[2020] IEHC 449

THE HIGH COURT

[2015 No. 272 MCA]

BETWEEN

MEATH COUNTY COUNCIL

APPLICANT

AND

EILEEN HENDY, FRED HENDY, GREEN ENERGY RECYCLING LIMITED, MARK FARRELLY, MARK FARRELLY PLANT HIRE LIMITED, PADRAIC MCDONNELL TRADING AS MCDONNELL HAULAGE, GERARD CONROY AND ANDREW FOX

RESPONDENTS

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Monday the 14th day of September, 2020

1. On 11th September, 2015 the present proceedings were instituted by originating notice of motion seeking orders under s. 57 of the Waste Management Act 1996 requiring the respondents to discontinue the unauthorised holding, recovery and disposal of waste on the respondents' lands (which are registered as folio MH2659), as well as a battery of other reliefs including orders for remediation.

2. On 19th October, 2016 a final order in the proceedings was made by Noonan J., including an order that the respondents were to discontinue the holding, recovery and disposal of waste on the site. Unfortunately, they haven't done that.

3. The council then brought a contempt motion dated 11th February, 2019 which I dealt with in *Meath County Council v. Hendy (No. 1)* [2020] IEHC 142, [2020] 3 JIC 0305 (Unreported, High Court, 3rd March, 2020). In the light of issues about the wording of that notice of motion, I allowed the council to bring a fresh contempt motion, which they did, by way of a motion that was made returnable for 13th July, 2020.

4. Relief 1 in that motion was a declaration that the respondents are in contempt of court. I made that declaration on 27th July, 2020, and adjourned the balance of the motion to 31st July, 2020 allowing the respondents to put in a replying affidavit by close of business on 30th July, 2020. I have now considered the full set of papers in the present motion and in the proceedings overall to date, going back to 2015, and have heard helpful submissions from Ms. Deirdre Hughes B.L. for the council and from Mr. Oisin Collins B.L. for the respondents. After hearing the motion on 31st July, 2020, I announced the order and indicated that reasons would be given later, which I am now doing.

Failure of the first-named respondent to attend

5. In the *(No. 1)* judgment, I directed the respondents to attend at any resumed hearing, but when the matter resumed on 31st July, 2020 the first-named respondent wasn't there. No advance notice as to non-attendance had been given and there was no medical certificate. However, it is not necessary to make any order specifically in relation to that aspect for reasons that will become apparent.

Respondents' allegation that the matter had been settled

6. Mr. Collins objected that the matter had been settled and thus that the council should not be entitled to proceed with their motion. Unfortunately, he hasn't put in any evidence

whatsoever on this issue, still less evidence establishing the existence of a settlement. The height of it is a letter of 30th July, 2020 sent on behalf of the *respondents*, not the applicant. Obviously not only is that not evidence, but it doesn't really prove anything. Yes there were some negotiations, but it is hard to see any unequivocal outcome dealing with all aspects even on the face of that correspondence. Under those circumstances, the respondents do not have a valid legal complaint just because the council has decided to proceed with its motion. Sure, negotiations often break down at the last minute, but they are also often only conducted at the last minute as well. The fixing of a date is a stimulus in that regard, but the late failure of pre-hearing negotiations is not generally (and certainly not here) a legally valid basis to say that the moving party can't legitimately proceed. The respondents have already had quite a lot of time to comply with the order against them.

Appropriate penalty for contempt

7. The council's main concern is to remediate the lands. There are basically two ways that can be done. The respondents can remediate it, and can possibly be imprisoned until they organise that, or alternatively the council can remediate the lands with some form of recourse to the respondents' assets to do so. Mr. Collins claims that the respondents have been trying alternative solutions, but that unfortunately on these facts is meaningless. They have done nothing effective for a three-year period. Good intentions ring hollow when offered at the eleventh hour and when chances to give effect to them have been frittered away. We can realistically discount the notion of the respondents doing so despite Mr. Collins' strenuous submissions. It would be a fool's errand for me to give them yet a further chance to begin to do something from a standing start, three years on from Noonan J.'s as-yet-unimplemented order. The applicant, therefore, has to do it, and must have recourse to the respondents' assets to do so.

8. The respondents' lands amount to approximately 253 acres, of which a total of 3 acres are contaminated, so a large amount of the lands are available for sale. According to the affidavit of Anne Marie Casey of 1st September, 2015 exhibit AMC 1 (tab 3, p. 12), the cost of remediation in option 1 (which was the option directed by Noonan J.) is €6.26 million. Eight-ninths of the lands are held by the first-named respondent and one-ninth by the estate of her late husband. The lands include the homes of both respondents.

9. The affidavits of means offered on behalf of the respondents refer to lands worth €665,000. Ms. Hughes queries whether these are additional lands. Mr. Collins rejects this on instructions, but the situation is far from clear on the face of the affidavits. It may be that cross-examination will be needed in due course. The affidavits of means do however indicate that there are no mortgages or charges on the lands.

10. Ms. Hughes set out a number of options for the court:

    (i). as regards imprisonment, one could generally look at alternative options before getting to that;

(ii). alternatively, she suggested the council or a party directed by the court should remediate and charge the lands with the cost of remediation;

(iii). the court could order a fine, payable to the council rather than the State which would then be charged on the land and the proceeds used for remediation - that was her preferred option;

(iv). she also suggested the court could grant an injunction restraining the respondents from dealing with the lands; and

(v). she sought liberty to apply if, for example, further inquiries indicated that there were additional assets.

