

THE HIGH COURT

[2014 No. 5379 P]

BETWEEN

MARTIN DUNNE

PLAINTIFF

AND

VEDANTA LISHEEN MINING LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 28th day of July, 2016.

Introduction

1. Since the 1960s the plaintiff has successfully farmed lands at Killoran, Moyne, Templetuohy, Thurles, County Tipperary. In these proceedings he claims that the defendant's mining activities and particularly those which started in 2012 caused settlement of some of those lands with damage to buildings also. The plaintiff's wife at this stage is joint owner of their home and the relevant lands.

The lease

2. Article 10 of the Constitution stipulates that provision may be made by law for the management of the State's ownership in mines and minerals. Pursuant to the Minerals Development Acts, 1940-1995 (**"the Mining Acts"**) the Minister for the Marine and Natural Resources and the Minister for Finance granted a lease to Minorco Lisheen Mining Ltd and others, for minerals including lead and zinc with a right to work those minerals in an area of 1.88 km² covering part of the townland of Killoran (**"the Lease"**). The parties agreed for the purpose of these proceedings that the defendant has the relevant duties imposed by the Lease. The defendant and its predecessors in title were known to the plaintiff as "the Mine" (**"the Mine"**).

SRK

3. In 1996 SRK Consultants studied and reported upon the expected settlement of the rock head face of the Mine. A coloured map outlined the predicted displacement and was relied upon by both parties at trial (**"The SRK Model"**). The SRK Model allowed experts described later to agree certain findings which the Court could use in its determination of the issues in these proceedings.

Claim

4. The plaintiff claims that the mining activities of the Mine and particularly those activities which started in 2012 have caused and will cause settlement to the surface of his farm. The area which was the subject of specific evidence about depressions at the plenary hearing of these proceedings fell within 18 acres in Killoran (**"the eighteen acres"**) together with adjacent buildings. The plaintiff relies on the tort of nuisance while claiming that the defendant breached its duty to engage with the plaintiff as required under the Lease.

Nuisance

5. Henchy J. in *Hanrahan v. Merck Sharp and Dohme (Ireland) Ltd* [1988] ILRM 629 at 634 stated:-

"It is clear from the authorities on the law of nuisance that what an occupier of land is entitled to as against his neighbour is the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances. It is difficult to state the law more precisely than that."

The Lease obligations

6. It was submitted on behalf of the plaintiff that the legal structure from the Constitution through to the Mining Acts and the Lease gives rise to obligations supplementary to those enforced through the law of nuisance. The Mining Acts have as one of their objectives the vindication of the property rights of those who own lands affected by the working of minerals on or under those lands. That vindication, according to the plaintiff, requires the restoration of land affected by mining while compensation for diminution in the value of the affected lands is not the manner by which the law should operate. In this way the plaintiff has sought to extend the effect of the duties arising under the law of nuisance by reference to the obligations of the defendant under the Lease.

7. More specifically Clause 3 of the Lease requires the defendant to observe covenants set out in the sixth schedule of the Lease which have the following extracts:-

"(4) The lessees shall work the minerals so as to minimise damage and disturbance to surface lands...which are not owned by the lessees and shall restore such surface lands so affected or deal therewith with the owner's requirements... [underlining added]"

(24) The lessees shall comply with the conditions of the planning permission and...leave...all surface lands and structures thereon in good order tidy and in a proper state having regard to the nature of the business conducted at the mine..."

(26) The lessees shall comply with their obligations as provided for in s. 31 (3) of the Minerals Development Act, 1940 as amended by s. 80 of the Petroleum and Other Minerals Development Act, 1960 and shall be liable to pay compensation to any owner...or occupier...having rights for the time being in surface lands...for all damage done to the surface of any land or to mineral deposits or to water supplies or nuisance caused either directly or indirectly by the working of the minerals."

S.31 (3)

8. The plaintiff points to Clause 26 of the Lease when relying upon s 31(3) of the Minerals Development Act, 1990 Act. S 31(3) requires "whenever damage to the surface of any land or to mineral deposits or water supplies or a nuisance is caused" that lessees pay compensation "for such damage or nuisance".

