THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 78
Record Number: 2018/136
2018/137
High Court Record Number: 2017/3203P

Whelan J.
Noonan J.
Faherty J.

BETWEEN/

MURPHY ENVIRONMENTAL HOLLYWOOD LIMITED AND INTEGRATED MATERIALS SOLUTIONS LIMITED PARTNERSHIP ACTING THROUGH ITS GENERAL PARTNER INTEGRATED MATERIALS GP LIMITED

PLAINTIFFS/APPELLANTS

-AND-

SPENCER PLACE DEVELOPMENT COMPANY LIMITED, P.J. HEGARTY AND SONS UNLIMITED COMPANY, AND BARNMORE DEMOLITION AND CIVIL ENGINEERING LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of April, 2020

Background

1. The appellants own and operate a landfill site at Hollywood Great, Nags Head, The Naul, County Dublin comprising some 54.4 hectares. The first respondent is the owner and developer of a site at Spencer Dock in Dublin. The second respondent is the building contractor for the development and the third respondent is a demolition contractor engaged on the development.

2. The appellants allege that in February 2017, the respondents delivered to the landfill site some 6,000 tons of waste from the Spencer Dock development which was deposited into what is known as Cell 4 on the landfill. The appellants allege that the respondents represented in writing to them that the waste was inert. They plead further that during the following month, March 2017, the appellants discovered that the Spencer Dock waste included contaminated and hazardous material in breach of the written representations of the respondents and also in breach of the operating licence issued to the appellants by the Environmental Protection Agency.

3. Arising from the foregoing, the appellants issued plenary proceedings in the High Court on the 6th April, 2017 and served a statement of claim on the same date. The appellants seek relief in the form of declarations that the respondents are required to carry out remediation works arising from the foregoing or alternatively, a declaration that they are responsible for the cost of those works. A mandatory injunction is sought compelling the respondents to carry out remediation works or in the alternative, an order requiring them to pay the cost of same.

4. Damages for negligence, breach of duty (including statutory duty), breach of contract, negligent misstatement, misrepresentation, trespass and nuisance are also claimed together with an indemnity against any future losses that might arise in connection with any works necessary to deal with the consequences of the alleged wrongful acts of the respondents. Separately from the foregoing, orders were sought in the statement of claim pursuant to sections 57 and 58 of the Waste Management Acts, 1996 – 2011 requiring the carrying out of such measures as may be specified by the court to remediate the damage caused. The latter claims were objected to by the respondents on the basis that they should have been brought by separate proceedings under the Waste Management Acts and as a result, those claims have now been dropped from the plenary proceedings.

5. Following the exchange of notices for particulars and replies thereto, the third respondent brought a motion before the High Court seeking an order pursuant to O. 50, r. 4 of the Rules of the Superior Courts for inspection and testing of the landfill property and the waste material the subject matter of the proceedings. The motion came on for hearing before the High Court (McGovern J.) on the 15th May, 2017 resulting in the order sought being granted by the court. Given the controversy that now arises between the parties as to the meaning and effect of this order, it is appropriate to recite its terms in full: -

> "Upon motion of counsel for the third named defendant pursuant to notice of motion dated the 10th day of May 2017 for the following relief:
>
> 1. An order pursuant to the provisions of O. 50, r. 4 of the Rules of the Superior Courts directing the plaintiffs and/or each or either of them to allow and facilitate access to the first named plaintiff's property at Hollywood Great, Nags Head, The Naul, County Dublin for the purpose of carrying out the inspection and testing of the landfill property at Hollywood Great, Nags Head, The Naul, County Dublin and the waste material the subject matter of the proceedings herein and/or the taking of relevant samples thereof such as may be necessary or expedient for the purposes of obtaining full information or evidence in relation to the plaintiff's claim the subject matter hereof by the defendants
> 2. Such further or other orders as this honourable court shall deem meet and just
> 3. An order providing for the costs of this application
>
> And on reading said notice of motion the affidavit of Patrick O'Sullivan filed on the 10th day of May 2017 the affidavit of Deirdre Nagle filed on the 12th

day of May 2017 the replying affidavit of Ann Henry filed on the 15th day of May 2017 the exhibits to said affidavits the pleadings and proceedings had herein and relevant *inter partes* correspondence
and on hearing said counsel and counsel for the plaintiffs and counsel for the first named defendant and counsel for the second named defendant
THE COURT DOTH DIRECT that an inspection of the first named plaintiff's property at Hollywood Great, Nags Head, The Naul, County Dublin by the Defendants' experts do take place on or before Friday the 26th day of May 2017 and that the reports following the inspection be completed and exchanged within one week thereafter (on or before Friday the 2nd day of June 2017)
AND THE COURT DOTH DIRECT that the relevant experts do meet by Thursday of this week (the 18th day of May 2017) to agree a protocol for inspection and the taking of samples for testing and if there is any difficulty in agreeing a protocol then the courts doth grant the parties liberty to apply and **IT IS ORDERED** that the costs of this motion and order be costs in the cause"

