[2020] IEHC 142

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

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of March, 2020

1. At some point in the period around 2004 to 2012, between 70,000 and 100,000 tonnes of waste were deposited in an illegal dump at Ballynakill, Co. Meath on land owned by the first named respondent, which was being farmed by the second named respondent. The remaining respondents have dropped out of the case (so reference to the respondents means the first and second respondents).

2. On 20th March, 2004, Meath County Council received a waste permit application form from the second named respondent. The council sought further information which was not provided, and the application was deemed incomplete and returned. No further waste permit applications were made in respect of the lands. Nonetheless, significant dumping of waste occurred on the lands, and an inspection on 23rd November, 2012 identified two landfills containing *inter alia* building materials and mechanically treated waste crushed into filings. The council served a notice under s. 55 of the Waste Management Act 1996 on 10th December, 2012. It then appointed Mr. Declan Grimes, Waste Enforcement Officer, to conduct a tier one environmental risk assessment, which identified that there was mixed waste present in both landfills, estimated, as mentioned above, as between 70,000 and 100,000 tonnes including household, commercial, construction & demolition and hazardous waste including broken asbestos waste.

3. The council then appointed URS (now trading as AECOM Consulting Engineers) to prepare a tier two environmental risk assessment. The option identified as preferable by AECOM and the council was the removal of the waste material, which would cost an estimated €6.14 million or possibly less depending on the quantum of hazardous waste that turned out to be present.

4. On 11th September, 2015, the present proceedings were instituted by originating notice of motion seeking orders under s. 57 of the 1996 Act requiring the respondents to discontinue the unauthorised holding, recovery and disposal of waste at the site as well as a battery of other reliefs including orders for remediation. On 19th October, 2016 a final order in the proceedings was made by Noonan J., which can be summarised as follows:

   (i). the respondents were to discontinue the holding, recovery and disposal of waste on the site - they haven't done that;

   (ii). they were also to discharge the costs incurred by the council in its investigations and reports - in that regard, the council sent a schedule of costs on 29th

November, 2017 in the amount of €209,554.74, but that includes not just the investigation costs, but also the purely legal costs which are a matter for legal costs adjudication; nonetheless, the respondents have not paid anything under either heading; I should also note that the costs of the enquiries and reports do not seem to be a matter for legal costs adjudication, but rather for the court to quantify if not agreed;

(iii). the respondents were to carry out remediation in accordance with a timetable in the third appendix to the second schedule of the order - again they have not complied with that requirement;

(iv). the first named respondent was to make lands available for access, and access apparently has been allowed when asked for, and he respondents were also to provide documents set out in part one of the second appendix to the second schedule of the order - however, those documents were not submitted to the Environmental Protection Authority; the respondents were also to permit EPA monitoring, but the matter did not get to that point;

(v). the respondents were to pay the costs and expenses of the council's management of the landfills within one month of receipt of itemised bills - no such bills were submitted so no contempt of court arises under that heading; and

(vi). the respondents were also to pay costs including reserved costs to the applicant - that matter is currently in the legal costs adjudication process, which has been suspended pending the determination of the current application.

5. On 20th June, 2017 a further order of Noonan J. was made providing for substituted service of the original order and an extension of time for the works concerned to begin, to run once the original order was so served. Such service occurred on 28th July, 2017 in the form of orders endorsed with a penal endorsement. In November, 2019 the second named defendant pleaded guilty in long-running criminal proceedings in Trim Circuit Court to an offence under s. 32 of the 1996 Act arising from matters the subject of the present application. He was remanded in custody awaiting sentence and appeared at the hearing of the present motion on foot of a production order made by Meenan J. on 27th February, 2020.

6. On 4th December, 2019 the second named defendant appears to have written a scandalous letter to the council, a copy of which has been produced, demanding €365 million from the relevant council official. The tone of that letter is grandiose and threatening and it certainly does nothing for the second named defendant's position.