Causation

9. There is no controversy about the onus on the plaintiff to establish on the balance of probabilities that damage was caused and that the damage arose from the activities of the Mine.

Damages

10. In addition to causation it may be instructive to state in the context of the claim made by the plaintiff that the Court can only award damages in respect of established nuisance or for an established breach of duty owed to the plaintiff which may arise under the Mining Acts. The damage must also be ascertained on the balance of probabilities. Furthermore future losses depend on damage already suffered having been proven. Incidentally the plaintiff did not advance a claim for loss of income to the date of trial but that would not preclude a claim for future loss if damage has occurred already.

11. The defendant acknowledged in its submissions that the limitation period for claiming damages "runs from the occurrence of the damage which in a mining case would be if ground subsides or cracks appear, not when material deep below was excavated". Thus, the real issue for the application of the law on damages in these proceedings relates to the extent of damage to the surface of the plaintiff's lands arising from the activities of the Mine some 160 metres below. The plaintiff claims that the subsidence in a specific area of his lands and damage to buildings which he sought to identify, constitute sufficient damage to allow this Court to direct the payment of compensation for the scenarios which he and his advisors suggest.

12. The defendant on the other hand, having submitted that even if any slight movement of the surface of the plaintiff's farm can be detected, it can be attributed to the previous reclamation of those lands that had been afforested up to the beginning of the twentieth century. In addition the defendant submitted that any surface damage was minimal even if it could be attributed to some movement at the rock face of the Mine or the effect of the dewatering process. The plaintiff's claim was defended principally on the basis that the plaintiff has not established damage due to the activities of the Mine and that there is no basis to justify the damages sought on behalf of the plaintiff.

Case management

13. Although the trial of these proceedings commenced on Tuesday, 12th of January, 2016 and adjourned on 2nd of February, 2016 for legal submissions over two days beginning on 26th April, 2016, it should be said that the preparation of the case for both sides was unfortunately an ongoing process throughout the trial. The advisors and legal representatives for the parties were not given the opportunity to consider the independent reviews of Ms. Marnie Pascoe, a geotechnical expert engaged by the defendant until the weekend following the opening of the case. The unsatisfactory state of the proceedings can be further gleaned from the following:-

1. Dr. Bielenberg, an agronomist and independent farm management consultant, engaged by the defendant carried out an inspection of the lands at Killoran on 22nd December, 2015. He furnished a report dated 5th January, 2016 which was updated and amended by versions dated 11th January, 2016 and 25th January, 2016.
2. Mr. Raymond Kennedy of Nicholas O'Dwyer Consulting Engineers at the request of the defendant visited the plaintiff's home on Monday, 11th January, 2016 to review the structural issues relating to buildings which had been listed and photographed in the report dated 4th January, 2016 from Mr. Moore, a chartered engineer addressed to the plaintiff's solicitor.
3. Mr. John Güven furnished a witness type statement dated 22nd December, 2015 to the defendant's solicitor which outlined his account of facts from the summer of 2012 as chief geologist with the defendant. He had visited the plaintiff's farm on receipt of the first complaints of surface damage to the eighteen acres.
4. At the end of the first week of trial on 15th January, 2016, Mr. Wyatt Orsmond a geotechnical consultant who had furnished a report to the plaintiff's solicitor dated 25th September, 2015 on the effect of the defendant's mining activities some 160 meters below the surface agreed¹ figures for maximum settlement at the rock head which might be described as just above the roof of the Mine when working in the Mine.
5. During the trial also Dr. Bielenberg for the defendant met with Mr. Miller, an agronomist who later advised the plaintiff in his report dated 18th January, 2015 about some of the effects of Dr. Bielenberg's observations.

14. All of the said individuals gave evidence which the Court has considered. At this stage, however, it is worth remarking that the absence of pre-trial management directions has cost the Court and the parties much time which could have been avoided. The additions to Orders 36 and 63 of the Rules of the Superior Courts with effect from 1st October, 2016 will hopefully reduce the risk of incurring such time and expense in this type of case in the future.

