

THE HIGH COURT

2011 6062 P

BETWEEN

ELECTRICITY SUPPLY BOARD AND EIRGRID PLC

PLAINTIFFS

AND

JOHN COMMINS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 22nd day of July, 2011.

1. The application

1.1 On this application for an interlocutory injunction the following primary reliefs are claimed:

(a) an injunction restraining the defendant from obstructing or preventing the first plaintiff (ESB) from entering on and remaining on the defendant's lands, being the lands registered on Folio 8736 of the Register of Freeholders, County Galway, for the purposes of erecting a 110 kV overhead electric line thereon in accordance with its statutory powers under s. 53(9) of the Electricity (Supply) Act 1927 (the Act of 1927), as amended; and

(b) an order restraining the defendant from preventing the plaintiffs or either of them from entering on the defendant's said lands and making such inquiries, investigations and examinations as they think proper relating to the 110 kV line in question, which is known as the Dalton-Galway 110 kV loop line, and, in particular, the construction thereof, and the monitoring, approval and inspection of the said construction pursuant to –

(i) s. 20(4) of the Act of 1927, and

(ii) Regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 (S.I. No. 445/2000) (the Regulations)

for the purpose of the exercise or performance of the powers and functions conferred on the plaintiffs by the Act of 1927, as amended, and/or the Regulations, as amended.

The plaintiffs also seek ancillary orders restraining the defendant from interfering with the works carried out by the ESB on the defendant's lands and directing the defendant to unlock all gates and remove all barriers and obstacles which are blocking the plaintiffs' access to the said lands.

2. Factual background

2.1 On 12th June, 2006 An Bord Pleanála, on appeal, granted planning permission for the construction of the Dalton-Galway loop line. On 7th June, 2011 Galway County Council granted an extension of the appropriate period of the above planning permission to 6th June, 2016.

2.2 The Dalton-Galway loop line passes over the defendant's lands registered on Folio 8736 County Galway. The ESB requires to construct one double wood poleset structure on the lands, from which three continuous wires will be suspended by insulators, with two earth wires located on the top of the structure.

2.3 On 6th May, 2010 statutory wayleave notices pursuant to s. 53 of the Act of 1927 were served on Patrick Commins, the father of the defendant, who was then the registered owner of the lands registered on Folio 8736 and on the defendant. The defendant became registered as full owner of the lands registered on Folio 8736 in succession to his father on 26th November, 2010.

2.4 Unfortunately, due to human error, at the pre-planning application stage in 2004 the lands registered on Folio 8736 were mapped as being the property of an adjoining landowner and that had a number of consequences. One was that the defendant's predecessor, Patrick Commins, was not identified as a person with an interest in land or structure affected by the proposed development on the application for planning permission. Another was that the adjoining landowner was incorrectly served with a wayleave notice on 13th October, 2009 in the belief that she was the owner of the lands registered on Folio 8736, which, in fact, at the time were owned by Patrick Commins. In consequence, on 3rd March, 2010 the ESB entered on the lands registered on Folio 8736 to advance the construction of the Dalton-Galway loop line without having first served a wayleave notice on the owner of the lands. A stone wall was knocked down on the boundary, but that has since been reinstated from the adjoining landowner's property. It is acknowledged that the ESB trespassed on the defendant's property and an apology has been tendered to the defendant for the trespass. As regards the historic trespass, the position of the plaintiffs is that any damage occasioned to the lands by virtue of the trespass was fully reinstated at the time. However, it is acknowledged that, apart from his entitlement to compensation pursuant to the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 pursuant to the wayleave notice served on him in May 2010, the defendant, if he wishes, may take proceedings in the civil courts against the plaintiffs for damages for trespass.