7. The applicant now moves on foot of a notice of motion dated 11th February, 2019 seeking attachment and committal of the first and second named respondents for "*neglecting to obey and comply with the terms of the orders"* of 19th October, 2016 and 20th June, 2017.

8. I have received helpful and indeed vigorous submissions from Ms. Deirdre Hughes B.L. and Mr. David McEntee, Solicitor (who also briefly addressed the court on some specific taxation-of-costs-related issues) for the applicant, and from Mr. Oisin Collins B.L. for the respondents. I have also received a full set of pleadings in the original substantive application as well as in respect of the present contempt motion.

Procedure for a contempt application

9. Contempt procedure is notoriously complex and stubbornly resistant to judicial clarification, despite repeated efforts. One clear distinction, however, is between coercive and punitive orders. Ms. Hughes made it explicit that her application is coercive rather than punitive. She says that I can punish the respondents as well on my own initiative if I see fit, but I am not sure that that would add anything to the situation other than unnecessary complication.

10. The notice of motion for attachment and committal does not refer to O. 44 of the Rules of the Superior Courts. Ms. Hughes *did* refer to that order in oral submissions, but seemed to be majoring on the inherent or common law jurisdiction of the court discussed by Peart J. (Irvine and Hogan JJ. concurring) in *McCann v. Malone* [2018] IECA 179 (Unreported, Court of Appeal, 21st June, 2018) at paras. 10 to 13. Order 44 is not a model of clarity of drafting, but the procedure envisaged is basically evident enough. The moving party brings a motion under O. 44 r. 3 seeking leave for the attachment and committal of the person in default. The court can then make either an order of attachment under O. 44 r. 1, requiring the person to be brought before the court itself to answer for the contempt, or alternatively an order of committal under O. 44 r. 3, requiring the person to be imprisoned until either he or she purges the contempt or until further order. However, the inherent and common law powers of contempt are significantly wider.

11. For example, the court has an inherent jurisdiction to impose financial penalties such as a fine as an alternative to imprisonment. The court can also give such substantive or procedural directions or orders as will ensure that its orders are upheld, an objective that takes precedence over minor procedural infelicities (as pointed out by Peart J. in *Laois County Council v. Scully* [2007] IEHC 212, [2009] 4 I.R. 488).

12. Ms. Hughes said that the order she was looking for was not so much an order for the immediate imprisonment of the respondents, but for an inquiry into whether or not the respondents are going to comply with the order of Noonan J. That seems to me to be an unnecessarily roundabout way of dealing with this issue. The normal way for the court to be satisfied that orders are not being complied with is for the moving party to actually seek attachment or committal, or both (or, I could add, some other coercive order such as a financial one). There is no particular necessity (at least in general) for a free-standing inquiry into whether a party intends to comply with an order, independently of an application for something specific to happen on foot of such an inquiry, such as attachment or committal.

13. In the circumstances of this case, there is no particular need for an inquiry. The respondents are saying that they are not going to comply with the order because they say

it is impossible to comply with the order. The three reasons advanced for that alleged impossibility were firstly, that the second named defendant is in custody; secondly, that the first named defendant is elderly and was not involved with the running of the operation; and thirdly, that the respondents do not have the money to remediate anyway. That latter point invokes the doctrine in *Laois County Council v. Hanrahan* [2014] IESC 36, [2014] 3 I.R. 143 *per* Fennelly J. 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*".

14. The respondents were also saying that the end goal of the order is inappropriate and suggest that the court should revisit the substantive content of the order sought to be enforced. However, we do not get to that issue because contempt is not a process for revisiting the merits of the original order. The process would be endless if that were so.

