# THE SUPREME COURT

[Appeal No. 391/2010]

Laffoy J.
Dunne J.
O'Malley J.

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

**BETWEEN**

**MONICA MULLER**

**APPLICANT/APPELLANT**

**AND**

**SHELL E&P (IRELAND) LIMITED**

**RESPONDENT**

**Judgment of Ms. Justice Laffoy delivered on the 14th day of June, 2017**

## Background to appeal

1. The original source of this appeal is District Court proceedings which were initiated by Monica Muller ("the Appellant") against the respondent ("Shell") in October 2007. What triggered the District Court proceedings was that Shell purported to give notice of its intention to enter commonage lands situate at Rossport in North County Mayo, which will be referred to as the "Rossport Commonage", pursuant to the provisions of s. 26 of the Gas Act 1976, as amended ("the Act of 1976, as amended"), to carry out site investigations. At the time the Appellant was the owner of one undivided sixty second share of the Rossport

Commonage. However, she was not given notice of the intention of Shell to enter on the Rossport Commonage in accordance with the requirements of the Act of 1976, as amended. At the time Shell was not the owner of any interest in the Rossport Commonage.

**2.** The original application brought by the Appellant against Shell was the subject of an order of the District Court made on 14th November, 2007 by Judge Mary Devins ("the District Court judge"). The order recited that –

> ". . . an application was made to [the District Court judge] pursuant to the provisions of Section 26(4) of the [Act of 1976], as amended, by [the Appellant] (being a person who is the Occupier and/or Owner of a share in [Rossport Commonage]) for an order prohibiting entry on to such lands by [Shell], its servants and/or Agents, either to carry out site investigations or otherwise".

In the order made by the District Court judge it was adjudged as follows:

> "An order for prohibition was granted until such time as the provisions of the [Act of 1976] have been complied with".

That order, which will be referred to as "the 2007 Prohibition Order", was not appealed against.

**3.** Following some procedural intervention, in March 2009 the Appellant brought an application in the District Court seeking orders for the attachment and committal of, *inter alia*, Shell for breaching the terms of the 2007 Prohibition Order on various dates in July 2008 and subsequently throughout January 2009. By that time, Shell had acquired one undivided sixty second share in the Rossport Commonage, such acquisition, apparently, having occurred by virtue of a transfer dated 28th May, 2008 by the registered owners of that share to Shell. Following a very thorough and comprehensive process in the District Court in Ballina, County Mayo, the District Court judge ruled on that application on 4th September, 2009. She found that Shell had been guilty of contempt. Following that ruling, Shell, being dissatisfied with the determination of the District Court judge, applied

to the District Court judge to state a case for the opinion of the High Court. The appeal by way of case stated ("the Case Stated"), as signed by the District Court Judge, was dated 8th December, 2009.

**The Case Stated**

**4.** In the Case Stated the factual and procedural circumstances were set out very clearly by the District Court judge. The starting point, as recorded, were steps taken by Shell in October 2007, being that Shell –

(a) "purported" to serve notice under s. 26 of the Act of 1976, as amended, on ascertained and potential owners or licensees of the Rossport Commonage,

(b) published in the Mayo Echo and in other local newspapers a public notice of its intention to enter on Rossport Commonage pursuant to the provisions of s. 26 of the Act of 1976, as amended, to carry out investigations, and

(c) affixed notices in similar terms at the entries to the Rossport Commonage.

Having referred to the application made to her on 14th November, 2007, the District Court judge stated that she held that there had not been valid service of the notice on the Appellant in accordance with the provisions of s. 5 of the Act of 1976. She decided to allow the application, notwithstanding that it was contested by Shell. She made the 2007 Prohibition Order, the terms of which were then quoted. That order was not appealed by Shell.

