

THE HIGH COURT

Record No. 2023/1546SS

[2024] IEHC 363

BETWEEN:

**OXYGEN ENVIRONMENTAL UNLIMITED COMPANY T/A CAVAN WASTE DISPOSAL, OXYGEN
COMMERCIAL, OXYGEN ENVIRONMENTAL**

APPELLANTS

AND

OFFALY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 13th day of June 2024

Introduction.

1. The appellants are engaged in the business of waste collection from domestic premises. They operate pursuant to a waste permit issued by the National Waste Collection Permit Office.

2. The present application is an application by way of consultative case stated from Judge Cody in the District Court, dated 13th October, 2023. The essential issue in the case, concerns the correct interpretation of reg. 5 of the European Union (Household Food Waste and Bio-waste) Regulations 2015 (S.I. 430/2015), as amended by reg. 6 of the European Union (Household Food Waste and Bio Waste) (Amendment) Regulations 2023 (S.I. 679/2023).

3. In essence, reg. 5, as amended, provides that as and from December 2023, waste collection companies, including the appellant, have to provide three bins to their customers: a black bin for general waste; a green bin for dry recyclable waste; and a brown bin for biodegradable waste, such as food and garden waste.

4. The regulation has a provision whereby house owners can avoid having to take a brown bin, but only if they provide the waste collector with written confirmation that they will either dispose of their food waste by home composting, or will bring it to an authorised food waste processing facility. The waste contractor must furnish that written confirmation to the relevant local authority.

5. The appellant accepts that for all new customers after December 2023, they must take the three bins, being a black bin, a green bin and a brown bin, unless they can bring themselves within what might be, for ease of reference, referred to as the "home composting" derogation, provided for in the regulation.

6. The dispute in this case concerns the appellant's existing customers, at the date of entry into force of this obligation concerning the provision of a brown bin. The appellant contends that on

a proper construction of reg. 5 (as amended), those customers who heretofore had entered into a contract for the provision of a black and green bin, will not be obliged to take a brown bin unless they specifically opt in to take such a bin.

7. The respondent disagreed with this interpretation and contended that on a true interpretation of reg. 5, as and from the operative date, all house owners had to take all three bins, unless they could bring themselves within the derogation for home composting by providing the necessary written confirmation that they will deal with their food waste appropriately. Thus, the key question for the decision of the court on this case stated, is whether reg. 5 (as amended), as correctly construed, provides for an automatic opt-in to the provision of a brown bin by all customers, unless or until they comply with the derogation provisions; or whether it merely provides that existing customers will only be bound to take a brown bin if they specifically opt in to that arrangement.

8. When the matter came before the District Court, there was extensive legal argument on this issue. Since the consultative case stated was raised by the learned District Court judge, there has been an amendment to the regulations. However, this amendment did not affect the essential provisions of reg. 5, but only related to its scope. The parties were agreed that the questions raised remain relevant to their dispute. They further agreed on a reformulating of the questions to take account of the amendments made by the 2023 regulations.

The Amended Questions raised in the Consultative Case Stated.

9. The reformulated questions which must be answered by the court are as follows:

Subject to questions 2 and 3:

1. *Does reg. 5 of the European Union (Household Food Waste and Bio Waste) Regulations 2015 (S.I. 430/2015) ("the 2015 Regulations") as amended by S.I. 679/2023 ("the 2023 Regulations") require that the appellant as an authorised waste collector must provide or arrange for the provision of a separate collection service for food waste for all household customers in accordance with time schedules set out in Regulation 4 of the 2015 Regulations (as amended by the 2023 Regulations)?*

If the answer to question 1 is yes:

2. *Does reg. 5 of the European Union (Household Food Waste and Bio Waste) Regulations 2015 (S.I. 430/2015) ("the 2015 Regulations") as amended by S.I. 679/2023 ("the 2023 Regulations") require that the appellant as an authorised waste collector must provide or arrange for the provision of a separate collection service for food waste for all household customers, irrespective of whether the household customer has signed up for*

and/or entered into a contract with it for that food waste collection service, unless the customer has provided written confirmation to the authorised collector that they do not wish to engage in the food waste collection service?

