judgment deals with the issues which were before the court on 9th and 10th May, 2006.

First and third defendants' motion for discovery against the plaintiff

2. The application of the first and third defendants against the plaintiff for discovery arises from a notice of motion which dates back to 5th September, 2005. While the affidavits which have been sworn on behalf of the plaintiff in response to the motion indicate that discovery will be made in respect of certain categories, an affidavit of discovery has not been sworn on behalf of the plaintiff, not by reason of any fault on the part of the plaintiff but because other issues, apart from discovery, came to the fore.

3. An affidavit of discovery in the prescribed form must be sworn now on behalf of the plaintiff and, in relation to any category of documents in respect of which it is contended the plaintiff does not have documents, that fact should be deposed to. I propose considering only the categories which I understand to be in issue, which are the following:

· Category 1(a): There is a dispute as to whether the quantitative risk assessment (QRA) in respect of the gas reception terminal at Bellinaboy is relevant. The plaintiff contends that it is not, whereas counsel for these defendants contends that it is because the issues are inseparable, which I understand to mean that issues concerning the onshore pipeline are inseparable from issues in relation to the onshore terminal. On the current state of the evidence, I cannot find that it is not relevant or that these defendants have not discharged the onus of proving that it is necessary for disposing fairly of the issues between these defendants and the plaintiff. Therefore, I direct discovery of it.

· Category 1(c): I did not understand these defendants to be pursuing this category. For the avoidance of doubt, I consider that the plaintiff cannot be directed to discover the *Shell FRED Modelling package*.

· Category 1(g): Having regard to what I will say at C below in relation to the particulars given on 4th October, 2005, I am not satisfied that the validity of the compulsory acquisition orders is properly in issue between these defendants and the plaintiff. Even if the plaintiff accepts that it is, for the reason set out at C, I am not ordering discovery of this category.

· Category1(h): These defendants are defending the allegations against them on the basis that the plaintiff does not have a consent, or a valid consent, under s. 40. Whether the plaintiff has a consent, or a valid consent, therefore is an issue at this juncture, as is the plaintiff's contention that these defendants are time barred from challenging the validity of the consent. As the latter issue has not been determined against the defendants and as the plaintiff no longer requires it to be determined as a preliminary issue, it seems to me that the plaintiff is entitled to the discovery sought under this category.

· Category 1(i): I do not accept that this category is a repetition of category (g) as asserted by the plaintiff. Having regard to the issues raised by these defendants in relation to the deviation strip and the waste water pipe and the umbilical conduits, I consider this category is relevant and necessary to fairly dispose of the issues and should be discovered.

· Category 1(j): I do not accept that the plaintiff's contention that this category is not relevant. Whether planning permission is necessary for the onshore pipeline is in issue as between these defendants and the plaintiff. Discovery is ordered of this category.

· Category 1(m): Counsel for these defendants contended that this category is germane to the issue as to whether there is, or will be, excessive use of the pipeline. Although it is noted that it is averred on behalf of the plaintiff that the application for the pipeline development incorporates the waste water pipe and the umbilical conduits, I consider that these defendants have shown that this category is relevant to the issues between these defendants and the plaintiff and necessary and discovery should be made.

· Category 1(p): I think the plaintiff's objection that this category goes far beyond the scope of what could reasonably be required by the defendants is well founded. Category 1(h), which has been allowed, covers documentation relevant to the s. 40 consent. This category is too general and non-specific and discovery is not ordered.

· Category 1(q): It was submitted by counsel for these defendants that this category is relevant to statutory easements which the plaintiff asserts. I do not accept that this is the case. Discovery is not ordered in relation to this category.

· Category 1(r): The plaintiff, in its reply, has put in issue the view of the Minister in relation to the works carried out by the plaintiff. In the circumstances this category is relevant and it is also necessary to fairly dispose of the proceedings and discovery should be made.