**5.** The District Court judge then outlined the process which followed the Appellant's application for orders for attachment and committal against Shell and others, being named servants and agents of Shell. The application was adjourned from time to time. After the first adjournment, to 14th May, 2009, only Shell remained as a respondent on the application, the application against the other parties having been struck out. At the hearing on 26th May, 2009 evidence was adduced of the following matters:

(a) that Shell had purchased a one undivided sixty second share of Rossport Commonage in May 2008;

(b) evidence in relation to various breaches of the 2007 Prohibition Order;

(c) that no further notice of intention to enter Rossport Commonage under s. 26 of the Act of 1976, as amended, had been served by Shell on the Appellant since the 2007 Prohibition Order was made, although the Appellant was notified of Shell's intention to enter for the purpose of "walk over surveys" once Shell had acquired a share in Rossport Commonage;

(d) that, subsequent to the acquisition of a share in the Rossport Commonage, Shell notified the Appellant of the fact of such purchase and of its intention to enter the Rossport Commonage; and

(e) that the Appellant's solicitor had advised Shell by letter dated 16th July, 2008 to apply to the District Court to vacate the 2007 Prohibition Order.

**6.** The next adjourned hearing was on 26th June, 2009. Once again, the District Court judge outlined the evidence adduced with clarity in para. 3(i) of the Case Stated. She recorded that evidence was adduced that there had been no entry onto Rossport Commonage by Shell before the purchase of the undivided share or prior to July 2008. Further she recorded that it was accepted that Shell had not made an application to the District Court seeking to vacate the order of 14th November, 2007 after the purchase of the commonage share. Also, significantly, she stated in this paragraph:

> "Subsequent to the purchase by [Shell] of a share in [Rossport Commonage] servants or agents of [Shell] entered thereon and evidence in this regard was given to the Court on the 26th day of June 2009. On entering [Rossport Commonage], as adduced in evidence, Representatives of [Shell] carried out surveys on the said Lands; including walking on the said Lands, carrying out observations of the flora and fauna thereon; and determining by means of tests the peat depth and type."

It was recorded that the hearing was further adjourned to enable the parties to prepare and lodge written submissions. That was obviously done and, although written submissions filed on behalf of the parties in the District Court, including certain documents appended to them, have been put before this Court, regard has not been had to those documents because this Court was informed that they were not before the High Court, nor are they part of the Case Stated. On 22nd July, 2009 the matter was further adjourned for judgment until 4th September, 2009.

7. Returning to the Case Stated, the District Court judge summarised the findings she made when the matter came on for judgment on 4th September, 2009 as follows:

> "(a) As I found the acts of ingress on the lands constituted contempt I did not consider it necessary to consider whether or not acquisition of the commonage rights allowed [Shell] to carry out works on the lands. I further held that the actions of ingress onto [Rossport Commonage] have been proved beyond reasonable doubt and were in contempt of my Order of the 14th day of November 2007;
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> (b) My Order of the 14th day of November 2007 was specific in its terms. It prohibits entry by [Shell] until the provisions of [the Act of 1976, as amended] had been complied with. It did not provide any other means of complying with the Order. [Shell] ignored the Order and was guilty of civil contempt. If [Shell] considered that the acquisition of the commonage rights rendered the Order moot then an application to vacate the Order should have been made.
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> (c) The purchase of the share in [Rossport Commonage] by [Shell] rendered my Order of the 14th day of November 2007 moot. I indicated that [Shell] should make an Application to vacate the District Court Order as soon as practicable and that I would consider any such Application favourably."

The references to "my Order of the 14th day of November 2007" are to the 2007 Prohibition Order.

**8.** There is also before this Court a Court Report of the judgment delivered by the District Court judge on 4th September, 2009, which is broadly, although not entirely, consistent with the summary contained in the Case Stated. One matter which is adverted to at the commencement of the Court Report of the judgment, which puts the whole process into perspective, is a statement that Shell had applied to An Bord Pleanála for compulsory acquisition orders under s. 32(1)(a) (that reference presumably should be to s. 32(1A)) of the Act of 1976, as amended. It records that the understanding of the District Court judge was that such application had not by then, that is to say, by 4th September, 2009, been determined. While the Court Report of the judgment is not referred to in the Case Stated, it is not clear whether it was before the High Court. It is referred to in this judgment by way of background, and not, in any way, to inform the decision of this Court.