If the answer to question 2 is yes:

3. *Does reg. 5 of the European Union (Household Food Waste and Bio Waste) Regulations 2015 (S.I. 430/2015) ("the 2015 Regulations") as amended by S.I. 679/2023 ("the 2023 Regulations") require that the appellant as an authorised waste collector must provide or arrange for the provision of (a) a separate collection service for food waste and (b) an approved waste receptacle which is designed for reuse (i.e. a brown bin) to all household customers, if they wish to avail of same, free of monetary charge and exclusively at the organised waste collector's own cost?"*

Regulation 5 of the 2015 Regulations (as amended).

10. The relevant regulations for the purpose of this case are regs. 5(1) and (2), which are in the following terms:

5(1) Without prejudice to the power of any local authority to provide for additional policy objectives under a relevant waste management plan or to apply more onerous conditions under a waste collection permit or under a waste presentation bye-law, authorised waste collectors shall ensure, as a minimum, that they provide or arrange for the provision of a separate collection service for food waste from households for population agglomerations in accordance with the time schedule set out in Regulation 4.

(2) Subject to paragraph (2B), other than where householders have provided confirmation in writing to the waste collector concerned—

(a) that they do not wish to avail of the service in accordance with Regulation 6(2), and

(b) the details of how food waste arising on the premises will be appropriately managed in the absence of a such a service,

a separate collection service for food waste from householders shall include the direct provision to the address of each household customer, by the waste collector, of an approved waste receptacle which is designed for reuse, with the exception of the collection of such waste by atypical collection solutions, in specific areas designated by a local authority as being only suitable for the collection of such waste by atypical collection solutions.

[...]

(2B) A waste collector shall –

(a) retain, for a period of not less than 7 years, information on householders not availing of a food waste collection service, and

(b) provide the information mentioned in subparagraph (a) to the relevant local authority on the written request of the authority.

11. The duty on a householder to segregate their food waste is contained in reg. 6(1); with the derogation provision being in reg. 6(2), which are as follows:

6. (1) Subject to paragraph (2) and without prejudice to the power of any local authority to provide for additional policy objectives under a relevant waste management plan or to apply more onerous conditions under a waste collection permit or under a waste presentation bye-law, an original producer of food waste arising as part of household waste shall ensure, as a minimum, that—

(a) food waste arising on the producer's premises is source segregated and kept separate from non-biodegradable materials, other waste and contaminants;

(b) source segregated food waste arising on the producer's premises is collected by an authorised waste collector.

(2) Paragraph (1)(b) shall not apply where an original food waste producer—

(a) subjects the food waste to a home composting process on the premises where the food waste is produced; or

(b) brings the food waste to an authorised facility with a view to its composting or anaerobic digestion or treatment in a way which fulfils a high level of environmental protection.

The Appellant's Case.

12. The appellant accepts that for all new customers after December 2023, if they wish to avail of the waste collection services provided by the appellant, they will have to take all three bins; being the black bin, the green bin and the brown bin, unless they can bring themselves within the home composting derogation by providing the necessary written confirmation to the waste collector.

13. As already noted, the essential dispute in this case concerns the appellant's existing customers, who have only agreed at the time of entering into their original contracts with the appellant, that they will take two bins, being a black bin and a green bin. The appellant's evidence was that they have circa 70,000 customers. Of these, approximately 25,598 customers have signed up to take a brown bin. Approximately 6,613 customers have declined to take a brown bin. They have provided the necessary written confirmation that they will deal with their food waste

appropriately in accordance with the regulations. The remaining 37,811 customers have not expressed any view, one way or the other, in relation to receiving a brown bin.

14. The respondent's case is that the appellant is acting in breach of the terms of its waste permit, by not providing these people with brown bins, because they have not specifically opted out of the requirement, as required by the regulation. The appellant contends that this interpretation of reg. 5 is incorrect. It contends that correctly interpreted, the regulation provides that for existing customers it will be an "opt in" arrangement, whereby they will continue to be provided with only two bins as per their existing contract, until they specifically opt in to receiving a brown bin.