· Category 1(u): The plaintiff has put on affidavit a much more convincing argument than the response of the Minister to the second and fifth defendants, dealt with at E below, that the plan of development is not relevant. In particular it has been averred on its behalf that the plan of development did not entitle the plaintiff to carry out any

work, that it was a precursor to subsequent applications for statutory consents including the s. 40 consent for the onshore pipeline. Notwithstanding that, I am not satisfied that one can infer that it is not relevant. Therefore, I am ordering discovery of it. If its relevance remains in issue the document will have to be looked at. The plaintiff also asserts that the document is commercially sensitive and confidential to the plaintiff. Even if this is the case, it is still discoverable unless the plaintiff can establish that it is privileged. Obviously, if the plaintiff can not establish privilege, a mechanism will have to be put in place to protect its commercial sensitivity.

4. Counsel for these defendants drew the court's attention to the fact that the plaintiff's solicitors, in their letter of 3rd October, 2005 furnishing a list of documents which the plaintiff is willing to disclose, intimated that there may be other documents which the plaintiff will rely on at the trial, which have not been sought or discovered. Provided the plaintiff makes proper discovery of the categories ordered to be discovered, it will be entitled so to do.

First and third defendants' motion for discovery against the Minister

5. By a notice of motion dated 13th April, 2006 the first and third defendants sought an order that the Minister make discovery of "all documentation relating to the promulgation of [the European Communities (Internal Market and Natural Gas) (Compulsory Acquisition) Regulations, 2001 (S.I. No. 517 of 2001)], its purpose and effect to include all or any communications between [the plaintiff] and the Minister, his servants or agents relating to the Corrib Gas Field prior to the said promulgation".

6. In order to determine whether these defendants are entitled to such discovery it is necessary to consider how S.I. 517 comes into play in the case being advanced by these defendants on their defences and counterclaims. The following are the significant points:

· The Minister is not a defendant to these defendants' counterclaim.

· In paragraph 6 of their defences delivered on 5th August, 2005 these defendants denied that the compulsory acquisition orders in relation to their respective holdings had the effects contended for in the statement of claim and they asserted that the legal provisions applicable for compensating them contained in the Acquisition of Lands (Assessment of Compensation) Act, 1919 as amended are repugnant to the Constitution and incompatible with the European Convention on Human Rights. The only relief sought by these defendants in their counterclaims arising out of the compulsory acquisition orders are declarations of repugnancy to the Constitution and incompatibility with the European Convention.

· After the plaintiff had delivered its replies and defences to these defendants' defences and counterclaims, on 4th October, 2005 these defendants delivered further particulars of para. 6 of their defences in which they asserted in relation to S.I. No. 517 of 2001 that:

  ○ it is *ultra vires* the powers of the Minister and is null and void and of no effect having regard to the provisions of the European Communities Act, 1972 and the Constitution (para. 1),

  ○ it purports to make a law providing for compulsory acquisition of land by a ministerial order that might be made by the Minister in certain circumstances, but as it was not mandated or necessitated by Directive 98/30/EEC, it purports to constitute the making of a law by a body other than the Oireachtas and offends Article 15.2 of the Constitution and therefore is void and of no effect (para. 5), and

  ○ it was made with the purpose of facilitating the compulsory acquisition by the plaintiff of the lands of these defendants and was not made for the purpose of giving effect to the Directive (para. 6).

· On 17th October, 2005 these defendants served notice pursuant to Order 60 of the Rules of the Superior Courts on the Attorney General. The contents of the notice giving particulars dated 4th October, 2005, including paras. 1, 5 and 6 thereof, were set out in the notice at paras. 15(a), (e) and (f). In para. 16 these defendants appear to me to make assertions that are not pleaded against the plaintiff.

7. The ground on which these defendants contended that the discovery they seek against the Minister is necessary is based on their assertion that the purpose for which the statutory instrument was made was not to implement the Directive but to facilitate the plaintiff in making compulsory acquisition orders. They say that the documentation sought will establish and prove the purpose and intent of the promulgation of the statutory instrument and without it these defendants will be at an evidential deficit.