6. The order was perfected on the 12th June, 2017. Two days after the making of this order, on the 17th May, 2017 the parties' respective experts met with a view to attempting to agree a protocol for the inspection mandated by the terms of the order. It would appear that there was disagreement between the parties as to the scope of the order and it was decided to await receipt of the perfected order before determining how to proceed.

7. Agreement was not reached as to how the inspection should be conducted before the matter again came before McGovern J. on the 19th June, 2017. Discussion ensued between the court and counsel for the various parties as to the implementation of the order for inspection. In one exchange with the court, counsel for the appellants said (at page 6 of the transcript): -

> "What the difference between the parties seems to have grown out of this is the defendants wanted to go beyond inspecting the impugned material that we said they wrongly brought into our landfill. They wanted to do various things and again I don't know how much the court wants to hear me. For example, they wanted to put about puncture holes into cells that had been sealed for ten years.
>
> And we went back, there's a long rake of correspondence, as you can imagine, saying, this is off the radar. Now, we sent a very detailed letter to them outlining what exactly we are agreeable to. We are waiting for the defendants to come back to us in terms of this. But the fight between us seems to be the kind of inspection the defendants want to do outside of inspecting the impugned material. We have no difficulty with it, provided they do it in a right way, and provided the protocol is agreed."

8. Counsel for the appellant accordingly made it clear to the Court that there was no issue about the respondents inspecting the entirety of the site outside of the impugned material

in Cell 4, and the dispute centred around the nature of the inspection to be done. If there was any doubt that the order contemplated an inspection of the site beyond the impugned material in Cell 4, that appears to have been laid to rest in the following exchange between the court and the appellants' counsel (at pages 10 – 11 of the transcript): -

"Mr. Justice McGovern: Wait now. The inspection was of the first named plaintiff's property at this site.

Mr. Foley: Yes.

Mr. Justice McGovern: Has that taken place?

Mr. Foley: Yes, Judge. They have been out and they have inspected, as far as I understand it they have taken samples.

Mr. Justice McGovern: You seem to be talking about inspection of some material not others. Inspection was defined in terms of a site. So within that site an inspection was to be carried out. Are you arguing over material in one part of the site as opposed to material in another part of the site?

Mr. Foley: I think so, Judge.

Mr. Justice McGovern: I mean the extent of the order covers the site, not one part of the site or another part of the site.

Mr. Foley: I take the point...."

9. Counsel went on to indicate that whereas the protocol could be agreed for the testing of the impugned material in Cell 4, what he described as the intrusive nature of the testing for the rest of the site was very much in issue between the parties.

10. On the 22nd of June, 2017, the experts then retained by the defendants, RPS, produced a suggested protocol for the implementation of the inspection and testing of the landfill site. The appellants' consultants, Golder Associates, produced a separate protocol on the 4th July, 2017. This protocol appeared to propose that the inspection and testing of the site should be confined to the impugned waste contained in Cell 4 only. Golders argued that there was no scientific case for any testing beyond that.

11. Because agreement could not be reached on the appropriate protocol, the appellants issued a motion on the 19th July, 2017 seeking an order directing that inspection of the site be conducted in accordance with the Golder report and in particular section 6.0 thereof. An extensive exchange of affidavits followed, which included reference to a new protocol proposed on behalf of the respondents by Marron Environmental on the 2nd August, 2017. As with the earlier proposed RPS protocol, the Marron protocol proposed taking soil samples outside the impugned material in Cell 4 but on a less intrusive basis than had been proposed by RPS.