15. The appellant contends that its relationship with its existing customers is a matter governed by private contract. It is submitted that they cannot force customers, who have only ever consented to receiving two bins, to take a third bin, which they have never agreed to take; nor have they ever agreed to pay for its periodic collection.

16. The appellant contends that the construction of reg. 5 proposed by the respondent is incorrect, because it would oblige the appellant to turn up at their customers' properties, leave a brown bin thereon, to which those customers had never consented. The appellant submits that to require it to do that, would mean that it would have to act in breach of the terms of its contract with its existing customers; they would have to commit a trespass by entering on to their customers' property without permission and leaving a bin thereon; and they would be breaching their customers' constitutional right to the inviolability of their dwelling, as protected by Art. 40.5 of the Constitution.

17. It was further submitted that the interpretation of reg. 5 as put forward by the respondent would operate a great injustice on the appellants, because it would impose an enormous financial burden on them, which they would be unlikely to recover from their customers. It was submitted that the cost of providing a brown bin was €30 per bin, together with a charge of €13 for delivery of each bin to a customer's house, and a further collection charge of €13, if the bin had to be taken back from their property. It was submitted that where customers had not consented to receiving a brown bin and where they had not agreed to pay any standing charge for the periodic collection of such bins, it was unlikely that the appellants would recover any money from their customers in respect of the provision of bins, which they did not want. It was submitted that this would result in the loss of over €1.6m to the appellant.

18. It was submitted that the construction of the regulation as put forward by the respondent, would have absurd and financially serious consequences for the appellant; whereas the construction put forward by the appellant, whereby existing customers have to specifically opt in to receive a

brown bin, meant that the objectives of the legislation would be complied with, without forcing the appellant to commit a trespass on its existing customers' property, or to suffer the grave financial loss outlined above. In these circumstances it was submitted that the interpretation put forward by the appellant was the proper interpretation of the regulation.

Submissions on behalf of the Respondent.

19. On behalf of the respondent, it was submitted that the regulations, and in particular reg. 5, were designed to give effect to various EU Directives, which mandated that there had to be segregation of waste, and in particular, that food waste had to be segregated and collected separately. It was submitted that reg. 5 was designed to achieve that objective for all customers, either new customers, or existing customers.

20. It was submitted that the waste collection industry was a heavily regulated industry. It was clearly known to all waste collectors, including the appellant, that the regulations under national law may change from time to time. It was for this reason, that there was provision in the standard form contract between the appellant and its customers, which provided that the terms and conditions of the contract under which supply of the service would be provided to the customers, could change from time to time. It was submitted that this was further supported by the provisions of the customer charter, as provided for under the regulations, which stated that the service would be provided by the service provider in accordance with national law.

21. It was submitted that there was no question of the appellant having to commit a trespass, or breach the customers' constitutional rights to inviolability of their dwelling, by simply leaving a brown bin on the property. What was envisaged, was that the waste collector would communicate with the existing customers and inform them that there had been a change in the law, following which, they would have to take three bins, including the brown bin for food waste; unless they could bring themselves within the derogation provided for in respect of home composting. It was submitted that, where this was clearly communicated to existing customers, there would be no question of any trespass being committed when the brown bin was delivered to their properties.

22. It was denied that there was the alleged or any enormous financial burden cast upon the appellant by virtue of the regulation. It was clearly provided in the regulations that the cost of provision of the brown bin and the standing charge for the periodic collection of such bins, could be recouped as part of the ongoing waste collection charges charged by the waste collectors under their contracts with their customers.

23. It was submitted that having regard to the wording of the regulation and having regard to its position within the scheme of the regulations as a whole, and their position within the general framework of the waste legislation, the automatic “opt in” interpretation was reasonable and was in accordance with the ordinary meaning of the words in the regulation, and was also in accordance with the scheme of the legislation as a whole and with the objectives provided for in the relevant EU Directives.

The Law.

24. At the hearing of this matter, the parties were agreed that the relevant law in relation to the principles of statutory interpretation, were those set down by Murray J. on behalf of the Supreme Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] 2 ILRM 313.