8. There are a number of fundamental problems in relation to the manner in which these defendants have sought to make the coming into existence of S.I. 517 an issue in this case. The first is its timing and the manner in which it is pleaded against the plaintiff. Having regard to issue No. 22 on the list of issues as between the plaintiff and these defendants furnished to the solicitors for these defendants by letter dated 2nd May, 2006, it may be that the plaintiff does not intend making any pleading point, although, given the propensity of all of the parties to shift ground, I consider it would be unwise to assume any such intention. The second, which is even more fundamental, is that it is asserted that its making was *ultra vires* the powers of the Minister in circumstances where the Minister is neither a party in, nor a notice party to, the case made against him by these defendants. Finally, the Order 60 notice, which should only relate to any issue which arises to the validity of a law having regard to the provisions of the Constitution or the interpretation of the Constitution, seems to go beyond the parameters of O. 60 and it also seems to go beyond the case pleaded against the plaintiff.

9. Even if the issue of the validity of S.I. 517 were properly an issue in the proceedings at the suit of these defendants, they have not made out a case that discovery is necessary for fairly disposing of the issue. What they have done is that they have made a bald assertion as to the purpose for which the statutory instrument was made in the hope that documents may exist which will substantiate the assertion. In other words, they have gone on a "fishing" expedition. As the Supreme Court pointed out in *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 529 (*per* Geoghegan J. at 534), they are not entitled to do that. For this reason, I refuse these defendants' application for discovery against the Minister.

10. I express no view on the submission made on behalf of these defendants that the situation here, which involves an assertion as to the motivation for the promulgation of a statutory instrument, is distinguishable from the situation which arose in *Controller of Patents v. Ireland* [2001] 4 I.R. 229, in which the Supreme Court held that documentation in relation to preparation, drafting, advice, changes, amendments, discussions with and briefing of members of the Oireachtas concerning the enactment of a bill was not relevant to proceedings challenging the constitutionality of the Act.

Second and fifth defendants' motion for discovery against the plaintiff

11. The motion for discovery which is before the court was issued by the solicitors formerly on record for the second and fifth defendants on 6th September, 2005, before these defendants were given leave to deliver amended defences and counterclaims. That notice of motion covered the same categories as categories 1(a) to (u) in the first and third defendants' motion of 5th September, 2005 and also four additional categories designated 1(v) to (y). When these defendants' current solicitors came on record, by letter dated 7th October, 2005, they sought further voluntary discovery and they sought one additional category by letter dated 11th October, 2005. The discovery they sought against the State parties in the motion dated 4th May, 2006, dealt with at E below, replicated the requests in the letters of 7th October, 2005 and 11th October, 2005.

12. In relation to categories 1(a) to (u) in the notice of motion dated 6th September, 2005, even though the issues raised as between the first and third defendants and the plaintiff and the issues raised as between these defendants and the plaintiff, while overlapping to some extent, are not the same, I do not intend to cover ground which I have already covered at B above. My comments on the issues specifically raised by counsel for these defendants are as follows:

> · In relation to category 1(d), which I did not understand to be in contention between the first and third defendants and the plaintiff, I do not find the averment made on behalf of the plaintiff that certain documents, notes or memoranda in relation to the recommendations of Andrew Johnson are not relevant conclusive on the issue of relevancy. I consider that the documents should be listed in the affidavit of discovery. If they are privileged, then privilege can be claimed in respect of them.
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> · In relation to category 1(u), I merely record that these defendants do not accept that the plan of development is not relevant.
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> · For completeness I should also say that I did not understand category 1(c) to be in contention at this juncture. Insofar as it is, I reiterate that I consider that the plaintiff cannot be directed to discover the *Shell FRED Modelling package*.

13. Dealing first with categories 1(v) to 1(y) of the notice of 6th September, 2005, as I understand the position, the only category which these defendants are pursuing is category (w) which seeks insurance documentation in relation to the "development and operation of the subject works". The point made by counsel for these defendants was that such documentation may contain statements in relation to risk exposure which are relevant to the issues in relation to health and safety raised by these defendants. I consider that this category is both relevant and necessary and that discovery should be ordered, but, for the avoidance of doubt, I understand the subject works to mean the onshore pipeline only.

