

THE HIGH COURT

[2005 No. 89 SP]

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996 TO 2003

IN THE MATTER OF SECTION 58 OF THE WASTE MANAGEMENT ACT 1996 (AS AMENDED BY SECTION 49 OF THE PROTECTION OF THE ENVIRONMENT 2003)

AND IN THE MATTER OF AN APPLICATION BY WICKLOW COUNTY COUNCIL

BETWEEN

WICKLOW COUNTY COUNCIL

PLAINTIFF

AND

JOHN O'REILLY, BROWNFIELD RESTORATION IRELAND LTD, RAYMOND STOKES, ANN STOKES, SWALCLIFFE LIMITED TRADING AS DUBLIN WASTE, LOUIS MORIARTY, EILEEN MORIARTY, SUBSTITUTED BY ORDER DEAN WASTE COMPANY LIMITED, WILLIAM JOHN CAMPBELL, ANTHONY DEAN, UNA DEAN

AND

BY ORDER

SAMUEL STEERS

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 2nd March, 2007.

1. Introduction

1.1 In the substantive proceedings the plaintiff ("Wicklow") seeks orders under the Waste Management Act, 1996 (as amended) ("the 1996 Act") relating to the alleged unlawful holding, recovery or disposal of waste on lands at Whitestown in Co. Wicklow.

1.2 I have already set out in a judgment delivered in these proceedings on 8th February, 2006 ("the earlier judgment") more details of the procedural history of the case to that point in time. It is unnecessary to set out all of the matters dealt with in that judgment again. Suffice it to say that, for the purposes of the application which I now have to decide, it should be noted that amongst the orders made on that occasion was one whereby the twelfth named defendant ("Mr. Steers") was added as a defendant. Mr. Steers was not, as is normal practice, a party to the application to have him added as a defendant. Having now been served with the proceedings, Mr. Steers brings this application before the court for the purposes of seeking an order that he be struck out as a defendant in the proceedings or that a preliminary issue be tried. The orders sought may be briefly stated as follows:-

- (a) it is said that the case as against Mr. Steers should be dismissed as bound to fail; or
- (b) in the alternative it is suggested that certain preliminary issues should be tried; or
- (c) it is said that the proceedings as against Mr. Steers should be struck out on the grounds of delay or allied grounds.

1.3 I turn first to the question of whether it may be said that the proceedings are bound to fail. Most of the facts relevant to that aspect of the application appear not to be in dispute and I turn to those facts.

2. The Facts

2.1 It would appear on the evidence currently available that Wicklow discovered an apparently unlawful dump on the 21st November, 2001 at Whitestown. There does not appear to be any suggestion that any unlawful dumping occurred at the site thereafter. For reasons which it will be necessary to go into in a little more detail when dealing with the delay aspect of this case, and which are set out in the earlier judgment, an error was made as to the corporate entity in respect of whom there was evidence of connection with some of the dumping concerned. It was for that reason that it became necessary to add the eighth named defendant ("Dean Waste"). Mr. Steers was, for a period, a director of Dean Waste.

2.2 However it is common case that Mr. Steers was not a director of Dean Waste during the period when the alleged dumping occurred. He had, by the time the error as to the identity of the proper corporate entity was discovered, become a director of Dean Waste and was, therefore, a director of that company at the time when I made my orders of the 8th February, 2006 which had the effect of varying the parties to these proceedings. On that basis Mr. Steers was joined for the purposes of Wicklow seeking, if necessary, a form of "fallback" order in respect of Mr. Steers, similar to that which had been made by O'Sullivan J. in *Wicklow County Council v. Fenton* (No. 2) [2002] 4 I.R. 44. It also appears to be common case that Mr. Steers is no longer a director of Dean Waste.

2.3 Therefore, there seems to be no dispute as to the fact that Mr. Steers was a director of Dean Waste but only for a period after any dumping ceased and is no longer a director. Equally it is clear from the case as made by Wicklow, on the evidence currently before the court, that the only order sought against Mr. Steers is a possible "fallback" order of the type which I have noted.