3. The bases of the defendant's opposition to entry on the lands

3.1 The defendant contends that, by reason of the interest of the defendant's predecessor, Patrick Commins, not having been disclosed on the application for planning permission, and the failure on the part of the ESB to invite the defendant's predecessor to be involved in the planning process, the result was that the owner of the lands registered on 8736 had no opportunity, through the medium of the IFA or otherwise, to negotiate in relation to the location of the poles at the pre-planning stage. More significantly, he had no opportunity to object in the course of the planning process. Accordingly, it is contended that the planning permission is invalid. Further, it is contended that, the error being known to the ESB before the application to the planning authority for an extension of the planning permission, the planning authority should have been alerted to the defect in the planning permission, but this was not done.

3.2 However, counsel for the defendant recognised that, having regard to the decision of the High Court (Clarke J.) in *ESB v. Burke* [2006] IEHC 214, which was followed by this Court in *ESB v. Roddy* [2010] IEHC 158, it is not open to the defendant to question the validity of the planning permission granted by An Bord Pleanála or the extension thereof in these *inter partes* proceedings. To do so, the defendant would have to proceed by way of application for leave to apply for judicial review in accordance with subs. (2) of s. 50 of the Planning and Development Act 2000 (the Act of 2000), as substituted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, within the period of eight weeks prescribed in subs. (6) of s. 50 or such extended period as might be allowed by the Court in accordance with subs. (8) of s. 50. Therefore, the issue of the validity of the planning permission and the extension as a bar to granting the plaintiffs the relief they seek was not pursued on this application, although the possibility of the defendant seeking relief under the Act of 2000 was not ruled out.

3.3 The consequence of the defendant not pursuing the planning point is the recognition by the defendant that ESB is entitled to orders in the terms sought by it.

3.4 The defendant maintained his objection to interlocutory relief being granted to EirGrid, however, on the basis that EirGrid does not have statutory power to enter on the defendant's lands. Whether that contention is correct or not is the core issue on this application.

4. EirGrid's entitlement to relief: the submissions

4.1 The role of EirGrid is explained by Deborah Meghen, Manager of Transmissions Projects for EirGrid, in her affidavit grounding this application sworn on 5th July, 2011. Ms. Meghen has averred that EirGrid is a public limited company established pursuant to Regulation 34 of the Regulations and that it holds a transmission system operator licence pursuant to s. 14(1)(e) of the Electricity Regulation Act 1999. EirGrid is charged as transmission operator by Regulation 8(1) of the Regulations with, *inter alia*, the function of developing a safe, secure, reliable, economical and efficient electricity transmission system with a view that all reasonable demands for electricity are met and having due regard for the environment and to ensure the availability of all ancillary services which are necessary for the transmission system operator, that is to say, in this case, ESB, to carry out that duty. Ms. Meghen goes on to explain why EirGrid has been named as co-plaintiff as follows:

"I say that EirGrid has been named as Co-Plaintiff to these proceedings in circumstances where it requires access to the Defendant's lands ... for the purpose of inspecting the proposed construction works, monitoring their progress and approving the completed works pursuant to its functions under 2000 Regulations (as amended)."

I think it is important to emphasise that the primary relief claimed for the benefit of EirGrid is formulated as enabling EirGrid to make "such inquiries, investigations and examinations as [it thinks] proper ... for the purpose of the exercise or performance of the powers and functions conferred" by the Act of 1927 and the Regulations, which, as to what will happen on the ground means, as explained by Ms. Meghen, "inspecting the proposed construction works, monitoring their progress and approving the completed works pursuant to its functions" under the Regulations.

4.2 It was confirmed to the Court by counsel for the plaintiffs that notwithstanding that the defendant was not objecting to interlocutory relief being granted to the ESB, that would not solve the problem and that it is necessary for EirGrid to be granted the interlocutory relief it seeks.

4.3 I propose now outlining the statutory provisions and the regulations on which EirGrid relies.

4.4 Section 20(4) of the Act of 1927 provides:

"For the purpose of the exercise or performance of any of the powers or functions conferred on the Board by this Act, the Board may enter on any lands or premises and there make such inquiries, investigations, and examinations as it thinks proper."