12. The appellants' motion was heard over two days before Costello J. who delivered judgment on the 21st December, 2017.

Judgment of the High Court

13. The trial judge set out the facts as I have outlined them above and then set out the principles to be applied to applications for orders for inspection pursuant to O. 50, r. 4. She referred to her judgment in *James Elliott Construction Limited v Lagan & Ors.* [2015] IEHC 631 where she summarised the principles applicable to such applications as follows:

> "(1) The Court may order that a party may take samples of the property of another party to proceedings which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (2) The power must be viewed in the context of a party's constitutional right of access to the courts;
>
> (3) The Court must ensure that the litigant will have facilities to present his case to the Court. This includes all the advices and information which the litigant wishes to present to the court, either in support of his own case, or to undermine that of his opponent;
>
> (4) The right to an order for inspection or the taking of samples is not dependent upon the strength of the case of the party seeking the order;
>
> (5) Inspection, or the ordering of the taking of samples, should be facilitated if it can be achieved while at the same time protecting the interests of the opposing party. The interests of an opposing party that a court takes into account are those relating to that party's rights as an owner or occupier of property;
>
> (6) The proposed inspection or taking of samples must be shown to be necessary or expedient by reference to the issues in the case;
>
> (7) The inspection or sampling ordered should be limited to that which the party seeking the order has shown to be necessary or expedient to his own case or his defence of his opponent's case."

14. The trial judge cited with approval the judgment of Murphy J. in *Ballymore Residential Limited & Anor v Roadstone Limited & Ors* [2017] IEHC 539. She referred to other authorities such as *Bula Limited v Tara Mines Limited (No. 1)* [1987] IR 85, *Wymes v Crowley* [1987] IEHC 68 and *Charleton v Kenny* [2007] IEHC 308.

15. The trial judge referred to the scope of the order noting that it was clear that it was not confined to the area where the impugned material was deposited. As noted by the trial judge, the appellants argued that the inspection and testing should be confined to Cell 4 in the High Court. The respondents contended that the order was not so limited. The court detailed the exchanges between the parties about the agreeing a protocol. She noted that one of the arguments advanced by the appellants in opposing the inspection

was that it might give rise to further damage to the environment for which they could be held liable. However, in circumstances where the judge noted that it had been clear from the outset that EPA approval would be required for the proposed works, she considered this ground of objection to be disingenuous and without merit.

16. Noting the arguments for and against the protocols proposed by both sides, the trial judge said (at para. 33): -

> "33. The court cannot attempt to reconcile the disputes on affidavits between the experts as to whether it is possible to reinstate the site following the proposed inspection and sampling in a manner which will not lead to or give rise to a risk of further environmental damage resulting from the inspection and reinstatement. Murphy J. was faced with precisely this difficulty in *Wymes v Crowley* but nonetheless he permitted a limited form of inspection to proceed.
>
> 34. In this regard it is useful to note that whichever protocol is adopted it will be scrutinised by the EPA as the EPA must approve the works involved. If the EPA has concerns that environmental damage may be caused by the proposed inspection and testing it would be open to the EPA to seek whatever appropriate variations or assurances are required or possibly to refuse some or all of the proposed works if this is necessary. In effect it will act as a neutral arbiter with regard to the concerns the plaintiffs raise regarding potential damage to the environment."

17. She observed that, as held by Murphy J. in *Ballymore Residential Limited*, a litigant has, within reason, and subject to the rules of evidence, the right to present his case as he considers appropriate. The strength or weakness of the case of the party seeking inspection was not relevant. She was of the view that the only relevant issue raised by the appellants in opposition to the respondent's protocol for inspection was the potential for environmental damage. In that regard, she held that the inspection to be carried out according to the Marron Protocol was in accordance with the principles set out in *Elliott* and takes account of the concerns raised by the appellants' experts. She considered this to be the least intrusive inspection and sampling of the appellants' site which would satisfy the respondents' requirements.

Grounds of Appeal

18. The appellants contend that the trial judge erred in ordering a much wider inspection than is necessary having regard to the issues in the proceedings. It is pleaded that the trial judge failed to give any sufficient weight to the fact that the inspection order was premised on an inspection of Cell 4 only; other contentions regarding the necessity for the inspection ordered are canvassed. It is said that the trial judge failed to give any weight to the suggested purpose of the inspection being to obtain information for the purposes of a cross-claim against the appellants.

19. It is contended that sufficient weight was not given to the risk of environmental damage posed by the proposed inspection and that the judge, having indicated that she could not attempt to reconcile the dispute between the experts, did in fact resolve the dispute in

favour of the respondents by directing the inspection proposed by them. The trial judge erred in considering that the Marron proposal was the least intrusive inspection when clearly the Golder proposal was. She failed to give appropriate weight to the fact that the information sought by the inspection was already available and that the Marron proposal was unworkable. As part of the within appeal, the appellants also appeal the subsequent order of Costello J. made on the 19th January, 2018 awarding the costs of the inspection application in favour of the respondents.