2.4 In those circumstances Mr. Steers suggests that the case as against him is bound to fail for two reasons:-

- (a) it is said that no jurisdiction of the type identified by O'Sullivan J. in *Fenton* in fact, exists; or
- (b) it is said that even if such a jurisdiction exists, it could have no application to a person in a situation, such as Mr. Steers, who was not involved as a director when any alleged dumping occurred and is no longer a director.

Against that background it is necessary to turn to the legal issues.

3. Dismissal as being bound to fail

3.1 The jurisdiction of the court to dismiss proceedings where they are shown to be frivolous or vexatious (in accordance with Order 19 Rule 28 of the Rules of the Superior Courts) or bound to fail (see *Barry v. Buckley* [1989] I.R. 306) is well established. It is equally well settled that the jurisdiction should only be exercised sparingly and in clear cases (see Costello J. in *Barry v. Buckley* and McCarthy J. in *Sun Fat Chun v. Osseous Limited* [1992] 1 I.R. 425). In the later case McCarthy J., having noted that this court should be slow to entertain an application of the type, went on to state that:-

"Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture".

3.2 In like manner O'Higgins CJ noted, in *Sun Fat Chun*, that the discretion can only be exercised "on admitted facts".

3.3 There is no dispute between counsel in this application as to the applicability of those principles. Against that background it is necessary to turn to the decision of O'Sullivan J. in *Fenton*.

3.4 In coming to the conclusion that a jurisdiction existed to make "fallback orders" against the directors of a corporate entity under the provisions of the 1996 Act O'Sullivan J., at p. 62, stated as follows:-

"In interpreting the Act of 1996, I must apply the teleological principle with the result that the Act must be interpreted in a way which achieves these objectives rather than otherwise. If a principle of purely domestic law, such as the protection afforded by limited liability in the case of corporations, were to operate in a given case so as to run counter to and frustrate the attainment of those objectives then, in the absence of any other appropriate remedy, in my opinion such a principle must yield of the superior imperatives of those objectives".

3.5 On the facts of the case before him O'Sullivan J. went on to indicate that he would make fallback orders of the type sought. In substance such orders appear to arise, on the authority of *Fenton*, in circumstances where the remediation of the waste problem caused by unlawful activity cannot otherwise be achieved.

3.6 In *Cork County Council v. O'Regan* (Unreported, High Court, Clarke J. 17th June, 2005) I followed the decision of O'Sullivan J. in *Fenton*. It should, however, be noted that the primary basis adopted by me in *O'Regan* for placing liability on the personal defendant in that case was his actual involvement in the events giving rise to the proceedings rather than on the basis of a "fallback" order. I did, however, indicate that if I was wrong in that conclusion, a "fallback" order would be appropriate.

3.7 *Fenton* was also followed by Peart J. in *Laois County Council v. Scully* [2006] IEHC 2. Having quoted the relevant passage from O'Sullivan J. in *Fenton*, Peart J. went on to state that:-

"There is no reason not to apply the above principle to the present case."

3.8 There are, therefore, a number of authorities in this court which suggest the existence of a jurisdiction, in an appropriate case, to make a so called "fallback" order. Counsel for Mr. Steers, however, argues that O'Sullivan J. was wrong in reaching the conclusions which he did as to the relevant jurisdiction and in particular was wrong in considering that such an approach was mandated by the relevant European directives. On the basis of the principles set out in *Irish Trust Bank v. Central Bank of Ireland* [1976/77] ILRM 50, (where Parke J. discussed the circumstances in which a judge of a court of equal jurisdiction might depart from a previous judgment of another judge of such a court), it is submitted that it would be appropriate for the court in this case to depart from the judgment of O'Sullivan J. in *Fenton* and, by implication, the subsequent following of that judgment by myself in *O'Regan* and by Peart J. in *Scully*.

3.9 It is, of course, fully open to Mr. Steers to seek to argue, in this case, that *Fenton* was wrongly decided and to seek to persuade the court, in this case, to take a different view. However what is at issue in this application is as to whether the case being made by Wicklow is bound to fail.