"Board" in that sub-section means the ESB. It was emphasised on behalf of EirGrid that it was not claiming an entitlement to a wayleave across the defendant's lands pursuant to s. 53 of the Act of 1927, as amended by, *inter alia*, the Electricity (Supply) (Amendment) Act 1985 subsequent to the decision of the Supreme Court in *ESB v. Gormley* [1985] I.R. 129.

4.5 Regulation 8(2) of the Regulations, insofar as is relevant for present purposes provides:

"Any function of the Board under –

- (a) ...
- (b) section ... 20, ... of the [Act of 1927],
- (c) ...
- (d) ...
- (e) ...

(f) ...

which is necessary for the discharge of the transmission system operator's functions under these Regulations shall, to that extent, be regarded as a function of the transmission system operator and not of the Board, other than where it is also necessary for the Board to discharge its functions as transmission system owner in which case that function shall be a function of the Board and the transmission system operator."

For the purposes of the application of that regulation –

(i) EirGrid is the transmission system operator and ESB is the transmission system owner, and

(ii) "function" is defined as including a power and a duty.

As Ms. Meghan has outlined, the functions of EirGrid are set out in Regulation 8(1), which confers exclusive functions on EirGrid "to operate and ensure the maintenance of and, if necessary, develop a safe, secure, reliable, economical and efficient electricity transmission system ...".

4.6 While reference was made in the legal submissions of counsel for the plaintiffs to an infrastructure agreement between ESB and EirGrid, which deals with the distribution of functions between them, that agreement is not before the Court and no reliance can be placed on it.

4.7 Counsel for the defendant submitted that the functions given to EirGrid in the Regulations could not have been envisaged by s. 20(4) of the Act of 1927 when it was enacted. It was pointed out that Regulation 8(2) does not transfer any function under s. 53 of the Act of 1927 on EirGrid. It was submitted that s. 20(4) does not cover what EirGrid intends to do on the ground; that the functions conferred on EirGrid do not include entry on the land of the defendant as a right. The right claimed by EirGrid is an interference with a constitutional right, presumably, the right to property and such a right must be expressly conferred by legislation, it was submitted on behalf of the defendant.

5. Conclusions

5.1 Whether the first criterion in determining whether EirGrid is entitled to interlocutory relief against the defendant is that EirGrid has established that there is a fair issue to be tried or, alternatively, if the relief claimed, although framed as prohibitory relief is, in fact, in the nature of a mandatory order directing the defendant to allow EirGrid to enter on his lands for the purposes identified, that EirGrid has shown "at least that [it has] a strong case that [it] is likely to succeed at the hearing of the action" (*per* Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137), in my view, EirGrid has met the relevant criterion. The powers and functions conferred by s. 20(4) of the Act of 1927 are now vested in EirGrid, insofar as is necessary to discharge its exclusive functions under the Regulations to operate and ensure the maintenance of the electricity transmission system. What EirGrid requires is an entitlement to enter to inspect, monitor and approve the construction of the Dalton-Galway loop line over the defendant's lands, as explained by Ms. Meghan, which is within the ambit of the powers and functions conferred by s. 20(4). Although the constitutional argument was not developed on behalf of the defendant, *prima facie*, by reason of the minor burden which such entitlement would impose on the defendant landowner, it could not be regarded as an infringement of his constitutional rights, having regard to the decision of the Supreme Court in *ESB v. Gormley*. EirGrid, as the transmission system operator, as distinct from ESB, as the transmission system owner, does not seek to rely on s. 53 of the Act of 1927, as amended.

5.2 I am satisfied that the plaintiffs have also satisfied the other criteria for the grant of an interlocutory injunction, namely, that damages would not be an adequate remedy for the plaintiffs if an injunction were refused and the balance of convenience favours the grant of an injunction. In fact, no issue was taken by counsel for the defendant in relation to the case made out by the plaintiffs' deponents in relation to both of those issues.

6. Order

6.1 Accordingly, subject to the plaintiffs giving the usual undertaking as to damages, the Court will grant the plaintiffs orders in the terms sought pending the trial of the action.