

THE HIGH COURT

[2022] IEHC 266

[Record No. 2019/121P]

BETWEEN

MICHAEL BUTLER AND WILLIAM BUTLER

PLAINTIFFS

AND

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
DEFENDANTS**

JUDGMENT of Ms. Justice Stack delivered on the 4th day of May, 2022.

Introduction

1. These proceedings are the latest saga in a long running series of litigation prosecuted by the plaintiffs first against private parties and now, in these proceedings, against the State.
2. The background to the proceedings is that many years ago the plaintiffs were involved in construction and development with two individuals who are not party to the proceedings, Mr. Crohan O'Shea and Mr. Thomas O'Driscoll. These two individuals, along with the plaintiffs, set up a company known as Bosod Ltd. Ultimately, there was a dispute between the parties, resulting in High Court proceedings bearing record number 2006/4849P, and entitled "Michael and Thomas Butler Ltd., Michael Butler and William Butler, Plaintiffs, and Bosod Ltd, Crohan O'Shea and Thomas O'Driscoll, Defendants".
3. An order was made in those proceedings by this Court (McGovern J.) on 11 February, 2008, at a sitting in Dundalk. The proceedings against the first named defendant was struck out with no order. However, a settlement was reached between the plaintiffs and Mr. Crohan O'Shea, and another settlement was reached between the plaintiffs and Mr. O'Driscoll. It is the settlement with Mr. Crohan O'Shea, the second named defendant in those proceedings, which has given rise to long running litigation, and ultimately to these proceedings.
4. Prior to the institution of these proceedings, the plaintiffs have litigated for many years, including on two occasions in the Supreme Court, on the basis that the High Court computerised record of the Order of McGovern J., is a fraud. The basis for this allegation is that the terms of settlement between the plaintiffs and Mr. O'Shea were handed into court on 11 February, 2008, and were annexed to the Order of McGovern J. However, the copy of that Order on the High Court file (which indicates that it was perfected on 14 March 2008) records an eight paragraph terms of settlement between the plaintiff and Mr. Crohan O'Shea in the 2006 proceedings, whereas the computerised record of the Order (which indicates that it was perfected on 28 March, 2008), subsequently printed off, has annexed a nine paragraph terms of settlement to it.
5. Both versions apparently provided that the plaintiffs were to pay to Mr. O'Shea the sum of €1.1m and the difference between the two versions is that the nine paragraph version contains a paragraph 6, providing for the entry of judgment against the plaintiffs in default of payment of that sum by 11 September, 2008.

6. Interestingly, the sum of €446,168 was paid by the plaintiffs to Mr. O'Shea, and Mr. O'Shea subsequently sued for the balance of €653,832. Judgment was subsequently granted to Mr. O'Shea in that amount, by Order of this Court (McGovern J.) on 12 May, 2009. It should be recalled that if the settlement reached between the plaintiffs and Mr. O'Shea did not contain para. 6, judgment could not have been entered in that way and Mr. O'Shea would have had to sue on the settlement.
7. The judgment entered against the plaintiffs on 12 May, 2009, was registered against lands owned by the plaintiffs and contained in three Folios in the Land Registry, and on 20 December, 2010, this Court (Dunne J.) granted a well charging order in respect of those lands in enforcement proceedings brought by Mr. O'Shea. Subsequently an order for sale of the lands was made on foot of the well charging order.
8. The Order of McGovern J. entering judgment of 12 May, 2009, also contained an error as it recorded that it had in fact been made by Clarke J. (as he then was). That error was corrected by McGovern J. on 24 February, 2010, on the application of Mr. O'Shea. The plaintiffs did not consent to that application, and appealed both the order of 24 February 2010, and the order of McGovern J. of 12 May, 2009, to the Supreme Court. In a second appeal, they also appealed the order of Dunne J. of 20 December 2010, to the Supreme Court.
9. In a judgment dated 18 October, 2017, *O'Shea v. Butler* [2017] IESC 65, the Supreme Court dismissed both appeals but, in light of concerns as to why there was no original Order of 11 February 2008 on the Central Office file and as to why the hard copy of that Order differed from the computerised copy, the Supreme Court directed that the matter would be remitted back to this Court for trial on the issue of whether or not the settlement had in fact included the default clause, and if so, whether the plaintiffs were liable thereon, and any ancillary issues.
10. That trial was conducted in this Court by Kelly P., over five days and he delivered a written judgment on 11 December, 2018: [2018] IEHC 702.
11. In the course of that hearing, as is evident from the judgment of Kelly P., the stenographer who was present in Dundalk High Court on 11 February, 2008, produced her transcript of the hearing, and also gave evidence. The senior counsel for the plaintiffs who had acted on their behalf in Dundalk High Court and had conducted the settlement negotiation also gave evidence. In addition, Kelly P. states in his judgment that he had listened to the digital audio recording of the proceedings before McGovern J. on 11 February, 2008, and it accorded not only with the evidence of senior counsel who had acted for the plaintiffs on that day, but also that of the stenographer and the stenographer's record. It clearly showed that the matter had been mentioned to McGovern J., sitting in Dundalk as having been settled, and that the plaintiffs' senior counsel had made specific reference to the default clause, i.e. para. 6, in open court.
12. Kelly P. rejected various assertions of the plaintiffs, including that there had been no settlement of the 2006 proceedings and/or that the plaintiff had been coerced into