14. My observations and rulings on these defendants' application for discovery against the State parties at E below also apply to their application against the plaintiff.

15. I emphasise that in relation to categories of documents of which these defendants are entitled to discovery, an affidavit of discovery must be sworn. In saying that, I am not suggesting that any fault is attributable to the plaintiff on account of an affidavit not having been sworn to date.

16. In relation to the categories set out in the letter of 7th October, 2005, I would make the following observations:

> · I consider items 1(l) to (p) to be relevant. The State parties have agreed to make discovery of these categories. However, the plaintiff must also deal with these categories in its affidavit of discovery. The fact that the s. 40 consent dated 15th April, 2002 is available to all of the defendants is not the end of the matter. As counsel for these defendants submitted, that document sought an acknowledgment of its contents from the addressee, the plaintiff, and an indication of acceptance of the conditions stipulated. If there was an acknowledgement or other response, that should be discovered. If there was not, the affidavit of discovery is necessary to establish that fact. Further, a reasonable inference to be drawn from the letter of 31st July, 2005 from the Minister to the plaintiff is that the "Pod Approval" dated 15th April, 2002 referred to in para. 3.(c) is not the "Pipeline Authorisation" referred to in the same letter (para. 3(a)). Again, this emphasises the necessity for an affidavit of discovery.
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> · In relation to categories 2 and 5, there is an issue as to whether the laying of the onshore pipeline is an exempt development under the planning code. Category 2 is relevant and should be covered in the plaintiff's affidavit of discovery. In relation to category 5, there is no "claim" by the plaintiff that it is a "gas undertaking" which is an issue as between the plaintiff and these defendants. I see no basis for assuming that the plaintiff must have considered whether it is a "gas undertaking" as submitted by counsel for these defendants. These defendants have not established that category 5 is necessary for the fair disposal of the issues in this case.
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> · In relation to the letter of 9th October, 2005, the category in that letter overlaps with category 6 in the these defendants' motion against the State parties. The State parties are making discovery of this category and I note that these defendants have reserved their position as regards the plaintiff.

Second and fifth defendants' motion for discovery against the Minister

17. The notice of motion issued by the second and fifth defendants against the State parties who are defendants to their counterclaim was dated 4th May, 2006. In a letter dated 8th May, 2006 the Chief State Solicitor indicated the State parties' attitude in relation to each of the categories of documents sought.

18. In relation to certain categories (1)(b), (c), (d), (e), (l), (m), (o), (p), (q) and (r), and 3, the State parties make the point that a vast amount of documentation has been requested, a lot of which is available on the website of the Department of Communication, Marine and Natural Resources. Counsel for the State parties, made the point, referring to the decision of Fennelly J. in *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264, at p. 277, that the documentation sought can be obtained by another means. That is true in relation to the documentation on the website. However, in my view, that does not dispense with the necessity of an affidavit of discovery sworn on behalf of the State parties. Accordingly, in my view, an affidavit of discovery should be sworn on behalf of the State categories in relation to those documents.

19. The affidavit of discovery should also cover categories 1(g), (h), (i), (j) and 6 which the State parties have agreed will be produced. As I understand it, category 1(k) is not being pursued. Accordingly, the categories which remain in issue between the parties are the following:

· Category 1(a): It is not obvious to me on the case put forward by these defendants to what extent the petroleum lease granted by the State to the plaintiff is relevant to the issues raised between these defendants and the State parties or necessary for the disposition of those issues fairly. If it is, and privilege cannot be claimed, the court can take measures to ensure that the confidentiality of its provisions is not breached by limiting access. An alternative approach I would suggest is that, if some of the clauses of the petroleum lease could be regarded as relevant while others not so, the lease could be discovered in a redacted form. I make this suggestion because I note that the Minister in his letter dated 31st July, 2005 to the plaintiff indicates that the development works in relation to the Corrib Gas Field are regulated, if indirectly, by the lease. There may be commercially sensitive provisions in the lease, for example, in relation to rents and royalties and such like which are of no relevance to the issues in this case, which could be redacted. Having regard to the Minister's letter, assuming that the lease is to some extent relevant, discovery is ordered.

