

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2005 22JR]

BETWEEN**MR. BINMAN LIMITED****APPLICANT**

**AND
LIMERICK CITY COUNCIL**

RESPONDENT**Judgment delivered by Ms. Justice Dunne on the 15th day of June, 2005**

1. The applicant is a limited liability company carrying on business of waste collection and is the holder of a waste collection permit (Regulations 2001). It operates in the area of the respondent among others. In these proceedings the applicant seeks judicial review in the following terms.

I. *Certiorari* by way of an application for judicial review in respect of the decision dated 22nd December, 2004 of the respondent to seek tenders from waste collection companies, including the applicant, for the provision of a household waste collection service to low income households in the respondent's functional area.

II. If necessary *certiorari* by way of an application for judicial review in respect of the decision of the respondent to enter into a contract arising from the tender process commenced on 22nd December, 2004 with a company for the provision of a household waste collection service to low income households within the respondent's functional area.

III. If necessary, a declaration that any contract entered into by the respondent with any waste collection company for the provision of the aforementioned service is prohibited and void by virtue of the provisions of ss. 4 and/or 5 of the Competition Act, 2002.

IV. An injunction by way of an application for judicial review restraining the respondent from entering into any contract with any waste collection company for the provision of the aforementioned service pursuant to the process commenced on 22nd December, 2004.

V. If necessary an injunction by way of an application for judicial review restraining the respondent, its servants or agents from contacting any of the applicant's customers who heretofore have availed of the respondent's waiver scheme in respect of waste charges with a view to inducing those customers to breach their contracts with the applicant in respect of the collection of their household waste and/or in the alternative representing to any of the applicant's customers that the respondent will only provide waivers or partial waivers if those customers avail of the waste collection service of a particular waste collection company.

2. As can be seen the decision of the respondent made on 22nd December, 2004 to seek tenders from waste collection companies, including the applicant, for the collection of household waste from low income households in the respondent's functional area is at the heart of these proceedings.

Background

3. Up to 2000, the respondent herein was responsible for the collection of household waste within its functional area. That service was privatised and since then the applicant herein has provided that service, along with other waste collection permit holders in the respondent's functional area. At the present time, the applicant has some 17,000 customers who have contracts for six or twelve month periods at a time, making the applicant the largest permit holder operating in the respondent's functional area.

4. When the new waste collection service was introduced a waiver scheme was also introduced for low income households. Certain households were entitled to a full or partial waiver in respect of the waste collection charge. It should be noted at this point that the applicant has a contract with the householder and charges the householder directly. In the case of low income households, the applicant identified those households in accordance with criteria set out by the respondent, invoiced the respondent directly for either the full or partial amount appropriate to the householder having regard to the waiver scheme and was paid accordingly by the respondent for the waste collection service.

5. A decision of 22nd December, 2004 to put out to tender a waste collection contract in respect of the low income households marks an intention to bring an end to the waiver scheme as it previously operated.

6. The respondent had been concerned by the operation of the waiver scheme for some time and in 2003, correspondence was exchanged between the applicant and the respondent in that regard. The correspondence referred to the then current practice, namely that a person qualified for a subsidy, then made a decision as to which permit holder would provide the service. In its letter of 3rd October, 2003, the respondent went on to invite submissions from the applicant and others and stated that on receipt of submissions it would then select the permit holder who would thereafter provide the service to low income householders. In other words, there would be no choice in the matter for the householder. As stated there was an exchange of correspondence resting with the letter from the applicant's solicitor dated 31st October, 2003. Thereafter nothing was heard until 25th November, 2004 when the respondent by letter of that date indicated that the respondent's waiver scheme was to be discontinued. A reference was made in that letter to the belief of the respondent that it did not have the legal authority to operate the waiver scheme.

The Law

7. It would be useful at this stage to refer to s. 33 of the Waste Management Act, 1996. Section 33(1)(a) each local authority shall collect, or arrange for the collection of, household waste within its functional area.

8. Section 33(5) a local authority may enter into arrangements with one or more other local authorities, or with one or more other persons, for the collection on its behalf by the said authority or authorities or, as the case may be, by the said person or persons of waste in its functional area or in a part or parts of that area.