25. The Supreme Court returned to the issue of the principles of statutory interpretation in *A,B and C v. Minister for Foreign Affairs and Trade* [2023] IESC 10, where the principles were summarised in the following way at para. 73 by Murray J:

“In answering these questions, it is to be remembered that the cases – considered most recently in the decision of this court in Heather Hill Management Company CLG and anor. v. An Bord Pleanála [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.”

Conclusions.

26. The court is satisfied, having applied the principles of interpretations laid down by the Supreme Court in the *Heather Hill* and in the *A,B and C* cases, that the respondent’s interpretation of reg. 5 is correct.

27. The court is satisfied that the plain meaning of the words in reg. 5 clearly provides that for the categories of dwellings covered by the regulation, which, since the 2023 Regulations, now includes all dwellings (subject to one or two minor exceptions that are not relevant here), a waste collector must supply three bins to each household, unless that house owner provides written confirmation of home composting, or that he/she will bring their food waste to an authorised food waste facility.

28. While it is true to say that the appellant's existing customers only agreed to take two bins under their original contract, the appellant knew and its customers knew that it was operating in a heavily regulated service sector, where the governing regulations were apt to change from time to time.

29. The court is satisfied that there is an implied term in the contract between the appellant and its customers, that the appellant will supply the service, but only in accordance with the relevant provisions of national law. This is reflected in the customer charter provided for under the regulations. If such a term were not implied into the contract, it would mean that people could avoid the provisions of national law by concluding contracts prior to any relevant change in the law, thereby immunising themselves and the service provider from compliance with any new provisions of national law that may be enacted subsequent to conclusion of the original service contract. That would be an absurd proposition.

30. If that were applied to the present case, it would mean that for 37,811 customers of the appellant, the appellant would be absolved of the obligation to supply three bins to those customers, and the customers would be relieved of the obligation to take a brown bin, while retaining the service in respect of the black and green bins. That would be unfair to other house owners, who are subject to the current provisions of national law.

31. Such an interpretation would also defeat the objective of the legislation and of the Directives, which is to provide for the separate collection of food waste. Such objective would thereby be defeated in respect of a significant number of house owners, who are customers of the appellant. Presumably, the argument would be that similar provisions would also apply to existing customers of other service providers; meaning that an even greater number of people would be entitled to act in breach of current provisions of national law. That would be both illogical and unjust. It would completely undermine the objectives to be achieved in the Directives and in the implementing legislation in Ireland.

32. There is no question that the existing customers could sue the appellant for breach of contract for failing to continue with the provision of only two bins as heretofore. It is well settled that the courts will not give judgment in favour of a party, if to do so would cause the defendant, even indirectly, to do an act prohibited by law: see *Daimler Co. Ltd v Continental Tyre & Rubber Co. (Great Britain) Ltd* [1916] 2 AC 307; *Namlooze v The Dorset Manufacturing Co* [1949] IR 203; *Fibretext v Beleir Ltd* 89 ILTR 141.

33. While the principle of freedom of contract provides that parties are free to forego some or all of the rights, that are afforded to them under national law; it is equally clear that parties to a contract cannot agree to oust the mandatory provisions of national law that apply to the subject matter of their contract. They cannot agree that regulations which govern the provision of a service, will never apply to them, merely because they were fortunate enough to have concluded their contract prior to the relevant regulations coming into force.

34. The court is satisfied that there is no question of the appellant having to commit a trespass, or act in breach of their customers' constitutional rights by leaving a brown bin on their properties. The contract which the appellant has with its existing customers, provides that the customer must take the service for a minimum period of twelve months. Thereafter, unless terminated by either party, it rolls over from year to year on the same terms.

35. This means that at the end of each yearly period, the appellant is entitled to offer a renewal of the contract on new terms. It is quite reasonable for the appellant to write to its existing customers, explain that there has been a change in the law, whereby they have to supply three bins to each customer, unless a customer provides written confirmation of home composting, or that they will dispose of their waste by bringing it to an authorised food waste facility. The letter would go on to state that in the event of the customer taking the third bin, the charge will be whatever charge will be imposed by the appellant for the provision of the third bin and for its periodic collection.