· Category 1(f): Under this category these defendants seek the plan of development delivered to the State parties in respect of the Corrib Gas Field. The State parties say, rather unconvincingly, that this is a "technical document relevant only to the Department's experts" and is, consequently, neither relevant nor necessary for the prosecution of these defendants' counterclaim. There is a *non sequitur* at the heart of that statement. It is not obvious to me that the plan of development in respect of the Corrib Gas Field would not have relevance to issues in relation to the safety of the onshore gas pipeline. Therefore, consistent with the approach I have adopted against the plaintiff at B above, discovery must be made in relation to this category.

· Category 2: Whether planning permission was necessary for the onshore pipeline is in issue in the proceedings. While it is true that the State parties and, in particular, the Minister has no function in relation to planning permission, the affidavit of discovery should cover this category, at least to the extent of containing an averment that the State parties have no documentation which falls within this category.

· Category 4: This category does not relate to the issues between these defendants and the State parties and discovery will not be ordered.

· Category 5: The State parties say that the question as to whether the plaintiff was or was not a gas undertaking did not arise in their dealings with the plaintiff. Neither relevance nor necessity has been established by these defendants. So discovery will not be ordered.

20. Counsel on behalf of the State parties submitted that these parties' obligation to make discovery should be dependent on the manner in which the issues are to be heard. I have come to the conclusion that it is not practicable to segment the obligation of the State parties to make discovery. Accordingly the order will be made now.

Trial of the preliminary issue

21. The only relief claimed in the plaintiff's notice of motion dated 30th January, 2006 which was not dealt with in my judgment of 23rd March, 2006 was the application for an order pursuant to O. 25, r. 1 and/or O. 34, r. 2 of the Rules directing the trial of a preliminary issue as to whether the defendants can raise public law issues in these proceedings. I adjourned that issue indicating that as, realistically, the question as to whether the public law issues raised by the defendants can be litigated in these proceedings will have to be addressed at some time, to deal with it by way of a trial of a preliminary issue would be likely to involve substantial savings of time and cost, but pointing to the necessity of some agreed *modus operandi* in relation to the underlying facts on which the question would be premised.

22. The plaintiff does not now wish to pursue its application to have a preliminary issue determined because the view has been formed that it would be unlikely to result in all of the issues between the parties being disposed of expeditiously because of the likelihood of the unsuccessful party appealing the decision on the preliminary issue to the Supreme Court. The plaintiff also gave as a reason the unlikelihood of the parties being able to agree a factual basis on which a preliminary issue could be tried. As the plaintiff does not wish to pursue the matter, that determines all issues on the plaintiff's motion except the issue of costs. Paragraph 4 of the plaintiff's motion is formally dismissed and there will be an order to that effect.

23. Although there was no other application before the court seeking the trial of a preliminary issue, it may be useful if I make the following comments on the following submissions made by other parties:

(1) The first and third defendants proposed that certain issues set out in a letter from their solicitors to the plaintiff's solicitors dated 7th April, 2006 should be tried as preliminary issues. In summary the questions posed were whether public law issues are justiciable in these proceedings and whether the public law issues are time barred and, specifically, whether these defendants can challenge the validity of S.I. 517 of 2001 and, if so, whether it is valid and whether the compulsory acquisition orders made on foot of it are valid and, if they are, the extent to which they entitle the plaintiff to use and occupy the lands to which they relate. The problems I have outlined at C above and, in particular, the fact that the Minister, who is the obvious *legitimus contradictor* in relation to the validity of S.I. 517 of 2001 is not a party to these issues at the suit of the first and third defendants, are an impediment to the approach suggested. Therefore, even if there were a motion before the court, the court could not direct the trial of these issues as the proceedings are currently structured.