Witnesses

15. The plaintiff was cautious in his answers to direct questions about reclamation prior to 2012 and the quantum of his claim. The Court appreciates that giving evidence may be demanding for a man of the plaintiff's disposition who had expressed a wish merely to get on with his successful farming operation. However, the plaintiff who was advised and represented by professionals knew quite well that he had the onus of satisfying the Court about the actual disruption to his farming and living activities at Killoran by reason of the Mine's activities and particularly when one considers the extent of his claim. In this context, the Court finds that neither the plaintiff nor his son identified for the defendant's representatives or independent experts prior to the commencement of the trial or in a manner which satisfied the Court that the hollows in the eighteen acres caused untoward dangers for tractor drivers when spreading fertiliser, rotivating or whatever as the plaintiff suggested. Even if the number or depth of hollows had increased after 2012 the Court was not satisfied that the changes justified the non engagement of outside contractors. No evidence was given at the trial by any such prospective contractor. Neither the plaintiff nor his son satisfied the Court that the hollows with which they were concerned, were so dangerous or so changed that other contractors would not be able to work on the land. No witness really supported the plaintiff's contention that it was necessary to exclude contractors from working in or around the eighteen acres.

16. The plaintiff was indeed justified in reporting vibrations from the Mine under his jointly owned land in June 2012 and subsequently together with his observations of what he perceived were previously unnoticed depressions when spreading fertilizer in spring 2012. The Court finds that the plaintiff's concerns relating to cracks in walls in outside sheds and in his home in 2012 were focused upon as a result of the move towards making a claim against the Mine. The anxiety of the plaintiff and his advisers to formulate a claim which could cover all future possible eventualities permeated to such an extent that they lost objectivity and reasonableness in outlining the plaintiff's claim for the Court.

17. Suffice to say that suspicions on the part of the plaintiff's team, a breakdown in positive communications between the parties and an eagerness to maximise the damages which the plaintiff could recover in these proceedings coloured the formulation of the plaintiff's

claim to such an extent that the claim ultimately bordered on the surreal.

18. The plaintiff's team included the said Mr. James Burke, engineer, who gave evidence. He had been engaged specifically to advise and negotiate with the defendant for the plaintiff. The objective of the plaintiff and his team was to get as much compensation as possible from the defendant.

19. The plaintiff's claim for special damages according to the "quantum scenarios" spreadsheet with nine scenarios and twelve components as summarised at the end of the trial in April 2016 ranged from €3,298,456.00 in restoration costs and lost income to €183,000 for diminution in value where the Court might find liability on the part of the defendant.

Exaggeration

20. The defendant did not plead or suggest that the plaintiff was fraudulent in his claim but submitted that exaggeration coupled with unnecessary tendentious propositions at trial about the defendant's mining operations constituted an affront to the court process. It is indeed regrettable that the court process in the absence of case management has allowed such a varied approach to be adopted at trial because it has the potential to undermine the integrity and trustworthiness of those involved. In the interests of clarity the Court expresses its view that the evidence of the plaintiff, his son and Mr. Burke about the actual and potential effects on the farming activities in Killoran was so affected by the desire to cover all possible eventualities that their evidence ended up being of limited value in the context of identifying the actual damage which they sought to attribute to the activities of the Mine.

Mr. Moore

21. Mr. Billy Moore furnished to Mr. Burke on 19th September, 2012 draft terms of reference for a subsidence risk assessment which was then forwarded to the defendant. Mr. Moore had been a county engineer who had completed a report in 1999 about serious subsidence issues caused by underground mining in that part of the county for which he was the engineer. Mr. Moore usefully agreed with Mr. Kennedy who had been engaged by the defendant, during the course of the trial the location of alleged damage which was identified by the plaintiff in his buildings.

22. Mr. Moore confirmed that the two identified cracks in an extension to the plaintiff's family home were slight. More significantly Mr. Moore did not attribute the complaints in relation to the buildings to the mining activities of the plaintiff while stating that he was unaware of the actual cause of the relevant physical manifestations which concerned the plaintiff. As in other situations at trial there was an absence of engagement between the experts on both sides until after the trial commenced. Ultimately, Mr. Moore did not offer a view that the alterations or cracks pointed out to him by the plaintiff or his son were caused by settlement at the rock head of the Mine.