**9.** The questions of law posed in the Case Stated for the opinion of the High Court were formulated as follows:

> "(a) Can the Order of the District Court made pursuant to Section 26(4) of The Gas Act, 1976 (as amended) which prohibited entry onto certain lands for the purposes of carrying out investigations or otherwise until such time as the provisions of such section have been complied with operate to prohibit the person against whom the said order was made from entering onto lands, the subject matter of the Order, after that person has acquired co-ownership of those Lands.
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> (b) Was it open to the Court to hold that the Order made on 14th day of November, 2007 absolutely prohibited any entry whatsoever onto [Rossport Commonage] by [Shell] and thus hold that any such entry amounted to contempt."

**10.** One fact which is not adverted to in the Case Stated, but which is recorded in the judgment of the High Court referred to later, is that an order vacating the 2007 Prohibition Order was made by the District Court judge in the District Court on 14th October, 2009.

**11.** Before considering the judgment of the High Court, it is useful to outline the relevant statutory provisions.

**The relevant provisions of the Act of 1976, as amended**

**12.** In the long title to the Act of 1976 its purpose is outlined as being –

> ". . . to establish a body . . . and to define its functions, to make certain provisions to enable that body to acquire land and certain rights relating to land, . . ."

The body was intended to be known as Bord Gáis Éireann or The Irish Gas Board, which is referred to as "the Board" in the Act.

**13.** Section 26 of the Act of 1976, in its original form, provided as follows:

> "(1) Any officer of the Board or any other person appointed in writing by the Board to be an authorised officer for the purposes of this section (which person is subsequently in this section referred to as an 'authorised person') may at any reasonable time enter on any land for any one or more of the following purposes, namely;
>
> (a) for inspecting and surveying the land and making thereon any inquiry, investigation or examination for the purpose of ascertaining whether or not the land, or a right over the land, is suitable for acquisition by the Board for a purpose of this Act,
>
> (b) for carrying out thereon any investigation or examination preliminary or incidental to the acquisition by the Board of the land or any right over the land.

(2) An authorised person entering on land under this section may do thereon all things ancillary to or reasonably necessary for the purpose for which the entry is made, and without prejudice to the foregoing he may in particular do, or cause to be done, any of the following, namely, line sight, drill, bore, probe or excavate, or carry out soil tests and, if necessary, remove soil.

(3) Before an authorised person enters under subsection (1) of this section on any land, he shall either obtain the consent, in the case of occupied land, of the occupier, or, in the case of unoccupied land, of the owner, or shall give to the owner or occupier, as the case may be, not less than fourteen days' notice in writing of his intention to make the entry.

(4) A person to whom a notice of intention to enter on land has been given under this section by an authorised person may, not later than fourteen days after the giving of such notice, apply, on notice to such authorised person, to the Justice of the District Court having jurisdiction in the district court district in which the land is situate for an order prohibiting the entry, and, upon the hearing of the application, the Justice may, if he so thinks proper, either wholly prohibit the entry or specify conditions to be observed by the authorised person making the entry.

(5) Where a Justice of the District Court prohibits under this section a proposed entry on land, it shall not be lawful for any person to enter under subsection (1) of this section on the land, and where a Justice of the District Court specifies under this section conditions to be observed by persons entering on land, every person who enters land under the said subsection (1) shall observe the conditions so specified."