(2) Ironically, perhaps, the Minister as a defendant to the counterclaim of the second and fifth defendants furnished a list of issues which they submitted should be tried by the court prior to a full hearing which, in summary, raised questions as to whether the defendants' challenge to the compulsory acquisition orders are time barred and, if not, whether they were validly made by statutory authority, and specifically, whether S.I. 517 of 2001 was validly made. The issues as formulated in the list furnished by the Chief State Solicitor fall very far short of addressing the totality of the questions in relation to the compulsory acquisition orders raised in the pleadings. A cursory glance at the list of issues drawn up by the legal team for the second and fifth defendants (items 1.1 to 1.21 on the list) demonstrates this. Moreover, the issues as formulated do not extend to the case made by the fifth defendant, who claims proprietary rights in plot No. 30660 as a lessee. In short, even if there was a motion before the court, in my view, the State parties have not established that anything would be achieved by acceding to the trial of the issues listed as preliminary issues.

In general, while I understand why the State parties would wish that public law issues would be tried by the court separately from the trespass and other tortious issues raised as between the defendants and the plaintiff, I do not see how the public law issues can be disentangled from the other issues except by agreement by all of the relevant parties including agreement on the factual basis on which the legal issues are to be tried. Taking an overview of the matter, I

can only surmise that such agreement is unlikely.

(3) Counsel for the second and fifth defendants, while not requesting the trial of a preliminary issue, submitted that one aspect of the issues listed by the plaintiff in their list of issues, to which I will refer at G below, needs to be resolved at an early stage. That aspect, which appears at several points in the plaintiff's list is to be found in summary form in issue 69 under the heading "relief sought by these defendants" where the issue is stated as follows:

> "Is the second named defendant, as contemnor, entitled to any relief from the Court and/or should the court exercise its discretion to grant him any relief from these proceedings?"

24. Similar issues have been listed by the plaintiff in relation to the plaintiff's reply to the first and third defendants on their counterclaim. On my reading of the pleadings the issue has not been raised against the first and third defendants, although I am satisfied it has been raised against the second defendant.

25. I fully appreciate the significance of the question which I have quoted from the perspective of the second defendant and the costs implications it points to. However, I do not see how the question can be properly resolved in the abstract, when, by attempting to do so, the court might be trying a moot. Therefore, as things stand, it remains an issue as between the plaintiff and the second defendant to be tried in conjunction with the other issues.

List of issues

26. The plaintiff's legal team has furnished lists of issues which arise as between:

- the plaintiff and the fourth and sixth defendants,
- the plaintiff and the first and third defendants, and
- the plaintiff and the second and fifth defendants.

27. I did not understand counsel for the fourth and sixth defendants to disagree with the list of issues as regards his clients. The approach of the first and third defendants was the proposal in relation to the trial of preliminary issues, which I have dealt with at F above.

28. The legal team for the second and fifth defendants furnished a list of issues headed "Issues arising on the pleadings of the plaintiff and the second and fifth defendants". Notwithstanding the heading, the list appears also to cover the issues as between the second and fifth defendants and the State parties on the counterclaim against the State parties.

29. By way of general observation, at this stage in the proceedings lists of issues can only be indicative of the issues with which the court will be concerned and can only act as guidelines. I consider that the lists drawn up by the plaintiff's legal team constitute useful templates. However, they may require to be modified insofar as they include matters which are not pleaded, for example, the question as to the entitlement of the first and third defendants as alleged contemnors to relief. It is for the parties to deal with these matters inter se.

30. There should be a separate list of the issues as between the second defendant and the State parties arising out of a counterclaim against the State parties. This list should be drawn up by the legal team for the second and fifth defendants and agreed with the State parties.

31. Finally, with one qualification, in the absence of agreement, it is for the plaintiff to decide the order in which the issues will be dealt with. The qualification is that issues in which the constitutionality of the statute is raised will not fall for determination until all other issues are determined.