STATE (CORK C.C.)

Henchy J.
Griffin J.
Hederman J.

THE SUPREME COURT

35

1981 No. 363 SS.
1982 Na 14

THE STATE (CORK CO. CO.)

v.

JUDGE FAWSITT AND OTHERS

Judgment of Henchy J. Mem. Liss.
delivered the 27 JULY 1983

In 1979 Cork Co. Council, in their capacity as a sanitary authority, were looking for a site which would serve as a dump for toxic waste. They set their eyes on an area of some 315a. at Nohoval, Co. Cork, as a possible location for such a dump. That particular area was owned by ten farmers (hereinafter "the landowners"). Before making a final decision as to whether, in exercise of their powers under the Public Health (Ireland) Act, 1878, they would acquire that particular area for the dump, they felt they needed to enter on the lands and examine them more closely, particularly by making boreholes. To do this they had to exercise the power vested in them by s. 271 of the 1878 Act.

S. 271 empowers a sanitary authority "whenever it becomes necessary ..... to enter, examine, or lay open any lands or

premises for the purpose of making plans, surveying, measuring, taking levels ....." and, if the owner or occupier refused to cooperate, after giving written notice, to apply to the District Court for an order authorising them to enter, examine and lay open the lands or premises.

The Co. Co. decided to avail themselves of this procedure in regard to this site. They therefore brought proceedings in the District Court against the landowners, seeking authorisation under s. 271 to enter on the lands for the specified purposes. In due course the order sought against each landowner was made by the District Court.

In each case an appeal was taken to the Circuit Court. The appeals were heard together by Judge Fawsitt. The landowners' case was that the area in question was so plainly unsuitable as a waste disposal site that it was not necessary for the Co. Co. to enter on the lands for the specified purposes. If that necessity was not found to exist, it would follow that the orders made in the District Court under s. 271 could not be upheld.

After a lengthy hearing in the Circuit Court, in which conflicting expert evidence was given as to whether that

necessity existed, Judge Fawsitt allowed the appeals of the landowners. But he did not do so because it had not become necessary for the Co. Co. to enter on the lands in order to carry out preliminary studies and tests. If he had allowed the appeals for that reason, his orders would have been unassailable, because there was evidence to support such a finding; so it could not be said that he had acted without or in excess of jurisdiction.

However, the course taken by the Judge put him out of jurisdiction. He stated as his reason for allowing the appeals that the evidence was such that he was not sure that the lands would be suitable as a dump for toxic waste. But that was not a question that arose on the appeals. It was not the Co. Council's case that the lands were thus suitable. They had not made a final decision on the matter. Their case was that it was necessary for them to enter on the lands to carry out tests which would show if the lands would be suitable as a dump. In deciding the appeals by thus answering the wrong question the Judge stepped out of jurisdiction, for the proceedings gave him no jurisdiction to answer that question.

The Co. Co. understandably sought to undo this erroneous

allowance of the landowners' appeals. They brought proceedings in the High Court seeking to have the Judge's orders quashed. They were successful. In a written reserved judgment McMahon J. quashed Judge Fawsitt's orders, and the High Court order added a direction that "the matter of the case be remitted to the said Circuit Court Judge to enter continuances and to proceed thereon as to law and justice shall appertain".

None of the parties took exception to the remission of the appeals back to Judge Fawsitt. In fact, also apparently without objection, McMahon J. made a further order directing that the appeals be re-entered before Judge Fawsitt "to proceed with their hearing on the basis of the evidence already heard and of such further evidence as in his discretion he may decide to admit".

It was in this somewhat unorthodox sequence of events that Judge Fawsitt found himself rehearing appeals which he had already decided, albeit in excess of jurisdiction. The situation was rendered somewhat more peculiar by the fact that at this rehearing the parties decided to adduce no further evidence. Thus Judge Fawsitt was left to decide the appeals in July 1981 on the basis of the evidence he had heard in May 1979 when he had

made orders which were quashed by the order of McMahon J. After reserving judgment for some days, he announced on the 20 July 1981, apparently without giving reasons, that he was allowing the appeals. Counsel for the Co. Co. thereupon inquired of the Judge if he was finding as a fact that the lands were manifestly unsuitable for acquisition as a dump and he replied in the affirmative.

It was in those circumstances that an application for certiorari to quash that finding was made by the Co. Co. Their primary complaint was that the Judge, acting on the same evidence at both hearings, having decided the appeals in favour of the landowners at the first hearing on a particular ground, had no jurisdiction at the second hearing to decide the appeals again in favour of the landowners but this time on an entirely different ground. After a conditional order of certiorari had been granted and after cause had been shown by the landowners (but not by the Judge), Gannon J. allowed the cause shown and discharged the conditional order.

It is from that decision that the present appeal has been taken by the Co. Co. The sole ground argued before us was

whether Judge Fawsitt acted within jurisdiction when at the second hearing he again allowed the landowners' appeals, but for a reason which, although the evidence was that given at the first hearing, was at variance with that given at the first hearing.

Gannon J. held in effect that, these appeals having been recommitted (apparently without objection) to Judge Fawsitt, it was not only correct but necessary for him to reassess the evidence in accordance with the legal rulings given in the judgment of McMahon J. (a copy of which presumably was before Judge Fawsitt) and to reach whatever conclusion he thought proper, provided it was supported by evidence, even if the reason given for that conclusion was different from the reason given at the first hearing.

I am of the same opinion. We must assume that at the second hearing Judge Fawsitt had due regard to the judgment of McMahon J. He thus approached the evidence from a different standpoint. The fact that he reached the same conclusion, but for a different - and this time valid - reason cannot be said to indicate any wrongful exercise of jurisdiction. So long as he had

seisin of the appeals, the Judge was entitled to change his mind, either as to the result or as to the reason for the result. As I stated when giving the majority judgment of this Court in Dolan v. Corn Exchange (1975) I.R. 315, 330: "The decisions of the Courts, be they verdicts of juries or judgments of judges, must yield to the overriding requirement that they truly accord with the law and the facts as they appear at the time of decision."

I would dismiss this appeal.

Approved
S.H.
27-7-83