15. A further complication is whether the court can or should separate a finding of contempt of court from the question of what consequential order is appropriate. The judgment in *Hanrahan* reflects that distinction, although O. 44 doesn't. At p. 186 of *Hanrahan*, Fennelly J. leaves in place the finding of contempt by the trial judge in that case and remits back to the High Court the question of what appropriate order should follow. That recognises and accepts the legitimacy (at least where there is an added value in doing so) of the court separating the question of a threshold finding as to whether contempt has occurred from the secondary question of what appropriate order should be made on foot of that finding. It seems to me, therefore, that the correct process for a coercive order in respect of civil contempt is as follows:

    (i). if there is some added value to a separate preliminary finding in that regard, the court can first make a finding *simpliciter* as to whether the respondent is in contempt or not;

    (ii). if so, the question of whether and to what extent a respondent has the capacity to comply with the order may need to be decided on, if that is an issue; and

    (iii). finally there is the question of the appropriate order, if any, on foot of any finding of contempt, which includes, but is not limited to the custodial orders referred to in O. 44, but may include financial orders as well; and in particular if there is no capacity to comply, or limited capacity, the court may have to confine itself to non-custodial options, such as orders addressed to assets.

16. In this case the position is as follows:

    (i). the respondents accept that they haven't complied with the order of Noonan J., although they do not accept that that should be called contempt;

    (ii). the respondents are pleading poverty, but have not put forward any appropriate evidence in that regard; and

(iii). as regards the appropriate order, there seems to be at least some acceptance in correspondence that consideration may need to be given to a financial, rather than an imprisonment-based, solution to the problem, although the primary obligation to identify the remedy is on the council as moving party to put forward specifically to the court what kind of financial order might be appropriate.

11. For the sake of making the ultimate disposal of the proceedings as simple and convenient as possible, it seems to me best in all the circumstances to allow the applicant (if it wishes to do so) to restructure its motion in those terms. The second named respondent has expressed a desire to show co-operation in the context of the criminal proceedings, and indeed such a restructuring will perhaps have the advantage of allowing him to demonstrate such co-operation in any reply, if he so wishes.

12. The question of revisiting the merits of the original order as sought by Mr. Collins does not arise. The fact that he describes this as the "*primary issue*" does not change that legal reality. The enforcement stage is not a mechanism to revisit the question of whether the original (and here, as it happens, unappealed) orders should have been made in the first place.

13. Strangely, the council has not registered a *lis pendens* in relation to the property, but presumably they will consider doing so pending finalisation of the matter.

Order

14. Accordingly, the appropriate order will be as follows:

(i). there will be no order on the existing notice of motion;

(ii). I will give liberty to the applicant to bring a further motion seeking such of the following reliefs as it wishes:

(a). a declaration that the respondents are in contempt of court; in that regard I accept that this is not strictly necessary, but there may be an advantage to a separating of that issue in this case;

(b). a specific order for attachment and committal under O. 44 rr. 1 or 2, or both, as opposed to merely an inquiry asking the respondents to answer for their contempt (as the existing motion does);

(c). the council can particularise (if it wishes) the possible financial orders that could be made as an alternative to imprisonment or alternatively seek such other orders by way of enforcement as are appropriate; and

(d). if the council wants the court to quantify the costs of the investigation envisaged by para. 2 of the order of Noonan J., it can seek that relief backed up by appropriate evidence;

(iii). any such motion must specifically set out by reference to each paragraph of Noonan J.'s order precisely what conduct or failure by each respondent constitutes the contempt alleged;

(iv). I will direct the respondents to each file affidavits of means and give them liberty to submit any other evidence they wish by way of defence;

(v). I will also list the matter again in early course for mention and retain *seisin* for now as requested by Ms. Hughes;

(vi). there will in principle be a production order directed to the Governor of Cloverhill Prison for the production of the second named respondent for the substantive hearing of the motion;

(vii). I will also direct the first named respondent to attend in person and likewise, will direct that if the second named respondent is at liberty on the date of such hearing, he must also attend;

(viii). given the previous difficulties with service, I will direct that by consent (helpfully conveyed to the court by Mr. Collins) the service of the new motion and grounding affidavit and any further documents may be effected by way of substituted service by ordinary post on the respondents' solicitors;

(ix). I will hear counsel on the timescale for all of this to happen; and

(x). I will also record that there is no necessity for re-service of the original order as endorsed with the penal endorsement, and indeed Mr. Collins has clarified that there is no issue being taken on that.