3.10 Having reviewed the principles to be applied, I propose approaching the two separate issues raised on behalf of Mr. Steers in order. I, therefore, first turn to the case made to the effect that the proceedings are bound to fail because the relied on jurisdiction does not, it is said, exist at all. It seems to me that this aspect of the application to dismiss could not succeed. There is authority from this court that a so called "fallback" jurisdiction does exist. It may be possible for counsel for Mr. Steers to persuade the court that that authority is wrong. However it is difficult to envisage circumstances in which one could successfully argue that a case is "bound to fail" on the basis of an absence of jurisdiction where there is authority (whether rightly or wrongly decided) to the effect that there is such a jurisdiction. It seems to me that, in reality, what Mr. Steers seeks is to invite this court to consider, in the guise of a motion to dismiss as being bound to fail, a preliminary issue of law in which it is suggested that the existing jurisprudence of this court is wrong. It does not seem to me to be either correct or appropriate to embark on such a course.

3.11 I will turn, in due course, to the question of whether it is appropriate to direct the trial of a preliminary issue. There is an established jurisprudence as to when it is appropriate to take such a course. However to attempt to bypass that jurisprudence by bringing an application to dismiss as being bound to fail and in the course of such an application to invite the court to enter into a consideration of a complex legal issue is not, in my view, an appropriate use of the "sparing to be exercised" jurisdiction to dismiss a claim which is bound to fail.

3.12 I now turn to the second leg of Mr. Steers argument under this heading. It is pointed out, correctly, that it would appear from the judgments in *Fenton*, *O'Regan* and *Scully* that the persons in respect of whom "fallback" orders were either made, or might have been made, in those cases, were all persons who were directly involved in the events giving rise to the substantive proceedings in the first place. On that basis it is said that even if a jurisdiction exists in general terms to make "fallback orders", it could have no application to a person, such as Mr. Steers, who was not a director at the time when the alleged dumping occurred and indeed, by definition, as he has resigned, could not be a director at any time when a final court order in these proceedings might be made.

3.13 There may well be important issues which require to be resolved under this heading. Assuming the jurisdiction to exist generally, the court may well have to consider the limitations on any such jurisdiction. As noted by O'Sullivan J. in the passage from *Fenton* quoted above, the jurisdiction should only be exercised where there is no other means of achieving the objective of the proper remediation of the unlawful waste concerned. The precise extent to which that necessity may apply to persons who were not directors or otherwise involved in a corporate entity at the time when waste was unlawfully deposited is undoubtedly an issue which will have to be tried in these proceedings. However it is an issue which, in my view, is very much dependent upon the facts.

3.14 The case made by Wicklow is that Mr. Steers may, properly, be made liable, on a fallback basis, for any failure on the part of Dean Waste to deal with such obligations as might be determined by the court, at least in so far as such obligations may be attributable to a period during which Mr. Steers was, in fact, a director. It seems to me that that proposition is, at least, stateable. If that proposition is correct, the precise parameters of any order that might properly be made against Mr. Steers may well depend on a variety of factors, including the extent to which it might be considered by the court to have been appropriate for Dean Waste to have taken remedial action at a time when Mr. Steers was, in fact, a director. Such a conclusion could not be reached without going

into the facts in considerably more detail than has been possible during the hearing of a motion such as that with which I am concerned. In the circumstances it does not seem to me to be possible to conclude that the proceedings against Mr. Steers are bound to fail under this heading as well.

4. Conclusions on bound to fail

Therefore, for the reasons which I have set out, it does not seem to me that Mr. Steers has met the test necessary to persuade the court to dismiss the proceedings as against him as being bound to fail. In that context it is necessary to turn to the question of whether either or both of the issues considered might properly be directed to be tried as a preliminary issue.

5. Trial of a preliminary issue

5.1 As pointed out above Mr. Steers adopts as a fallback position the suggestion that the court should direct a preliminary issue on either or both of the matters which were raised in the context of suggesting that the case as against him was bound to fail.