**14.** By virtue of s. 20 of the Gas (Amendment) Act, 2000 ("the Act of 2000"), the powers conferred by, *inter alia*, s. 26 of the Act of 1976 were extended so as to be exercisable by a "relevant person" as defined in s. 20. It is common case that Shell thereby

came within the definition of "relevant person" and that thereby the powers conferred by s. 26 of the Act of 1976, as amended, were exercisable by Shell in addition to being exercisable by the Board. Section 20 also made some amendments to subs. (1) of s. 26. It added two paragraphs, paragraph (c) and paragraph (d), which added to the purposes for which, *inter alia*, a "relevant person" might enter on land, although neither paragraph has been referred to by either party on this appeal. Section 20 also inserted a new sub-section into s. 32, subs. (1A) which has been alluded to and which provided that a relevant person, as defined in s. 20, might apply to acquire compulsorily any land or right over land which the relevant person required in connection with the construction or operation of the pipeline referred to in s. 20, being, presumably, for present purposes the pipeline by reference to which Shell came within the meaning of "relevant person" under subs. (1)(b) of s. 20.

**The judgment of the High Court**

**15.** The judgment of the High Court was delivered by Kearns P. ("the High Court judge") on 19th June, 2010 ([2010] I.E.H.C. 238). Some observations he made are worth recording. Having noted (at p. 9) that the 2007 Prohibition Order of 14th November, 2007 had been vacated, he observed that, given that the District Court judge herself took the view that the purchase by Shell of its share in the Rossport Commonage rendered that order moot, it undeniably created a certain sense of artificiality about the entire proceedings. That observation, I think, overlooks the consequences of the ruling made by the District Court judge on 4th September, 2009. As has been recorded earlier in the Case Stated, she found that Shell was "guilty of civil contempt". The Court Report of the judgment records that she then stated that she was adjourning the matter "for sentencing" on three conditions which followed. The first, which was noted in the Case Stated, was that Shell should make an application to vacate the 2007 Prohibition Order, which she

would consider favourably. The two other conditions were that Shell should contribute €3,000 to a charity of choice of the Appellant and that the costs of the application were awarded to the Appellant. Once again, the reference to the Court Report of the judgment is merely for the purpose of giving a full picture. Apart from that, as counsel for the Appellant submitted, the 2007 Prohibition Order was not rendered moot by the acquisition by Shell of the undivided share in the Rossport Commonage. It is not disputed that it was a valid order until vacated, although there was an issue between the parties as to its continued effect after the acquisition of the share in Rossport Commonage by Shell.

**16.** In setting out his decision on the second question, that is to say, question (b), which he characterised as being "perhaps easier to deal with", the High Court judge recorded that both sides had agreed that the 2007 Prohibition Order "did not absolutely prohibit any entry whatsoever on the commonage lands by [Shell]". On that basis, he stated that it seemed clear that the second question required no further consideration in the judgment. On the hearing of the appeal it was conceded on behalf of the Appellant, properly in my view, that the 2007 Prohibition Order was not an absolute prohibition on entry to the Rossport Commonage by Shell, and, accordingly, it was recognised that the answer to question (b) should be in the negative. Therefore, it is unnecessary to consider that question any further in this judgment.

**17.** On the first question, that is to say, question (a), which in the light of the concession on the part of the Appellant outlined in the immediately preceding paragraph is characterised by the Appellant as the "key" issue, the High Court judge stated (at p. 14) that he was quite satisfied that the 2007 Prohibition Order –

> "was not one which could prohibit entry by [Shell] on the said lands after [Shell] had acquired its co-ownership interest in those lands".

That observation seems to relate to entry only, as distinct from particular activity on the land. He then went on to state:

> "This is not a case where the evidence before the Court indicated that [Shell] carried out works of the sort prohibited by the Order. There is a complete dearth of evidence to that effect and I do not accept that the passage in the case stated which appears at para. 3(i) of the Case Stated supports the far-ranging interpretation suggested by [counsel for the Appellant]. At best, the portions relied upon by [counsel for the Appellant] suggests that something other than 'walking' or 'observation' may have taken place but I am satisfied no other definitive findings emerged from a consideration of the case stated. It might have been a quite different proposition had there been evidence of excavations or pipe laying activities or clear findings of fact to that or similar effect. Thus, to the extent that the evidence and findings are unclear, it seems to me that, having regard to the penal nature of the contempt remedy, the Court would have to have been satisfied beyond reasonable doubt both on the facts and the law before finding that a breach of its Order had been committed."