Mr. Kevin Miller

23. Mr. Miller is an agronomist who has been involved in valuations and negotiations for compulsory purchase scenarios which occur typically in large scale infrastructure projects. He has practical and personal knowledge of farming. Following his inspection of the plaintiff's farm on 30th March, 2015 he furnished a "précis of evidence" based on information furnished by the plaintiff's team.

24. Mr. Miller had to rely on the plaintiff for his understanding of the state of the ground before 2015 in order to suggest that depressions in the eighteen acres had appeared after 2012. Ultimately, with the Court's finding that the plaintiff's complaints about increased unevenness to the ground from 2012 due to the Mine have not been established, Mr. Miller's extraordinary opinion about spending money on restoration greatly in excess of the value of the land is irrelevant. Even if restoration costs and the farm losses that might be incurred during restoration were relevant, a frenzy to compile and maximise the claim for damages, lead Mr. Miller into areas of unjustified speculation about what might happen.

25. Mr. Miller gave evidence of some depressions in the eighteen acre area and opined that if the other areas were to exhibit similar depressions, the lands may only be suitable for forestry. On cross examination, Mr. Miller accepted that he was not given any history of forestry on the lands or reclamation works with pipes undertaken by the plaintiff. He sought to differentiate between settlement following pipeline works and the extent of the problem facing the plaintiff. However he fairly conceded that fixing and patching up some depressions could be undertaken with topsoil and filler material.

Mr. Wyatt Orsmond

26. Mr. Wyatt Orsmond has a masters degree in science specialising in geotechnical engineering with many years of professional experience in that area from large construction projects like reservoirs and diamond processing plants to private home dwellings. He deals mainly with the structural interactions between soil and rock. He explained that a geologist on the other hand looks at the preciseness of rock. He was called as an independent expert by the plaintiff and assisted the Court willingly and in an assured manner.

27. Mr. Orsmond's 14 page review dated 25th September, 2015, tracked the assessment prior to the commencement of mining and set out the extent of the Mine's activities from December 2001 to November 2013 under and near the plaintiff's lands by reference to figures extracted from exhibits to an affidavit sworn by Mr. Wheston on 17th September, 2014 on behalf of the defendant. Mr. Orsmond opined that the Mine should have tried to purchase the land from the plaintiff or agreed a compensation scheme at an early stage.

28. Mr. Orsmond then described the current situation throughout the defendant's farm by using survey data provided by the Mine and a survey company employed by Mr. Burke in 2013. He plotted that onto a map which indicated where the ground was higher and lower. There were more points on the ground having a lower value than in 2012. The values were extremely low ranging from -1.628mm to +392mm. Mr. Orsmond proffered a view in his written review that the acts of the Mine caused damage to structures to the east of the plaintiff's slatted shed without the benefit of the locations agreed by Mr Moore and Mr Kennedy.

29. Furthermore, Mr. Orsmond did not have the benefit of any report or exchange with Ms. Pascoe until after the end of his first day of giving evidence on Thursday, 14th January, 2016. These experts agreed matters² which saved considerable time. Ms. Pascoe gave evidence on the last Thursday and Friday of January 2016. She had only prepared a desktop review of the reports made available to her by the Mine.

30. Having had access to the SRK Model and details which emerged from an interlocutory application in these proceedings, Mr. Orsmond concluded that Mine related subsidence had occurred on the plaintiff's land.

Ms. Pascoe

31. Ms. Pascoe is employed by AMC Consultants (UK) Ltd which provides advice to many companies around the world on issues from geology to geotechnical engineering and mining engineering. She herself pursued academic qualifications in geology and rock mechanics. It is an understatement to describe her experience in mining as impressive. Ms. Pascoe was familiar with the Mine because

she had undertaken an independent technical review in 2013 and 2014 for the Mine which involved inspecting the workings of the Mine.

32. Ms. Pascoe in her report of 14th January, 2016 relied on satellite radar to conduct a retrospective analysis of movement of the plaintiff's buildings since 1992. The amazing application of Persistent Scatterers using a satellite borne radar method called Interferometric Synthetic Aperture Radar (InSAR) allowed Ms. Pascoe to plot on a graph the rate of displacement of points on the plaintiff's buildings from 2002 to 2010 with a 95% confidence level. Ms. Pascoe explained that an absolute accuracy can only be established by using ground data. The readings also showed periods of upsidence (upwards motion) and no motion. Atmospheric effects and other components could affect the results and interpretation. Suffice to say that the cumulative rate of slight displacement of the buildings has been reducing to original values. The cessation of the dewatering operation of the Mine may have some contribution in this regard. In other words, whatever slight displacement occurred, will according to Ms. Pascoe recover, substantially at least.