5.2 It does not seem to me that the second issue (that is to say the question of whether, even if there be a jurisdiction to make a fallback order on the type identified in *Fenton*, a "fallback" order could be made on the facts of a case such as this) is an issue which could properly be directed to be tried as a preliminary issue. A preliminary issue cannot raise a point of law in the abstract. On the assumption that there is, in general terms, a jurisdiction of the type identified in *Fenton*, then the precise parameters within which such a jurisdiction might be said to operate, will, necessarily, be highly fact dependant. I am not satisfied that it would be possible to reach any meaningful conclusions concerning the limitations, if any, on the relevant jurisdiction, insofar as they might have an application to this case, without going fully into the facts. In those circumstances it does not seem to me to be appropriate to direct a preliminary issue in relation to the parameters of a jurisdiction to make a fallback order.

5.3 However different considerations seem to me to apply in relation to the issue of principle itself. That issue is not fact dependant. Mr. Steers asserts that the jurisprudence to be found in *Fenton*, *O'Regan* and *Scully* is incorrect. That raises a pure issue of law. It is also a pure issue of law which, if Mr. Steers be correct, would automatically lead to an end to these proceedings as against him. In those circumstances it seems to me that it is an issue which meets the appropriate criteria for the direction of the trial of a preliminary issue. It has the potential, indeed the certainty if decided one way, to bring an end to the proceedings so far as Mr. Steers is concerned. It does not involve the court having to consider hypothetical issues of fact without going into those facts in evidence.

5.4 In addition it seems to me that, if Mr. Steers is correct, he should not be exposed to having to defend these proceedings, which will inevitably involve him in having to deal with complex legal and factual issues. This will be so not least because of the particular position of Mr. Steers in not having been a director at the time of the alleged unlawful deposition of waste. Nonetheless if he is to be made, even in part, responsible, on a "fallback", basis, for the remediation of that waste, he will have to involve himself in issues concerning the extent of that waste, the measures necessary to remediate it and the extent to which others (whether it be Dean Waste, other personal defendants connected with Dean Waste, or other parties) should share any such burden. In my view the balance of justice leans towards affording Mr. Steers the opportunity to persuade the court that he should not be involved in that process at all on the basis that no jurisdiction to make a fallback order exists.

5.5 In those circumstances I propose directing that a preliminary issue be tried as and between Mr. Steers and Wicklow as to:-

"Whether, on a true construction of the law, a "fallback" order may be made against individual directors and/or shareholders of a corporate entity under the provisions of the Waste Management Act, 1996 (as amended)".

6. Delay

6.1 Under this heading Mr. Steers seeks the dismissal of the proceedings against him under a number of headings arising out of what he alleges is a delay in the bringing of the proceedings generally and in particular the proceedings as against him.

6.2 In summary it is alleged that the claim should be dismissed for any one of the following grounds:-

(a). An alleged want of prosecution on the grounds of inordinate and inexcusable delay on the part of the plaintiff in the commencement and prosecution of the proceedings;

(b) On the grounds that the maintenance of the claim as against Mr. Steers is contrary to the interests of justice and infringes the rights of Mr. Steers under the Constitution, and, in particular, his rights to natural and constitutional justice, fairness of procedures and a fair trial; and

(c) On the grounds that the maintenance of the claim infringes the rights of Mr. Steers under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") as applied in this jurisdiction by the European Convention on Human Rights Act 2003 and in particular his right to a fair hearing and a trial within a reasonable time.

7. Inordinate and Inexcusable Delay

7.1 The jurisprudence under this heading is well settled. The basic test for the exercise of the court's discretion is still to be found in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. However the Supreme Court recognised in *Gilroy v. Flynn* (Unreported, Supreme Court, Hardiman J., 3rd December, 2004) that there had been significant developments in the area including the decision of the European Court of Human Rights in *McMullen v. Ireland* (No. 422 97/98, 29th July, 2004).

7.2 Thereafter this court in *Stephens v. Paul Flynn Ltd.* (Unreported, High Court, Clarke J., 12th April, 2005) and *Rogers v. Michelin Tyre Plc* (Unreported, High Court, Clarke J., 14th November, 2005) noted that a stricter approach to compliance with reasonable time constraints was now mandated in the light of the Supreme Court decision *Gilroy v. Flynn*.