settlement. Kelly P. concluded that the plaintiffs had settled their case against Mr. O'Shea and had undertaken to pay him €1.1 million, with a provision in the written settlement terms that, in default of such payment, judgment could be entered against them.

13. As pointed out by Kelly P. in his judgment, a key feature of the proceedings is that a considerable sum of money had in fact been paid by the plaintiff to Mr. O'Shea, which is inconsistent with their contention that they never settled the proceedings in Dundalk. Therefore, those issues have all been finally determined in the judgment of Kelly P. on the basis of a plenary hearing. Those issues of fact therefore having been determined by Kelly P., the matter subsequently returned to the Supreme Court, which delivered its final judgment on 10 September, 2021: [2021] IESC 59.
14. It is evident from the judgment of Kelly P., and indeed the earlier judgment of the Supreme Court in 2017, that the Superior Courts in this jurisdiction were alive to the fact that there was a very unsatisfactory situation where there was no original order on the High Court file, the original order being one which would be signed in ink by the registrar. Instead, there was a photocopy of an order which appeared to have been perfected on 14 March, 2008, and which had annexed to it a different copy of the terms of settlement from those annexed to the perfected order maintained on the electronic file, which recorded the date of perfection as 28 March, 2008. The electronic copy order had the nine clause terms of settlement annexed to it, whereas the earlier one had the eight clause terms of settlement annexed to it. In addition, the earlier copy order recorded that the plaintiffs were to pay Mr. O'Shea €1.5m, whereas the later copy order referred to the lower sum of €1.15m. In fact, it appears that the correct sum was €1.1m, as reflected in the balance sought by Mr. O'Shea when he entered judgment against the plaintiffs and as set out in the nine paragraph terms of settlement which I have seen. As previously stated, it also appears from the judgment of Kelly P. that this sum was provided for in the eight paragraph terms of settlement also.
15. The plaintiffs seemed to lay great stress on the fact that their then solicitors sent them a copy of the Order as apparently perfected on 14 March, 2008, and on the fact that it had subsequently been said to them by email from Ms. McLoughlin of the Courts Service that this copy had been overwritten by the later version dated 28 February, 2008. However, I do not think it is appreciated by the plaintiffs that the undoubtedly unsatisfactory situation as to the absence of any original order and of copy Orders in two different versions does not alter the fact that the case was settled.
16. As pointed out by Kelly P. in his judgment, the fact is that the plaintiffs had paid over a considerable sum of money to Mr. O'Shea, a matter which is entirely inconsistent with their asserted belief that there was no settlement. Indeed, the existence or non-existence of para. 6 is not in itself indicative of there being no settlement.
17. It is evident that the issues of whether the case was in fact settled and whether the terms of settlement contained a default clause permitting Mr. O'Shea to enter judgment for the unpaid balance of the settlement sum have now been determined definitively by a court of competent jurisdiction. Accordingly, it has been established as a fact in the

appropriate proceedings that the plaintiffs reached a settlement with Mr. O'Shea in Dundalk High Court on 11 February, 2008, agreed to pay him the sum of €1.1 million, and subsequently paid him €446,168. When the balance was not paid, judgment was entered against the plaintiffs for the amount outstanding. As Kelly P. has found as a fact that the terms of settlement contained a default clause, no issue arises as to the entry of judgment against the plaintiffs or the subsequent well-charging order.

18. These proceedings arise from the fact that that whole saga disclosed a very unsatisfactory state of affairs as to the absence of any original Order and the existence of two copies which were at variance with each other.
19. I have read all of the affidavits sworn by the first plaintiff including that sworn on 8 December 2021, and I am satisfied that all of the complaints in those affidavits about the unsatisfactory situation with the record of what was done in court on 11 February, 2008, have already been fully examined and considered by Kelly P. in his judgment. Furthermore, there is a complaint at para. 6 of that affidavit that, in the plaintiffs' appeal to the Supreme Court in the 2006 proceedings, they sought an Order *nul tiel* in respect of the order perfected on 28 March, 2008. This is a plea that the record does not exist, the remedy for which is to inquire into whether the record does or does not exist. The first plaintiff complains that the Supreme Court never determined that issue, but I cannot see how this is so, given that they remitted that appeal to this Court for trial of the issues of fact referred to at paragraph 9 above.
20. Similarly, the first plaintiff's reliance on the email from Ms. McLoughlin of the Courts Service of 18 October, 2013, as to the two versions of the copy order, and which set out that the later version which appeared to have been prepared on 28 March, 2008, superceded the version prepared on 14 March, 2008, does not advance the matter because the fact remains that the plaintiffs settled their case and agreed that judgment could be entered against them in default of payment.
21. Having said that, it is clear from that entire process that both the Supreme Court and this Court took very seriously the issue which had arisen in relation to the court file and examined all of these issues quite thoroughly. Towards the conclusion of his judgment, Kelly P. stated (at para. 68):