9. The Protection of the Environment Act, 2003 amended certain provisions of the Waste Management Act, 1996:-

Section 52. The following section is inserted after s. 74 of the Act of 1996:

Section 75(1) a local authority may make a charge in respect of the provision of any waste service by, or on behalf of, that authority. Section 75(3) a local authority may, if it is satisfied that it is appropriate so to do on grounds of personal hardship, waive all or portion of a charge made by it under subs. (1). Section 75(4) where a charge (or portion thereof) is waived under subs. (3), the liability of the person to pay that charge (or portion thereof) and any obligation on the local authority by whom the waiver was made to collect the charge (or portion thereof) shall seek.

The applicant's submissions

10. There are two points made in the submissions on behalf of the applicant. The first point made is that any new contract entered into by the respondent on foot of the tender process commenced by the decision of 22nd December, 2004 would inevitably involve existing customers of the applicant breaching their contract with the applicant in circumstances where that is the only practical option open to them (the customers) if they want a waste collection service for which they do not pay in full or at least, partially. The second point is that the tender process will lead to an exclusive contract being granted for the low income households which will be anti-competitive in nature.

11. In his affidavit sworn herein on 12th January, 2005, Martin Sheahan deposes to the fact that its customers enter into contracts for six months or a year. He goes on to say "in keeping with our practice invoices were issued to our customers at the end of December for the six month period from 1st January, 2005 to 30th June, 2005."

12. He then says that bins were collected in the normal way during the first week in January. He makes the point that if the tendering process is completed then it is likely that the respondent and the successful contractor will notify those customers already benefiting from the scheme and that those customers are likely to engage the new contractor.

13. Mr. Hogan on behalf of the applicant argues on the basis of the likely change of service provider that the decision to tender and grant an exclusive contract amounts to an inducement to a breach of contract. He referred to McMahon and Binchy on the law of torts in support of his argument and to a number of authorities referred to therein. He concedes that if there was a longer lead in to the change of waiver scheme which did not result in breaches of his customer's contracts he would have no complaint.

14. The second point relied on by Mr. Hogan is that any contract entered into by the respondent and the successful candidate in the tender process will be anti-competitive in nature. He argued that the object and effect of any such agreement would be to restrict or distort competition between waste collection companies in relation to the provision of services to low income households as such households whilst they could use whatever service provider they wished, would only benefit from a waiver scheme if they used the company specified by the respondent. Mr. Hogan referred to the decision in *Ambulanz Glockner* in support of his argument in this regard.

The respondent's submissions

15. Mr. Butler S.C. on behalf of the respondent argued that it was never the intention of the respondent to induce any householder to break their contract with the applicant. He made the point that some of the applicant's contracts are for a six month period which will end on 30th June, 2005 and notes the concession on behalf of the applicant that there could be no complaint of the proposed new arrangement at a longer lead in time. He submitted that if the circumstances did amount to an inducement to breach of contract, then the respondent could rely on objective justification, namely the alleged unlawfulness of the previous arrangement. He referred to the obligations on the respondent in relation to waste as provided by s. 33 of the Waste Management Act, 1996.

16. He went on to argue that there was no contract in existence at the time of the making of the decision under challenge that is the 22nd December, 2004. He argued that there was nothing anti-competitive about the respondent's conduct. Finally he referred to the discretion of the court in relation to the remedy of judicial review.

17. Mr. Hogan in reply accepted that there was no *mala fides* in respect of the conduct of the respondent. He argued that it was contrary to the evidence given in Mr. Sheahan's affidavit to suggest that there were no contracts in existence at the time of the commencement of the tender process. He stated that the natural and probable consequence of the proposed arrangement will be a breach of contract by low income householders with their service provider.

Conclusions

18. There is no issue between the parties that if the respondent is acting unlawfully in relation to the tender process either by committing the tort of inducement of breach of contract or by a breach of the provisions of ss. 4 and/or 5 of the Competition Act, 2002 then the tender process can be quashed by way of judicial review.

19. The tort of inducement of breach of contract is one which does not generally arise save in limited circumstances. It has most frequently arisen in the area of trade union disputes.

20. There is a distinction between persuasion or pressure on the one hand and information or advice on the other hand. Mr. Hogan in his submissions referred to the case of *Talbot (Ireland) Limited v. ATGWU* an *ex tempore* decision of the Supreme Court 30th April, 1981 in which Henchy J. stated that:-

"it was well established that where a defendant, knowing of a contract between the plaintiff and a third party, intentionally induced a third party to break the contract and thereby cause loss to the plaintiff, a tort was committed unless there was justification for the defendant's action."