7.3 Equally there can be little doubt that a party, such as Mr. Steers, is entitled, as a matter of constitutional right, to an expeditious trial and one which is not delayed in such a manner as might cause prejudice to his ability to defend the action. Similarly his rights under the Convention are to like effect.

7.4 Therefore it seems to me that under the first of the contended for bases for dismissing the claim, the court has to consider whether there was inordinate and inexcusable delay and if there was where the balance of justice lies in relation to permitting the

proceedings to continue. In addition the court needs to consider whether there has been a breach of the right to an expeditious trial and whether a fair trial is now possible. Against that background it is necessary to turn to the contended for delay.

7.5 In his submissions to this court counsel on behalf of Mr. Steers divides the period of any contended for delay into six parts as follows:

- (a) The period from the commencement of the alleged unauthorised activities to the date of the discovery of the site which would appear to be November, 2001.
- (b) The period from November, 2001, to the 4th March, 2005, when the proceedings were commenced.
- (c) The period from the 4th March, 2005, to the 8th February, 2006, being the period between the commencement of the proceedings and the joinder of Mr. Steers.
- (d) The period from the 8th February, 2006, to the 30th May, 2006, being the period from when the order joining Mr. Steers was made to the date when an amended summons dealing with the claim as against Mr. Steers was issued.
- (e) The period from the 30th May, 2006, to the 10th October, 2006, during which period a summons as against Mr. Steers had been issued but not served upon him.
- (f) The period from the 10th October, 2006, to date.

7.6 Some of those periods can be readily dealt with. Mr. Steers issued the motion with which I am concerned on the 28th November, 2006. Through no fault on the part of any of the parties it is only now that it is possible to reach a determination of the issues raised. There has not, therefore, been any material delay during that period. While there was, *prima facie*, a delay of over four months from the issuing of the summons to its service on Mr. Steers, there is no doubt but that difficulty was encountered by Wicklow in attempting to effect service. Messrs A & L Goodbody, who act for Dean Waste in the proceedings, were initially served but indicated that they did not have instructions on behalf of Mr. Steers. A subsequent attempt to serve Mr. Steers by registered post failed as the documents were returned. Thereafter personal service was affected. It does not seem to me that any blame can be placed on Wicklow for those matters.

7.7 Similarly there were practical difficulties concerning the form of the amended summons which required the matter to be brought back before the court in order to clarify the appropriate form in which the amended summons was to be issued. In those circumstances no blame can be attached to Wicklow in respect of that period either.

7.8 Therefore, in summary, I am satisfied that the case has moved with a reasonable expedition since the order was made joining Mr. Steers in February of 2006 and it cannot be said that there has been any inordinate or inexcusable delay during that period.

7.9 While strictly speaking a period prior to the commencement of the proceedings is not relevant to the question of inordinate or inexcusable delay it can, in my view, have an indirect relevance in one of two ways. Firstly it is well settled that a case which is late in starting must be proceeded with with great expedition. Secondly insofar as the overall balance of justice is concerned the court can have regard to the totality of delay between the date of the events giving rise to the proceedings and any likely date of hearing.

7.10 However I am satisfied on the affidavit evidence of the law agent of Wicklow that the steps which were required to be taken after the discovery of the alleged illegal dump in question and the commencement of proceedings involved complex questions relating to environmental testing and the identification of potential defendants. In all the circumstances I am not satisfied that that period (or indeed the extended period up and until Mr. Steers was joined) could be said to be characterised by inordinate and inexcusable delay. Nor am I satisfied that the totality of the periods which I have analysed can be so characterised. I have considered that question because it seems to me that while it is, of course, important to analyse each period that has elapsed from the events giving rise to a cause of action to the trial by reference to what was happening (or not happening) during the relevant period, nonetheless the court should also have regard to the overall period in its considerations.

7.11 In all the circumstances I am not satisfied that it has been established that there has been inordinate delay and even if I am wrong in that conclusion it seems to me that there is a good and reasonable explanation for each element of the delay which occurred. In coming to that view I have also had regard to the fact that proceedings of this type are mandated by Directives of the European Union.