36. The customer would also have to be given the option of terminating the contract before the relevant date, if they do not wish to receive three bins as and from that date onwards.

37. I am of the view that it would be permissible to give existing customers adequate notice, that unless they indicate to the contrary by a given date, their silence would be taken as agreement by them to the amendment of their contract, which would effectively include the provision of a brown bin.

38. Further, I am of the view that given that there has been a change in the governing national law, waste collectors, including the appellant, would not have to await the termination of the relevant

yearly contract period for each customer, as long as the waste collector picked an implementation date that was sufficiently far in advance, to give customers reasonable notice of a change in the terms of their contract. I do not see it as being in breach of contract, for the waste collector to pick a universal date that would apply to all its existing customers for implementation of the new regime, as long as the customers were given reasonable notice thereof and the opportunity to terminate the contract altogether.

39. Obviously, the roll out of the new contractual regime to the existing customers, would be a two-step process: the first, being the date by which they had to either terminate the contract, or provide written confirmation of home composting; which date would, in the absence of any communication to the contrary, be taken as the date on which they agreed to the new terms, i.e. their agreement to take three bins. Thus, silence on the part of the customer, would effectively be deemed as being an agreement by him or her to take the brown bin.

40. Thereafter, the waste collector would roll out the provision of brown bins to its customers, with the relevant additional charge only being applied as and from the date of delivery of the brown bin to the customer.

41. In this way, waste collectors, including the appellant, would acquire a contractual right to deliver a brown bin to those customers who did not respond in the negative *i.e.* by either terminating the contract altogether, or by providing written confirmation of home composting.

42. In these circumstances, no question of a waste collector, including the appellant, permitting an act of trespass would arise; nor would any question of their acting in breach of their customers' constitutional rights arise, by leaving a brown bin at their properties. In delivering the bin to properties in these circumstances, the waste collector, including the appellant, would be acting further to the terms of the contract as amended.

43. In these circumstances, the appellant would not be exposed to any possible legal actions, nor would it suffer the financial loss as contended for by it. For the reasons set out herein, I am satisfied that the respondent's submissions on the interpretation of reg. 5 of the 2015 Regulations, as amended, are correct.

Answers to the Questions posed in the Consultative Case Stated.

44. I answer the questions raised by the learned District Court judge in the following way:

Question 1.

1. Yes, subject to the answers to questions 2 and 3, reg. 5 of the 2015 Regulations (as amended by the 2023 Regulations) requires that the appellant as an authorised waste collector must

provide or arrange for the provision of a separate collection service for food waste (i.e. a brown bin collection service) for all household customers in accordance with the time schedule set out in reg. 4 of the 2015 Regulations (as amended by the 2023 Regulations).

Question 2.

2. Yes, reg. 5 of the 2015 Regulations (as amended by the 2023 Regulations) requires that the appellant as an authorised waste collector must provide or arrange for the provision of a separate collection service for food waste for all household customers unless the customer has provided written confirmation to the authorised collector (a) that they do not wish to avail of the food waste collection service in accordance with reg. 6(2) and (b) details of how food waste arising on the premises will be appropriately managed in the absence of such a service.

Question 3.

3. Yes, reg. 5 of the 2015 Regulations (as amended by the 2023 Regulations) requires that the appellant as an authorised waste collector must provide or arrange for the provision of (a) a separate collection service for food waste and (b) an approved waste receptacle which is designed for reuse (i.e. a brown bin) to all household customers if they wish to avail of same. The approved waste receptacle (i.e. brown bin) must be provided to household customers directly and without any requirement for the prior payment of a charge therefore, however the cost of providing (a) for separate collection service for food waste and (b) the approved waste receptacle designed for reuse may be indirectly recovered by the appellant from household customers in accordance with the terms and conditions (as amended) of the contract between the appellant and each household customer.
- 45.** As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on costs and on any other matters that may arise.
- 46.** The matter will be listed for mention at 10.30 hours on 10th July 2024 for the purpose of making final orders.