

THE HIGH COURT

[2014 No. 8662 P]

BETWEEN

DERMOT MURPHY

PLAINTIFF

AND

IRISH WATER

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on the 15th day of March, 2016

Introduction

1. The within matter has come before the Court on the 10th March, 2016 pursuant to a notice of motion bearing date the 28th October, 2014 by the plaintiff, who appears in person seeking relief as follows:-

- i. an order preventing the defendants from trespassing on the plaintiff's property at 55 The Park, Lake Point Park, Mullingar in the County of Westmeath;
- ii. an order preventing the defendants from installing "defective, not fit for purpose equipment" or in the alternative to restore the plaintiff's property to its original condition before installation of said equipment;
- iii. an order by way of injunction preventing the defendant from installing a water meter on or near the plaintiff's property and in the alternative to restore the plaintiff's property to its original condition before the installation of the equipment;
- iv. further and other relief;
- v. costs.

2. Aside from various affidavits supporting and resisting the interlocutory application, a plenary summons of the 13th October, 2014 together with an appearance on behalf of the defendant of the 17th October, 2014 are the only other pleadings undertaken in this matter.

3. In the general indorsement of claim of the plenary summons the plaintiff claims he is the freehold owner of 55 The Park, aforesaid, and at para. 4 states that the defendant committed a serious act of trespass on the plaintiff's property. At para. 5 the plaintiff complains that in breach of contract and negligently, the defendant did not advise him of the existence of potential defects in the installation of the water meters and the lid or cover of same. At para. 6 the plaintiff complains that the defendant fitted and installed a water meter allowing full access to unidentified unknown third parties to the water supply to the plaintiff giving rise to apprehension, distress and trauma constituting a breach of the plaintiff's constitutional right to bodily integrity. Based upon the foregoing, the plaintiff sought relief by way of permanent injunctions in the form now sought in the notice of motion of the 28th October, 2014 together with damages including punitive and/or aggravated and/or exemplary damages.

Evidence before the Court

4. The plaintiff has submitted, in total, eight affidavits. The substance of his complaint might be summarised as follows:-

- a. Because of the grade C cover over the water meter installation a fully laden coal truck cannot come onto his property to effect deliveries of coal resulting in a possible nuisance to a third party delivering coal.
- b. There is the potential for access to the meter by third parties who might contaminate the plaintiff's water supply (see para. 7 of the plaintiff's affidavit of the 29th January, 2015).
- c. The grade C product is not in conformity with British Standard BS5834 and/or European Standard "B" EN124 and furthermore is in breach of a circular of the Department of the Environment of the 31st March, 2009 (see paras. 4 and 5 of the plaintiff's affidavit of the 28th October, 2014).

5. The defendant relies on three affidavits of Mr. Fergus Collins together with two affidavits of Edward Fitzgerald and one affidavit of Brian O'Brien.

6. The defendant's position is that:-

- a. It is unaware of any incidents of contamination of water supplies (see para. 6 A of the affidavit of Mr. Collins of the 4th March, 2015).
- b. The defendant's complaints are general and are non-specific to the plaintiff (see para. 7 of the affidavit of Mr. Collins of the 4th March, 2015).
- c. The grade C products used by the defendants are more than adequate for the standards referred to by the plaintiff (see paras. 24 et. seq. of Mr. Collins's affidavit aforesaid together with the affidavit of Mr. Collins of the 22nd January, 2015, para. 10).
- d. There are advantages in using grade C products over grade B products.

e. The asserted directive referred to as BC6-2009 is in fact a circular to local authorities and is not a directive to the defendant (see also the affidavit of Mr. Fitzgerald of the 20th July, 2015, para. 5 thereof). Furthermore, grade C product standards exceed British Standard BS5834 and/or European Standard "B" EN124.

f. No works were carried out on any portion of the plaintiff's property (see para. 10 and Exhibit 2 of Mr. Collins's affidavit of the 11th December, 2014).

7. The affidavits of Mr. Edward Fitzgerald in support of the defendant's position are dated the 15th April, 2015 and the 20th July, 2015, and the affidavit of Brian O'Brien is dated the 21st September, 2015.