33. Ms. Pascoe compared the process of what occurred in the Mine with a mine in England where significantly more material was extracted. She explained to the Court that the plaintiff's concerns often arise for people such as the plaintiff who own land over or close to a mine. Ms. Pascoe explained like no other witness the effect of pressure and water levels following the cessation of mining. Significantly, she confirmed that a purchaser of land like that of the plaintiff would probably get an expert opinion who could look at records of the Mine if it was thought necessary. The Court hopes that future occupiers of the plaintiff's farm if concerned about the suggestion of subsidence as a result of activities in the Mine will be assured by the reports and information which emerged during the course of the trial leading to this judgment.

The Experts' Agreement

34. Mr. Orsmond, Ms. Pascoe and Mr. John Güven (former Chief Geologist with the defendant) agreed the following during the trial:-

1. The SRK model is a fair prediction of expected settlement and has been confirmed by follow up more recent analysis.
2. The monitoring data provided by the Mine is a true reflection of settlement of the rock. The monitoring data compares well with the SRK model. It is expected that the settlement profile will follow a similar trend to the model with maximum settlement of up to 300mm of the rock head.
3. Backfill is an effective way of stabilising a mine while it significantly reduces ongoing settlement. It does not eliminate settlement.
4. Monitoring data indicates settlement of up to 210mm and from the latest information provided it appears rock settlement is slowing down.
5. Settlement may continue for many years to come (10\20 years) albeit at a slow rate.
6. Sinkhole \ soakaway is not a large karst cavern that is about to collapse.
7. Mining and backfilling activities have ceased. Dewatering activities have ceased in the main zone. There are no driving forces to perpetuate high displacement rates.
8. The paste backfill (used by the Mine) is a fit-for-purpose engineered material.

Dewatering

35. The evidence indicated that the eighteen acres in particular was less prone to water retention following the dewatering process commenced by the Mine. That ameliorated the condition of the Plaintiff's lands for farming and work. During the various inspections immediately prior to the commencement of the trial flooding was noticed by a few witnesses flooding due to heavy rain on their way to the farm while it was not as noticeable on the Plaintiff's farm. The gradual turning off of the Mine's pumps which commenced after the closure of the Mine will probably allow the land to return to its previous saturation abilities. The pumps took water from the area in and above the Mine and had an unascertained pressure effect on the water levels above. It was not established to the satisfaction of the Court that the depressions which were the subject of the plaintiff's complaints were caused or contributed to by the dewatering. The limestone and structure above the Mine and below the surface of the eighteen acres was likened to a sponge for water. The principal focus of complaint rested on the movement at the rock face.

Displacement conclusion

36. Having considered the evidence I find that there was minimal if any settlement in the surface of the plaintiff's lands due to the activities of the Mine. Moreover, the plaintiff has not established on the balance of probabilities that the slight cracks in plaster on walls or changes in his outhouses and silage pit area are attributable to whatever minimal surface settlement has occurred. As far as the farm land is concerned, it is more probable that the few significant depressions, other than those along the avenue and the public road, identified in the eighteen acres arose as a result of the peat fen, the gley soil type, the impermeable clay and settlement due to the decomposition of tree stumps and residue in that area. The 1902 Ordnance Survey map adduced in evidence which showed afforestation, the recognition of the soil type together with reclamation and reconfiguration of the avenue/ditch in and around the eighteen acres are the factors which the Court or any objective observer must consider as being the most relevant to the cause of the depressions in this area.