Arguments

20. The essential contention of the appellants is that the order for inspection made by the High Court is unjustified, unnecessary and disproportionate. Of note in the appellants' written submissions they contend that the order made by McGovern J. was in fact intended to relate to the impugned waste only. Thus, they submit (at para. 18): -

> "The 15 May order must be read and interpreted against the background outlined above. The purpose of the order was to enable the defendants inspect and test *the Impugned Waste*. No more and no less."

21. The appellants go on to observe (at para. 20): -

> "While it is accepted that the 15 May *order* refers to an inspection of the first named plaintiff's *property*, the defendants ought not be entitled to seize upon this wording to assert an entitlement to inspect the entire site."

22. These submissions appear to me to be significantly at odds not only with the terms of the un-appealed order of McGovern J. and the transcript extracts to which I have referred, but indeed to the oral submissions advanced at the hearing of the appeal in which it no longer appeared to be disputed that the respondents are entitled to inspect the entire site, the only issue being the nature of inspection and sampling. This appears to constitute a significant and unexplained departure from, not only the appellants' written submissions, but also the notice of appeal and in particular ground 3 thereof.

23. The appellants advance five objections to the inspection ordered which may be summarised as follows:

    (i) No compelling reason has been advanced for it.

    (ii) It is not necessary to enable the respondents to defend the claim. The respondents only seek the broader inspection to defend one ancillary aspect of the remedies sought by the appellants, namely, the post-remediation indemnity. Inspection for this purpose is not necessary or justified at this stage of the proceedings.

    (iii) It is scientifically misconceived.

    (iv) The data is available from another source.

    (v) It is a form of fishing expedition.

Scope of the Order of 15th May, 2017

24. It seems to me that the order made by the High Court on the 15th May, 2017 is clear on its face. By that order the court directed that "an inspection of the first named plaintiff's property at Hollywood Great, Nags Head, The Naul, County Dublin by the defendants' experts do take place…" The court went on to direct that the parties' respective experts should meet to agree a protocol "for inspection and the taking of samples for testing." Nowhere is it envisaged in the order that the inspection and taking of samples is to be confined to the impugned material only, or to the material in Cell 4 only. If there was any doubt that that was what the order meant, it would appear that that was clarified by McGovern J. in the exchanges with counsel to which I have referred above, and indeed that was accepted by counsel for the appellants.

25. If it was sought to suggest that the order was deficient or was objectionable to the appellants on the grounds that are now advanced in this application, it was open to the appellants to appeal the original order, but they chose not to do so. It seems to have been understood by all parties following the making of this order that it was to extend to the entirety of the appellants' site and not just a part thereof. However, the Golder protocol subsequently created, and the motion on which that protocol is based, amounted in my view, to an attempt to retrospectively restrict the un-appealed order. This is evident from the terms of the Golder protocol which provided only for inspection and testing at Cell 4 and nowhere else on the appellants' site. To that extent the Golder protocol was non-compliant with the court's order and the court was perfectly entitled to reject it for that reason, if for no other.

26. I am therefore, satisfied that ground 3 of the grounds of appeal and the associated submissions to which I have alluded above are misconceived. At the hearing of this appeal, the appellants argued that it was open to Costello J. at the hearing of the appellants' motion to vary the terms of the original order. I accept the contention that the court had jurisdiction to vary the interlocutory order as appropriate, but the fact remains that no application in that regard was made by the appellants. It would of course have been open to the appellants to make such an application if they considered that the wording of the order of McGovern J. was unclear or in some way "being seized upon" by the respondents and exploited to their advantage in the context of a site-wide inspection, as their submissions now suggest.

27. By the time the matter came before Costello J., it was clear from the competing protocols on both sides that the respondents had taken the view that the order entitled them to inspect and test the whole site, not just Cell 4, and when that became clear, it would have been open to the appellants to seek a variation of the order which, they contend, was being exploited by the respondents. The appellants chose not to do so and cannot be heard to complain of that now.

Orders for Inspection

28. The court's jurisdiction in this regard derives from O. 50, r. 4 of the RSC which provides for the making of orders for inspection "which may be necessary or expedient for the purpose of obtaining full information or evidence."

29. The order thus distinguishes between something that is "necessary" and something that is "expedient". The adjective "expedient" is variously defined as something that is helpful, useful, convenient, practical, suitable for achieving a particular purpose, advantageous and so forth. Thus, even if a particular inspection cannot be shown to be absolutely necessary, it may yet be ordered if the court considers it suitable and appropriate in all the circumstances. This is of some relevance in the context of the present case where it is suggested by the appellants that the inspection is unnecessary because of the availability of records going back a number of years which will provide the respondents with the same or even superior information or evidence. That, however, it seems to me, is but one factor to be considered in balancing the competing interests of both sides.