8. Edward Fitzgerald aforesaid is a consulting engineer who prepared a report bearing date the 15th April, 2015.

9. Mr. O'Brien is technical manager in the firm of BHP Laboratories Ltd. He prepared a report bearing date the 25th June, 2015 having been instructed by Mr. Fitzgerald's firm and his brief was to test the cover or lid of the water meter. This was found to be broken by Mr. Fitzgerald when he attended at the plaintiff's premises on the 2nd March, 2015 for the purposes of assessing how such lid was broken.

10. Mr. Fitzgerald, in his report and affidavits, deals with the adequacy of the grade C cover or lid adjacent to the plaintiff's property and further deals with a letter which issued from the Department of the Environment to local authorities and other third parties known as "BC6 – 2009" and the impact, if any, on the installation of the grade C cover aforesaid. In addition, he addresses and refutes the complaints of alleged non-compliance with BS5834 and/or "B" EN124, which he states are not applicable (see para. 4 of his report of 15th April, 2015).

11. Notwithstanding the several affidavits of the plaintiff and his stated apprehensions, no expert evidence has been adduced on his behalf to support his position. Rather, the plaintiff relies on a newspaper article printed in the Irish Mail on Sunday on the 20th July, 2014 which apparently involved Irish Water upgrading a cover installed adjacent to a third party's property. Aside from the one page newspaper article no other information is available as to the circumstances of that case. In addition the plaintiff relies on an anonymous e-mail of the 16th May, 2014 to the Commission for Energy Regulation complaining that grade C boxes installed by the defendant are far too weak.

12. It is common case that the initial lid installed by the defendants adjacent to the plaintiff's property in June 2014 was found to be broken on the 2nd March, 2015. Mr. O'Brien, in his report aforesaid, opines that the breakage occurred because of a blunt trauma to the lid as opposed to the damage having occurred because of a vehicle traversing same. The plaintiff accepts that the lid was replaced within a day of being found to be broken (the 2nd March, 2015) and the replaced lid remains in situ without complaint of damage. Furthermore, the plaintiff has not complained of any adverse consequence to him because of the breakage to the initial lid installed.

13. The plaintiff has accepted that following the installation of the water meter he removed same and returned it to Irish Water. The plaintiff acknowledges the defendant's complaint in this regard that such removal constitutes an offence under s. 74 of the Water Services Act, 2007.

14. In the affidavit of the 11th December, 2014 of Mr. Collins, at para. 10 thereof, Folio 20053F of the Register of Co. Westmeath is exhibited and a perusal of this folio discloses that on the 10th March, 2003 Dermot Murphy and Angela Healy became registered owners and this folio relates to the plaintiff's premises at 55 The Park, aforesaid. It is clear from a perusal of the map attached that the adjoining highway is not owned by the plaintiff but rather is outside the curtilage of his premises.

15. Photographs of where the water meter was installed have been furnished to the Court and it was ultimately accepted by Mr. Murphy that these water meters are situated on the footpath outside of his property.

16. In the report of Mr. Fitzgerald of the 15th April, 2015, which has not been challenged by any other expert on behalf of the plaintiff, (although it is noted that the plaintiff has challenged the affidavit of Mr. Fitzgerald in his affidavit of the 4th June, 2015) he concludes that a grade C meter box installation satisfies various requirements for meter box installation under the National Domestic Water Metering Programme. In addition, he deals with a BC6 – 2009 Circular letter relied upon by the plaintiff, and at para. 5 of his second affidavit reiterates that these letters were issued for guidance only and are non-binding.

17. At para. 4 of his report he sets out the background to the issue of such letter and the proceeding circular letter of 2008 which was entitled "Recommendations for site development works for housing estates".

Findings

18. Based upon the evidence and submissions tendered to this Court, this Court is of the view that:-

i. The relevant installation in June 2014 occurred on the footpath outside the curtilage of the plaintiff's property and therefore did not constitute a trespass. Furthermore, any further works which the defendant may carry out at this site would not constitute a trespass over the plaintiff's property.

ii. The circular letter referred to as BC6 – 2009 is not, as was contended for by the plaintiff, a directive addressed to Irish Water and does not in fact deal with grade C product installations in any manner whatsoever. Furthermore, such a circular could not be a directive to the instant defendant given that Irish Water was not established until July 2013 under the Water Services Act, 2013.

iii. The uncontroverted expert evidence before the court, as per Mr. Fitzgerald's report, is to the effect that the grade C products are fit for purpose and are suitable for an area such as the public highway adjacent to the plaintiff's premises.