It is pertinent to observe that the High Court judge did not identify what he referred to in the first sentence in that passage as "works of the sort prohibited by the Order".

**18.** At that stage, the High Court judge considered the standard of proof applicable to a claim of civil contempt, finding that it is proof beyond reasonable doubt. It is not disputed on behalf of the Appellant that such conclusion is correct. The High Court judge also quoted the following passage from the judgment of Jenkins J. in *Redwing Limited v. Redwing Forest Products Limited* [1947] 64 R.P.C. 67, which had been quoted with approval by McKechnie J. in *Competition Authority v. Licensed Vintners Association* [2010] 1 I.L.R.M. 374:

> ". . . a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that

undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."

**19.** For the purpose of comparison with what is actually stated in the Case Stated, it is convenient to quote at some length the conclusions of the High Court judge in relation to the findings made by the District Court judge. He stated (at p. 19):

> "It is clear beyond doubt that the [District Court Judge] in this case was herself to a certain degree uncertain as to the lie of the land when expressing the view that her own Order had been rendered moot by the purchase by [Shell] of a share in the commonage lands. It is clear that she did not intend by her Order to prohibit entry on to the lands in all circumstances.
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> It is notable that the [District Court judge] did not make any finding that she was satisfied beyond a reasonable doubt that [Shell] had breached her Order and committed contempt. She merely found that the entry of [Shell] on to the commonage lands had been proved beyond a reasonable doubt. She made no finding that [Shell] had executed works or had entered upon the lands for purposes which were in specific breach of the terms of her Order, or certainly she did not do so in terms which make the matter clear beyond reasonable doubt.
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> Thus I am satisfied, both as regards the facts and the law, that the matter was not brought home to the requisite legal standard such as would justify a finding by the [District Court judge] that [Shell] was guilty of civil contempt."

**20.** The High Court judge then answered the first question, question (a), in the negative, which was reflected in the Order of the High Court dated 12th July, 2010 and perfected on 29th July, 2010 appealed against on this appeal. No order for costs was made in the High Court.

**Discussion on question (a)**

**21.** Question (a), as formulated, is based on the following propositions in relation to the 2007 Prohibition Order:

(a) that it was made pursuant to s. 26(4) of the Act of 1976 as amended, which is unquestionably the case;

(b) that it prohibited entry on to the lands in issue, Rossport Commonage, for "the purposes of carrying out investigations or otherwise", which is also correct because the jurisdiction exercised by the District Court judge was that conferred by subs. (4) of s. 26, which will be analysed later;

(c) that it was temporally limited "until such time as the provisions of s. 26 were complied with", thus pointing to what is disclosed in the Case Stated, namely, that the ground on which the order was made was that Shell had not complied with the requirements in relation to service on the Appellant contained in subs. (3) of s. 26; and

(d) that, after it was made, at the time the question was posed, Shell had acquired a co-ownership interest in the lands.

What question (a) as formulated does not expressly state is that –

(i) Shell did not appeal to the Circuit Court against the 2007 Prohibition Order, or seek to have it quashed by way of judicial review;

(ii) Shell did not rectify the non-compliance with s. 26(3) at any time, so that the prohibition on entry continued; and

(iii) Shell did not apply to have the 2007 Prohibition Order vacated until after the District Court judge found that Shell was guilty of civil contempt.