30. As in other pre-trial disclosure procedures, the underlying rationale for inspection orders is to ensure equality of arms while avoiding undue oppression, as noted by Murphy J. in *Ballymore Residential Limited*. In general, a party to litigation is entitled to choose how it proves its case, subject to the court striking the appropriate balance between that right, on the one hand, and the rights of the party whose property is the subject of the inspection on the other. The more intrusive or invasive the proposed inspection, the higher the threshold will be for establishing that it is either necessary or expedient.

31. The application of a principle of proportionality is now firmly embedded in pre-trial procedures such as discovery and should equally apply to the closely related order for inspection. With the ever increasing complexity of litigation comes ever increasing cost and the courts remain vigilant in the context of pre-trial disclosure procedures to ensure that they do not become ends in themselves and potential impediments to access to justice. As already noted, the principles to be applied to orders for inspection were discussed by Costello J., then a judge of the High Court, in Elliott. They appear to me to represent the law.

32. Counsel for the appellants suggested that to the seven principles should be added two more, one dealing with proportionality and the second with alternative means of proof. I do not think this is necessary. Principle number (5) clearly envisages the application of a proportionality test by the court. Whether alternative means of proof exist or not is but one aspect of that proportionality. As Costello J. noted, in assessing whether or not an order for inspection should be made, the court cannot calibrate the entitlement to an order by reference to the strength or weakness of the case of the party seeking it any more than it could in, for example, a discovery application. Because inspection, and in particular sampling, is a potential interference with property rights, it is of particular importance to balance the competing rights and interests of both sides in doing justice between the parties.

Interlocutory Appeals

33. Order 50, rule 4 empowers the court to make an order for, *inter alia*, inspection "upon such terms as may be just" and clearly confers a wide discretion on the court in considering such applications. This is accordingly an appeal from a discretionary interlocutory order made by the High Court and the principles to be applied by this court

in such circumstances were set out in *Lawless v Aer Lingus Group Plc.* [2016] IECA 235. The sole judgment was delivered by Irvine J., with whom the other members of the court agreed, and she stated at para. 22: -

> "This is an appeal against an order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach. …
>
> 23. … In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."

34. As I have noted, inspection orders are closely analogous to orders for discovery and the same principles should apply. In considering interlocutory appeals, this court must accord a significant margin of discretion to the trial judge. If the order under appeal falls within the spectrum of orders that the exercise of that discretion permits, there is no basis for this court to interfere, even if it might have exercised the discretion differently. An appellate court will only intervene where it is demonstrated that there is a clear error in the exercise of the discretion giving rise to injustice. Although Irvine J. noted that even if an error cannot be identified, this court may allow an appeal if the justice of the case so requires, such instances will be rare. In most cases, the occurrence of such injustice would in itself point strongly to an erroneous exercise of the discretion.

Conclusions

35. Although much time was spent both in the High Court and in this court on arguing the respective scientific merits of the parties' positions and whether the respondents had in fact established a sufficient factual basis for the necessity for the inspection, the trial judge correctly concluded that she could not reconcile the disputes on affidavit as between the respective experts. She was however, in my view, entitled to come to the conclusion that the protocol proposed by Marron Environmental was compliant with the order and the least intrusive inspection and sampling of the appellant's site which would satisfy the respondents' requirements. Again, she was entitled to conclude that the respondents were not simply obliged to accept what was offered by the appellants but to determine their own mode of gathering information and evidence so long as the exercise was not disproportionate.

36. She was entitled to come to the conclusion that the only real issue of relevance in the appellants' objection to the inspection was the potential for environmental damage, but that was offset by the necessity for the EPA to approve the works so that this concern

was not justified. I think when one examines the appellants' grounds of appeal which are mainly concerned with the trial judge failing to give sufficient weight to certain factors, it is difficult to avoid the conclusion that this is in large measure an appeal on the merits.

37. Insofar as the appellants complain that one of the grounds set out in the respondents' affidavits for the inspection order was that it was necessary for the purpose of proceedings by the respondents against the appellants, I agree with the appellants that this would be an improper purpose if it was the only one, but it was made clear in submissions by the respondents that this was not relied upon.

38. In summary therefore, I am satisfied that the trial judge acted well within her discretion in making the order under appeal herein and that the appellants have not established that there is any basis for this court to interfere with the exercise of that discretion or that a real injustice will arise if the order is not set aside. I would accordingly dismiss these appeals.

39. As this judgment is being delivered electronically, Whelan and Faherty JJ. have indicated their agreement with it.