iv. The plaintiff, by his own admission, did not own the previous cover on the footpath adjacent to his property so as to support a claim that the defendant had removed the plaintiff's property and should reinstate same.

v. The evidence of the plaintiff by way of newspaper article and/or anonymous statement addressed to the Commission for Energy Regulation by way of e-mail of the 16th May, 2014, which does complain of grade C products and suggests that grade B products would be preferable, comprises hearsay evidence and in any event is entirely insufficient to refute the findings of Mr. Fitzgerald.

vi. The plaintiff, by his own admission, has committed a criminal offence in the removal of the water meter installed by the defendant in June 2014.

vii. The only evidence to the effect that the grade C products used by Irish Water in June 2014 pose any danger to the plaintiff's health or safety are statements to this effect by the plaintiff in his affidavits. However the plaintiff's stated apprehension in this regard in the face of his admission that the current products in situ since early March 2015 have not occasioned any health or safety issue to him is unfounded. The height therefore of any existing adverse impact on him is his complaint is that a fully laden coal truck cannot come on to his property resulting in an alleged nuisance to his coal supplier.

viii. As was pointed out on behalf of the defendants, notwithstanding eight affidavits on the part of the plaintiff, there is no undertaking as to damages.

Legal principles

19. The Supreme Court, in *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88, in a judgment of the 17th May, 1983, disallowed an appeal from the judgment of Keane J. in the High Court delivered on the 24th March, 1983, on the basis that the High Court Judge had applied the proper test in determining the issue raised which was an interlocutory relief application on the part of the defendant. Keane J. granted the relief sought on the basis that the correct test to be applied for an interlocutory injunction involved establishing 1) that there is a fair question to be determined at the trial of the action concerning the existence of the right which a party seeks to protect or enforce by the injunction and 2) that the circumstances are such that the balance of convenience lies on the side of the granting of the injunction.

20. The test to be applied in an application for a quia timet injunction, such as arises in the instant case, was addressed by Geoghegan J. in *Szabo v. Esat Digifone Ltd. & Ors.* [1998] 2 I.L.R.M. 102. In that case, that Court indicated that it was being asked to consider the risk of danger to the plaintiff and the Court held that a person seeking an injunction to restrain an alleged future nuisance must show that there is a proven substantial risk of danger.

21. In the text book of *The Principles of Equitable Remedies* by Spry, 4th Ed., (United Kingdom, 1990) at p. 370, the author opines that "the fact that no breach has yet taken place is a matter of relevance" and if, in all of the circumstances, "the likelihood that an injury will take place is not sufficiently high, quia timet relief will be refused".

22. Although the plaintiff complains (for example see para. 12 of his affidavit of the 9th February, 2015) that the grade C product installed outside his premises is not fit for purpose, the evidence before the Court does not support this. In this regard there is the expert opinion of Mr. Fitzgerald and the fact that the product has been in situ outside the curtilage of the plaintiff's property since early March 2015 without incident.

23. It is the view of this Court that the matter can be dealt with without the necessity of an examination of the motive of the plaintiff or as to whether he has come to the Court with clean hands.

Conclusion

24. The plaintiff, in his submission to the Court, indicated that he was not pursuing Relief No. 1 in the notice of motion. Irrespective of whether he was pursuing the relief or not, the reality is that there was no evidence presented to the Court that the defendant had trespassed on any portion of the plaintiff's property having regard to the boundaries identified in his title map attached to Folio 20053F of the Register of County Westmeath.

25. There is insufficient evidence presented by the plaintiff before the Court to suggest that the grade C products are defective and not fit for purpose as contended for by the plaintiff nor is there any evidence before the Court that the previous water main cover situated outside the curtilage of the plaintiff's property comprised property belonging to the plaintiff and accordingly the relief at para. 2 is refused.

26. The evidence of the plaintiff was an assertion as to the inferior nature of the grade C cover to the water meter box outside his curtilage and his apprehension that the cover could easily be removed causing damage to himself or his family. No such damage has been occasioned or indeed asserted and the plaintiff has failed to prove a substantial risk of danger to secure a quia timet type injunction. Furthermore, no works were carried out by Irish Water to the plaintiff's property or any portion thereof. Accordingly the relief claimed at para. 3 is refused.