**22.** While the manner in which the High Court judge rationalised his decision that question (a) should be answered in the negative in his judgment has been quoted extensively earlier, it is useful to summarise his conclusions. First, he was satisfied that the 2007 Prohibition Order did not prohibit "entry" by Shell after it had acquired its co-

ownership interest in Rossport Commonage, which, as already observed, seems to relate to entry only. Secondly, he concluded that the evidence did not establish that Shell carried out "works of the sort" prohibited by the 2007 Prohibition Order, without identifying those works, rejecting the Appellant's contention that the activity on behalf of Shell found by the District Court judge to have occurred in the Case Stated (as quoted earlier at para. 6) was prohibited. Thirdly, he stated that the District Court judge did not make any finding that she was satisfied beyond reasonable doubt that Shell had breached the 2007 Prohibition Order and committed contempt and, in particular, that she did not express in terms making it clear beyond reasonable doubt that Shell "had executed works or had entered upon the lands for purposes which were in specific breach of the terms" of the 2007 Prohibition Order. Whether such rationalisation justifies answering question (a) in the negative turns on whether it accords with the proper construction of s. 26 of the Act of 1976, as amended, and its application to the facts, in particular, to the conduct of Shell.

**23.** The analysis of s. 26 of the Act of 1976, as amended, put forward on behalf of Shell on the hearing of the appeal was interesting and, up to a point, it is correct. It was suggested that subs. (1), in effect, creates a statutory licence which permits entry on to land for any of the specific purposes which are now outlined in paras. (a) to (d) inclusive of that sub-section. While I agree with that analysis, I think it is important to emphasise that permitted entry is specifically related to those purposes only, not to any other purposes. It was suggested that subs. (2) delimits what can be done pursuant to the statutory licence. I agree with that analysis, in that it is limited to all things ancillary to or reasonably necessary for the purpose for which entry is made, although it is specifically provided that within the limitation are the specific activities identified, for example, drilling, probing or carrying out soil tests. It is true, as was suggested on behalf of Shell, that if a person is a co-owner of land and wishes to use the land in a manner which a co-owner is permitted to use it, he or she does not have to rely on s. 26. On the other hand, certain activity on land

owned in common by one owner of an undivided share in the land without the consent of an owner of another undivided share in the land can amount to trespass, as was found in the authority relied on on behalf of the Appellant: the decision of the High Court (Feeney J.) in *McKeever v. Hay* [2008] I.E.H.C. 145. In that case it was held that laying water pipes under commonage amounted to trespass as regards the owner of one undivided seventeenth share of the commonage who did not consent to that action.

**24.** As was suggested on behalf of Shell, subs. (3) does impose a precondition to the coming into existence of the statutory licence, in that the consent of the occupier or owner as provided in subs. (3) must be obtained or, alternatively, notice in writing of intention to make the entry must be given to the occupier or owner. Such notice triggers the entitlement of the person on whom it is served to make an application to the District Court for an order prohibiting the entry. Sub-section (4) also delineates the jurisdiction of the District Court on such an application. The suggestion made on behalf of Shell that the jurisdiction conferred on the District Court is to prohibit "entry" *simpliciter* on the land, in my view, is not correct. While subs. (4) refers to "to enter" or "the entry" on the lands no less than four times, subs. (4) must be construed in the overall context of s. 26 as a whole and the jurisdiction of the District Court relates to entry on the land for one or more of the purposes set out in subs. (1). Indeed, that is clear from the jurisdiction expressly conferred on the District Court in subs. (4), which is jurisdiction to "wholly prohibit the entry" or "specify conditions to be observed" by the person making the entry. As a matter of construction, the intention must be that such conditions will relate the purpose or purposes for which the permission to enter may be given. The effect of the exercise by the District Court of the jurisdiction conferred by subs. (4) is set out in subs. (5). If entry is prohibited, then it shall not be lawful to enter the land under subs. (1). Once again, it seems to me that that must be read as to enter the land for one or more of the purposes set out in subs. (1). Alternatively if conditions are specified, there is a statutory obligation to observe the

conditions so specified. If that interpretation of subss. (4) and (5) was not correct, it would mean that the District Court would have no control in relation to the purposes for which the person wanted to enter the lands, which would make no sense, because such purposes are likely to be much more detrimental to the occupier or owner of the lands than mere entry.