Those directives require that appropriate steps be taken to deal with unlawful waste. While that fact could not be said to warrant the continuance of proceedings which would amount to a breach of the rights of a defendant or respondent under the Constitution or under the Convention nonetheless it is clear that the nature of the proceedings is a factor which can properly be taken into account and it seems to me that that factor clearly favours the continuance of these proceedings in the absence of any significant prejudice.

8. Prejudice

8.1 In those circumstances it seems to me that the only basis upon which it would be appropriate (in the absence of inordinate and inexcusable delay) to dismiss these proceedings by reason of the time which has elapsed, is if it could be shown that such a degree of prejudice has occurred as would make it unjust to permit these proceedings to continue. I would emphasise that in approaching the matter in that way I am not considering the finer balancing of rights and obligations with which the court is concerned in determining where the interests of justice lie in a case where inordinate and inexcusable delay is established. Rather I am considering whether there is some overriding consideration which ought prevent the continuance of these proceedings notwithstanding the absence of inordinate and inexcusable delay.

8.2 The only matter of prejudice put forward is an unusual one. There is no suggestion that Mr. Steers will be in a worse position to defend the proceedings today than he would have been at any other material time.

8.3 Rather it is said that Mr. Steers would not be the subject of the proceedings at all, were there not delay. In that context it is asserted, correctly so far as it goes, that Mr. Steers only became a director of the company at a time well after the existence of the alleged illegal dump was discovered. In those circumstances it is further suggested that if the proceedings (and in particular proceedings naming individual directors of Dean Waste), had been commenced in a timely fashion, same would have been commenced at a time when Mr. Steers had not yet become a director. In those circumstances, it is said that Mr. Steers would have had an opportunity to decline to become a director of Dean Waste in the knowledge that, by becoming such a director, he would be exposing himself to the risk of being joined as a respondent to these proceedings.

8.4 The extent to which there may be real prejudice to Mr. Steers under this heading is not, in my view, clear at this stage. I do not at all rule out the possibility that a consideration of facts, such as those which I have just outlined, may very well be a real consideration for a court in determining whether it is appropriate to make any order against Mr. Steers. I could well envisage that a court might be persuaded that, irrespective of the normal parameters (if any) of a jurisdiction to make fallback orders, it might not be appropriate to make an order against a person where, having regard to the history of the proceedings including the time when the proceedings as against that individual were commenced, such person might be said to have been unfairly prejudiced by the course of the proceedings. I do not, therefore, rule out the possibility that these issues may be relevant at the trial. However it does not seem to me that it would be appropriate, at this stage, to conclude that there has, necessarily, been prejudice of a type and of a degree as would warrant the dismissal of the proceedings at this stage.

8.5 I am strengthened in that view by the fact that no case was made on behalf of Mr. Steers that he would be prejudiced in the conduct of his defence per se. That defence can, if considered appropriate, include issues such as the ones which I have just identified. If he has a valid point to make under that heading then it will, undoubtedly, be properly taken into account by the trial judge.

8.6 In those circumstances I am not satisfied that it has been established that allowing this matter to go to trial would amount to a breach of the rights of Mr. Steers under either the Constitution or the Convention.

9. Conclusions

9.1 I am not, therefore, satisfied that Mr. Steers has made out a case for the dismissal of these proceedings under any of the delay headings asserted. For the reasons which I have already addressed I am not satisfied that Mr. Steers has made out a case for the dismissal of the proceedings as being bound to fail. I am, however, persuaded that it is appropriate to direct the trial of a preliminary issue in the terms specified in para. above.

9.2 I should, however, emphasise that in my view the conduct of the trial of that preliminary issue should not, in anyway, delay the substantive proceedings and it will be necessary, therefore, for Mr. Steers to participate fully in those proceedings unless and until a favourable order is made (from his prospective) on the preliminary issue. However having regard to the fact that the preliminary issue is a pure question of law in respect of which counsel for Mr. Steers has already prepared detailed and comprehensive submissions, it does not seem to me that there should be any significant delay in the hearing and determination of that issue. I will hear counsel further on the logistical arrangements that require to be put in place to ensure such a timely determination of that preliminary issue.