THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 64
Record Number: 2019/394
Supreme Court Record Number: 2011/60
High Court Record No. 2010/39SP

Noonan J.

Collins J.

Pilkington J.

BETWEEN/

CROHAN O'SHEA

PLAINTIFF/RESPONDENT

-AND-

MICHAEL BUTLER AND WILLIAM BUTLER

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 9th day of March, 2021

1. This appeal is brought by the appellants against the order of the High Court (Quinn J.) made on the 22nd July, 2019 directing the Accountant of the High Court to make payment out to the respondent of certain monies standing to the credit of this suit under the control of the Accountant. For the purposes of this judgment, it is unnecessary to revisit in any detail the extraordinarily lengthy history of this matter which is set out in the affidavit grounding this motion sworn by the plaintiff's solicitor, Robert Dooney. As is evident

from that affidavit, the appellants are experienced litigants in person and the first appellant has presented this appeal on behalf of both appellants, as in previous hearings. On the 12th May, 2009 the High Court (McGovern J.) gave judgment against the appellants in the sum of €653,832 which was subsequently registered by the respondent as a judgment mortgage over certain lands of the appellant. On the 20th December, 2010 the High Court (Dunne J.) granted a well charging order and an order for sale in respect of the appellants' said lands.

2. Both of these orders were appealed to the Supreme Court. Various orders were made from time to time in respect of sales of different parcels of land and on the 30th May, 2016 Haughton J. directed the sale of some of the lands by public auction. The court made consequential orders including noting an undertaking by the respondent's solicitors in the following terms: -

> "And on the undertaking of the solicitors for the plaintiff to not apply for any order for payment out of the purchase monies in respect of the aforementioned lands until the final determination by the Supreme Court of the appeal herein of the defendants…"

3. At the time Haughton J. made this order, there were three appeals outstanding before the Supreme Court related to the two orders of McGovern J. and Dunne J. to which I have referred and a third appeal in relation to the amendment of the order of McGovern J. under the slip rule which appeared erroneously to refer to Clarke J. In referring to "appeal" singular, it is perhaps not entirely clear which appeal is contemplated by the order of Haughton J. However, only the first and possibly second appeals could have had any bearing on the respondent's entitlement to the monies in court, and it is clear in my view that the undertaking can only have related to those appeals.

4. The Supreme Court gave judgment on the 18th October, 2017. The sole substantive judgment was delivered by McMenamin J. with whom the other members of the court agreed. He expressly dismissed the appeals against the orders of McGovern J. and Dunne J. and went on to direct a new trial on a discrete issue concerning whether a particular clause, disputed by the appellants, was contained in the original settlement agreement. As I have said however, the orders of the High Court to which I have referred were not disturbed and remain valid and subsisting. The trial of the issue took place before Kelly P. who gave judgment on the 11th December, 2018 holding that the clause disputed by the appellants was in fact contained in the original settlement and that another document which appeared to omit this clause was a forgery. The appellants have appealed that judgment to the Supreme Court having been given liberty to do so in the judgment already referred to.

5. Following the completion of the relevant sales, the proceeds thereof were lodged in court and were set out in a payment schedule prepared by the Examiner on the 5th June, 2019. The motion now under appeal was brought by the respondent and is a purely procedural motion seeking a payment out of the sums in question amounting to some €837,614. At the time Mr. Dooney swore his affidavit on the 6th June, 2019, the sum due to the respondent substantially exceeded the funds in court at €1,101,374. The application before Quinn J. was opposed by the appellants on the basis of an affidavit sworn by Michael Butler, the first named appellant. Neither appellant appeared at the hearing, though a brother of theirs was present on their behalf

6. The sole ground of substance raised was that the respondent's solicitors were still bound by the undertaking given to Haughton J. because the matter had not yet finally been determined by the Supreme Court. I am satisfied that this contention is incorrect. Not only did the Supreme Court dismiss the appeal against the two orders which remain valid and

subsisting but the trial of the discrete issue had already been heard and determined by Kelly P. at that time. Furthermore, despite the judgment of the Supreme Court, Mr. Butler continues to allege that the order of McGovern J. is invalid as having been wrongly interfered with. That issue has of course been conclusively determined by the Supreme Court against the appellants. It is also to be noted that the order of Quinn J. was not subject to a stay and accordingly, the sums in court have now been paid out to the respondent.

7. The notice of appeal herein impermissibly again raises the same issue which permeates the entire proceedings, namely that the underlying order of McGovern J. is invalid. The appellants also again seek to suggest that the respondent's solicitors' undertaking given to Haughton J. remains in force until such time as the Supreme Court finally disposes of the "slip rule" appeal and also the new appeal from the order of Kelly P. I am satisfied that this contention is misconceived in circumstances where the Supreme Court has upheld the order granting judgment to the respondent.

8. As counsel for the respondent points out, even if the appellants win both the slip rule appeal and the new appeal, that does not affect Mr O' Shea's entitlement to judgment because even without the disputed clause, the settlement still acknowledges the sum due. There can thus be no outstanding issue in relation to that. Insofar as other issues are raised in the notice of appeal, none of these were raised or argued before the High Court and cannot be considered by this court on appeal for the first time. In the appellants' notice of appeal, they expressly state that they are not seeking a reference to the CJEU but their submissions appear to indicate otherwise.

9. Similarly, the appellants issued a motion on 21st January, 2020 before this court seeking an order pursuant to Article 267 of the TFEU referring to the CJEU certain

questions concerning the compatibility of sections 9 and 13 of the Court Services Act 1988 (presumably intended to be the Court Service Act 1998) with various provisions of EU law, including the Treaty, the Charter of the Fundamental Rights, and Directives 95/46/EC and 2002/58/EC on data protection, as well as certain provisions of the European Convention on Human Rights. Quinn J. was not called upon to determine any such issue. Rather, in his grounding affidavit, the first appellant referred to the fact that he had issued a motion returnable before the Master of the High Court seeking a reference to the CJEU and sought an adjournment pending the determination of that application.

10. The trial judge referred to this in his decision and declined to adjourn the matter. In due course, the motion before the Master was referred to Kelly P. who refused to make a reference and I understand that that determination is also challenged in the new appeal to the Supreme Court.

11. In any event, I have carefully considered the request for a reference under Article 267. As will be obvious from the narrative above, no issue of EU law arises in this appeal nor, for that matter, does the appeal involve any issue as to the validity of any provision of the Courts Service Act 1998. It follows that there is no basis on which this Court could make such any such reference.

12. I am therefore satisfied that no error in the approach of the High Court judge has been demonstrated by the appellants and this appeal should accordingly be dismissed.

13. With regard to costs, my provisional view is that the respondent has been entirely successful in this appeal and is therefore entitled to his costs. If the appellants wish to contend for an alternative form of costs order, they will have liberty to deliver a written submission not exceeding 1,000 words within 14 days and the respondent will have a

similar period to respond. In default of such submissions, an order in the terms proposed will be made.

14. As this judgment is delivered electronically, Collins and Pilkington JJ. have read and agree with it.