21. Mr. Hogan, in making this case, argued that the respondent was aware of the basis on which the applicant entered into contracts with its customers and therefore would have realised that those from low income households would, as a matter of probability, breach their contracts as soon as a single contractor was appointed for the purpose of providing a service to low income households. He relied on *James McMahon Limited v. Dunne* [1965] 99 I.L.T.R. 45, Budd J. at p. 56 where it is stated:-

"A person is presumed to intend the ordinary and probable consequences of his acts. If the ordinary and probable consequences of the actions of the defendant would be such as to cause a breach of contract then the intent would ordinarily be presumed."

22. One of the difficulties in this case arises from the question as to whether there were in fact contracts in existence at the time of the critical decision. The applicant says that there were on the basis that there were invoices sent out for the coming six month period during the month of December, 2004. However, even if the invoicing of customers was sufficient to set up new contracts, is

that enough to establish the necessary intention on the part of the respondent? The respondent has argued that the contracts had not come into effect at that time, that is to say the 22nd, December, 2004. However, even if it is the case that there were contracts in existence at the time of the making of the decision, I am not satisfied that the applicant has successfully made out a case on the ground that the Act of the respondent amounts to an inducement of breach of contract. It was argued on behalf of the respondent that there was an objective justification for the steps taken by the respondent, namely that the respondent is not entitled to pay a third party for a waiver scheme – all it is entitled to do is to waive a charge it levies itself for a service provided by or on behalf of the local authority. (Section 75(1) and (3), Waste Management Act, 1996 as amended)

23. I am satisfied that the basis upon which the previous scheme operated was flawed by virtue of the payment wholly or in part by the respondent to the service provider and that in those circumstances, the respondent was entitled, indeed obliged, to bring to an end the scheme in those circumstances. The respondent clearly has a duty to comply with the terms of s. 75 of the 1996 Act as amended. In other words there is an objective justification for the decision of the respondent.

24. This does not dispose of the matter however. The second point relied on relates to the argument that the proposed change is anti-competitive. As mentioned earlier reliance is placed by Mr. Hogan on the decision of the European Court of Justice in the case of *Ambulanz Glockner v. Landkreis Fudwestpsalz*, 25th October, EUECJ C-475/99, 25th October, 2001.

25. That case concerned the provision of ambulance services in the administrative region of Rhineland-Palatinate. By its laws, the local administrative authority distinguished two types of ambulance service, emergency transport and patient transport. The national court held that the local law, para. 18(1) of 1991 Rett D.G., the relevant statutory provision, granted medical aid organisations a defecto monopoly on the market for emergency and patient transport services, since the assessment which it requires, to determine whether or not there is full utilisation of the capacities available to the medical aid organisations, always results in practice in the rejection of new applications owing to the extent of the aid and rescue resources kept available by those organisations. Accordingly, it was held a legislative measure had conferred on medical aid organisations a special for exclusive right within the meaning of Article 90 (1) of the Treaty. It went on to hold that the infringement of Article 90(1) in conjunction with Article 86 of the EC Treaty, had the effect of limiting markets to the prejudice of consumers by reserving to the medical aid organisations an ancillary transport activity which could be carried on by independent contractors.

26. Mr. Hogan argued by analogy that by limiting the market of low income householders to one contractor the tender process has the same effect as the administrative law had in the *Ambulanz Glockner* case.

27. It seems to me that the situation in the present case is somewhat different. That case involved a statutory provision which in effect gave a veto to those already in the market in respect of those who could come into the market. What is proposed by the respondent here involves an open tender process to all who wish to tender for the delivery of a limited service, namely the collection of waste from low income households on behalf of the respondent. Whilst there is an element of exclusivity in that one contractor only will thereafter provide the service, as long as the service is provided on behalf of the respondent in accordance with the provision of s. 33 and s. 75 of the Waste Management Act, 1996 as amended it seems to me that this is a permissible activity by the respondent, which is not in breach of ss. 4 and/or 5 of the Competition Act, 2002.

28. Accordingly, the applicant must fail under this heading also.