37. The height of a claim which could have been advanced on behalf of the plaintiff is that the Mine contributed in some way to subsidence on his lands but the plaintiff did not seek to claim for the extent of any such contribution. The plaintiff and his advisors concentrated on seeking to establish that the surface movement was caused by the Mine. He claimed that the Mine was the cause of settlement. Neither the experts nor the plaintiff ventured to apportion a contribution to the minimal settlement at the rock face which is far below the surface of the farmland. In effect it has become a black and white issue about whether the Mine or naturally occurring events and environmental conditions caused the damage and anticipated changes claimed by the plaintiff.

The extent of damage

38. The absence of objectivity on the part of the plaintiff in making his claim before this Court, which was described earlier, meant that the claim became so inflated as to undermine the casting of the plaintiff's claim in reasonable terms. Therefore, if the Court is in some way wrong in its finding that the minimal settlement at the rock face of the mine together with the effects of dewatering and rewaterning have not caused sufficient settlement on the surface to create the few depressions which concern the plaintiff, the

plaintiff has not established the actual loss arising on the balance of probabilities.

Future loss

39. As the Court finds that no nuisance damage has arisen to date, the plaintiff may take some small comfort that if his worst fears ever came to pass, the plaintiff can rely on the submission made on the behalf of the defendant, that damage which might result in the future as a result of the Mine can give rise to a claim for damages which he can then pursue within the limitation period then arising. It is worth emphasizing that the Court as of today finds that there is no prospect of such damage based on the facts found and the evidence adduced.

Claim under the Lease and statute

40. Apart from the Court's conclusion that the incidents of subsidence in the eighteen acres has been caused by factors other than the movement at the rock face of the Mine, the plaintiff's claim for reinstatement or restoration of his property by virtue of the Lease and s. 31(3) of the Minerals Development Act 1940 (as amended) must as a matter of course be limited also to the extremely slight movement of building heights identified by Ms. Pascoe as they constitute one part of the findings of fact by this Court. The Court clarifies that it does not find that the slight changes plotted on a graph by Ms. Pascoe to the height of points on the buildings were wholly attributable to the Mine as other factors may have contributed to these slight changes. Furthermore, there are more plausible reasons for the cracks to buildings than the surface movement alleged on behalf of the plaintiff. The question then arises as to the extent to which the Lease and s. 31(3) affords the plaintiff a remedy for such insignificant movements if they can be attributed to the activities of the Mine.

De minimis

41. Counsel for the defendant referred to two sentences from the judgment of Birmingham J. in *Bryszewski v. Fitzpatrick and Hanleys Limited t/a Caterway and the Labour Court* [2014] IEHC 263 at p. 13:-³

"The reference to a de minimis gloss is an abbreviation of the legal maxim de minimis non curat lex, usually translated as "the law does not concern itself with trifles". It is a recognition that some matters are of such minimal significance that the law will not involve itself with them."

42. This Court accepts the continued relevance of the *de minimis* maxim. It can be seen to operate in the law of nuisance since the reasonableness or unreasonableness of damage expected from a neighbour is considered on a daily basis by the courts. As far as the movement in buildings might be established by reference to the persistent scatterers method in Ms. Pascoe's evidence and the limited contribution, if any, to the depressions in the eighteen acres as fairly described by Mr. Bielenberg, the Court cannot make any meaningful order to reinstate. Moreover, the absence of a reasonable approach in the plaintiff's claim to these minimal movements prompts the Court to out rule consideration of the plaintiff's reliance on s. 31(3) which confines the remedy to compensation.

43. Insofar as the Lease is concerned the plaintiff was not a party to the Lease and his advisors appear to have stumbled upon the phrase underlined in paragraph 7 of this judgment when preparing for these proceedings. Notwithstanding, there was no evidence that the Mine failed to minimise damage or disturbance to the surface lands which is a phrase that precedes the underlined phrase in clause 3(4) of the Lease. On top of that, the Court is at a loss to understand what restoration work could be done to restore the very minimal changes which the plaintiff actually refuses to acknowledge in his massive claim for damages. In other words, no matter what way one looks at the plaintiff's alternative claim based on the Lease or s. 31(3), the plaintiff's claim for the reliefs sought from this Court fails.

44. In those circumstances, the plaintiff's claim for damages is dismissed.

¹ See paragraph 34 below

² See paragraph 34 below

³ This case concerned an appeal on a point of law from a Labour Court decision in relation to rest periods and the availability of rest during work interruptions