**25.** The effect of the 2007 Prohibition Order in the light of the foregoing interpretation of s. 26 falls to be considered at the date on which it was made, that is to say, 14th November, 2007. Its effect was to prohibit Shell entering on Rossport Commonage and implementing any of the purposes which brought Shell within s. 26 at the time until it had complied with the provisions of the Act of 1976. In order to comply with the relevant provision, Shell could have properly served a fresh notice on the Appellant in compliance with s. 5 of the Act of 1976, but it did not do so. Therefore, the 2007 Prohibition Order continued in existence and it remained in existence until it was vacated just over a month after the District Court judge found that Shell was guilty of civil contempt.

**26.** Against that background, the rationalisation by the High Court judge of his decision to answer question (a) in the negative does not stand up to scrutiny. While the fact that, by the time it entered on Rossport Commonage, Shell had acquired one undivided sixty second share thereof and it is not in dispute that such ownership entitled it to enter on the lands, Shell, through its agents, did much more than mere entry on the lands. It clearly entered for the purpose or purposes on the basis of which it considered that it was entitled to serve the notice under s. 26(3) on the Appellant in October 2007, which was for the purpose of carrying out site investigations. Even if the works carried out on behalf of Shell, as described in the Case Stated, could not be regarded as being as invasive as, say, drilling or excavating, they were works of a type in respect of which Shell clearly considered it required the consent of the occupiers, or of owners who by mid-2008 were its co-owners, being site investigations, which included, for example, surveys and probing peat depth and type. While the District Court judge did not consider it necessary to

consider whether or not the acquisition of the share of Rossport Commonage by Shell allowed it to carry out works on the lands, she did find that what she described as "the acts of ingress", not merely "entry" as found by the High Court judge, constituted contempt. It is reasonable to infer, in my view, that the "acts of ingress" included the actions taken on behalf of Shell which she had described in paragraph 3(i) of the Case Stated.

**27.** It is immaterial that the District Court judge did not conduct an analysis of the nature of the works in the context of whether they could have been carried out by a co-owner of an undivided share without the consent of a co-owner of another undivided share in land. Those acts were acts in respect of which Shell required the consent of the Appellant when the 2007 Prohibition Order was made and by reason of the Appellant having invoked subs. (4) of s. 26 they were acts which were prohibited by the 2007 Prohibition Order. Moreover, notwithstanding what was stated by the High Court judge in his judgment, it is stated in the Case Stated that the District Court judge held that the actions of ingress had been "proved beyond reasonable doubt and were in contempt of" the 2007 Prohibition Order. Further, in the Case Stated, the 2007 Prohibition Order was expressed to be specific in its terms and it was stated that Shell ignored it and was guilty of civil contempt. Those aspects of the Case Stated have been quoted earlier (at para. 7). Those very clear and unambiguous findings of the District Court judge were not diluted by the statement in the Case Stated that the purchase of the share by Shell in Rossport Commonage rendered the 2007 Prohibition Order moot, which statement I consider to be incorrect. The context in which that statement was made was that the District Court judge indicated that Shell should make an application to vacate the 2007 Prohibition Order as soon as practicable and that she would consider such application favourably.

**28.** For the foregoing reasons, I consider that the decision of the High Court judge that question (a) should be answered in the negative was incorrect. In short, I consider that the

Case Stated demonstrates that the District Court judge was correct in finding that Shell was in contempt by being in breach of the 2007 Prohibition Order.

**Conclusion**

**29.** I am satisfied that when question (a) is considered in the context of the factual and procedural background of the interaction between the Appellant and Shell as set out in the Case Stated, including the matters that are not expressly stated in it, for the reasons outlined above, the High Court was incorrect in answering that question in the negative. In that context, it should have been answered as: yes. Accordingly, the Appellant's appeal must be allowed.

Approved
Mary Laffoy
14th June 2017