11. Mr. Collins argued that the remediation might end up being less than what was ordered by Noonan J., so he thought that there should be a hearing as to what was to be done. The problem with that submission is that the order of Noonan J. doesn't direct the council to do anything. It is an order against the respondents requiring them to take a series of steps. Therefore, if the council for whatever reason think that a different form of remediation is necessary, they aren't precluded by the order of Noonan J. from forming such a view.

12. Mr. Collins also wanted to put in further affidavits, but it's way too late for that. He has had years to do so, and even the *(No. 1)* judgment specifically allowed the respondents to put in affidavits by way of defence, which they didn't do. On top of endless previous chances to put in affidavits in these proceedings, the order of the 27th July, 2020 was a final opportunity which wasn't taken. The demand for a further hearing is unfortunately an exercise in playing for time. Mr. Collins claims he was handicapped in making a submission on the question of a fine because he didn't know on what basis it was being sought, but the basis is very clear – the respondents didn't comply with Noonan J.'s order, and have been found in contempt, so an order is appropriate to ensure that the lands will be remediated. The cost of doing so has already been set out on affidavit as noted above.

13. Mr. Collins also majored on his clients' rights – rights to property, rights to personal liberty and rights to fair procedures. Unfortunately, property rights and rights to personal liberty are subordinate to the requirement to comply with court orders, which the respondents haven't done. Their rights to fair procedures aren't infringed either, because there have been multiple opportunities to put forward any kind of a legally valid defence or to comply with Noonan J.'s order. Unfortunately they haven't done either.

14. The most effective order and the one that is most appropriate in all the circumstances is Ms. Hughes' preferred option of a fine payable to the council by the respondents to be charged on the lands to fund the remediation. The fact that the costs of remediation are probably going to be in excess of the respondents' means is irrelevant. Fennelly J. made the point in *Laois County Council v. Hanrahan* [2014] IESC 36, [2014] 3 I.R. 143 at 187, that *"if compliance is truly beyond the reach of one's capacity, imprisonment as a*

coercive means should not be resorted to. That is not to say that other measures may not be considered. Ultimately this becomes a matter for the trial judge." This means that while the court should not imprison somebody for non-compliance which is beyond that person's means, the court is not precluded from a fine or other measures, even if the fine is going to be greater than the means available to that person. Such a fine can't be enforced beyond the respondents' means anyway. An alternative option, maybe conceptually neater, would be to appoint a sequestrator over the assets and income of the respondents under O. 43, r. 2 of the Rules of the Superior Courts, but Ms. Hughes didn't press for such an order in that form. The order I am making is in effect not that different however. The theory that a court can't fine a defaulter more than their assets is a polluter's charter and a defaulter's dream, because of the sheer practical difficulty of framing such an order, the delay involved, the pointless technicality and artificiality, the pretence at precision in trying to snapshot the value of a respondent's assets, the possibility that assets whether present or future may escape, and the breach of the polluter pays principle. I've obviously considered the evidence as to the respondents' assets and the evidence as to the cost of compliance with Noonan J.'s order, which is considerably greater. But the fact that it is greater does not provide a defence, or a basis to dilute fixing the respondents with the costs of the remediation. Such an order ensures that whatever assets they have will be available, whereas an order artificially limited to my estimation of their present assets would not. It goes without saying that they can't be imprisoned for failure to pay the balance of the fine once their assets have been exhausted.

15. Finally, I should emphasise that the fine I am ordering in this case is coercive rather than punitive, in the sense that the purpose of the fine is not to punish the respondents for their 3-year-long contempt of court by failing to comply with Noonan J.'s order, but to ensure that the remediation actually happens. As the respondents have squandered the opportunity to do that themselves, I am ordering that the remediation will be done on the direction of the council. I will ensure that the coercive aspect is built into the order, however, by requiring the council to return any balance to the respondents if the remediation can be achieved within the scope of monies recovered from the respondents, making due allowance for the council's entitlement to costs and interest.

Order

16. Accordingly, on 31st July, 2020, I ordered that:

(i). the application that the matter should be adjourned for further evidence or otherwise stand refused;

(ii). the respondents jointly and severally pay a fine as sought in para. 5 of the notice of motion which will be payable to the council (rather than the Courts Service or Central Government) in the amount of €6.26 million;

(iii). the fine is to be a charge on the lands such that the council would have liberty to register the order of the court as a charge over any assets of the respondents and to exercise a power of sale over the whole or any part of such assets provided that:

(a). one-ninth part of any proceeds of the sale of folio MH2659 (representing the interest of the estate of the late Fred Hendy Snr.), would be held by the solicitor for the council pending further directions of the court; and

(b). the contaminated parts of the lands may not be sold unless and until the waste has been removed therefrom;

(iv). there would be an injunction restraining the respondents and each of them from dealing in any way whatsoever with their lands, or property representing the proceeds of the lands;

(v). in the event that the council is satisfied that the lands have been remediated and that the cost of remediation (together with any costs due to them in the proceedings and any interest thereon) is less than the amount actually recovered from the respondents, the council are to return any surplus balance to the respondents; and

(vi). there is to be liberty to apply regarding attaching any further income or assets of the respondents with liberty to seek a further listing and cross-examination of the respondents and either of them.

17. When I invited views on costs, Mr. Collins sensibly didn’t make any submission as to why costs of the present motion, including reserved costs, shouldn’t be granted to the council, so I made that order as well.