"Given this unsatisfactory situation I propose to discuss with the Chief Justice and the President of the Court of Appeal alterations in the system of inspection of High Court files so as to ensure that files are not interfered with and that they accurately record orders of the court. It is, in my view, essential that the integrity of High Court Central Office files be protected. This unsatisfactory situation concerning the file does not alter or affect the contractual obligations undertaken by the Butlers in settling the case."

22. This summarises succinctly not only the unsatisfactory situation which had arisen in relation to the court file but the fact that the court was satisfied, after conducting a plenary enquiry into the matter, of the order actually made by McGovern J., and that the

irregularities relating to the order did not affect the substantive rights and obligations of the plaintiffs.

Claim made in these proceedings

23. The plenary summons in this case originally contained an entirely extraneous indorsement of claim which has since been deleted in full on foot of an amendment application. It now contains 28 paragraphs which are extremely general in nature, seeking to have various provisions of the Court Services Act, 1998, declared invalid having regard to the Constitution or incompatible with the European Convention on Human Rights or contrary to European Union law. More specific paragraphs in the general indorsement of claim refers to the fact that the State and the first defendant have failed in their obligation to uphold the public record of the Superior Courts of Ireland and, perhaps critically, seek:

"an order setting aside all earlier orders that arise devoid of jurisdiction in Crohan in O'Shea V. Michael Butler and William Butler Record Nos:- 2010/39 Sp AND 2011/060 and Michael and Thomas Butler Ltd Michael Butler and William Butler V. BOSOD Ltd Crohan O'Shea and Thomas O'Driscoll 2006/4849 P and 2009/228".

24. It should be noted that 2010/39 Sp is the record number of the well charging proceedings before Dunne J., 2009/228 is the number of the appeal to the Supreme Court in the 2006 proceedings which were settled in Dundalk on 11 February, 2008, and 2011/60 is the number of the appeal to the Supreme Court in the well charging proceedings determined in this Court by Dunne. J.

The defendants' application

25. The defendants now seek to dismiss the within proceedings on a number of alternative bases:

- (i) On the basis that they are frivolous, vexatious and have no reasonable prospect of success, and should be dismissed pursuant to O.19, r.28 of the Rules of the Superior Courts;
- (ii) An order pursuant to O.19, r.28 striking out the plaintiff's claim against the defendants on the ground that it discloses no reasonable cause of action against the defendants;
- (iii) An order pursuant to the inherent jurisdiction of this Court striking out the plaintiff's claim on the basis that it discloses no cause of action, is bound to fail and/or is frivolous and vexatious;
- (iv) An order striking out the within proceedings pursuant to O.19, r.28, or the inherent jurisdiction of the court on the basis that the subject matter thereof is *res judicata* and/or on the basis of the rule in *Henderson v. Henderson* and/or on the basis of the within proceedings constitute a manifest abuse of process.

26. It seems to me that there are two fundamental issues which govern the determination of the defendants' application. First, insofar as these proceedings seek to question either the

existence or validity of the settlement reached with Mr. Crohan O'Shea in Dundalk High Court on 11 February, 2008, they are doomed to fail. Insofar as it is contended that there was no settlement agreement reached by the plaintiff with Mr. Crohan O'Shea in Dundalk on 11 February, 2008, that case cannot succeed, because it has already been determined by Kelly P. and the appeal to the Supreme Court has been dismissed.

27. Of course, these defendants were not a party to the proceedings before Kelly P., and the Supreme Court in the three judgments that I have referred to above. The doctrine of *res judicata* is a doctrine which prevents the same issues being raised between the same parties. However, closely related to it is the concept of issue estoppel whereby a finding in a particular issue which is made in a manner averse to an individual party, can raise an issue estoppel so as to prevent that party from re-litigating that issue in other proceedings. There is no doubt, in my view, having considered in detail the written judgments of the Supreme Court and of Kelly P. that this plaintiff is precluded from re-litigating the issue of whether he was party to a settlement with Mr. O'Shea in Dundalk High Court on 11 February, 2008, and whether the terms of that settlement included just eight paragraphs or nine paragraphs. He settled those proceedings and he agreed to the nine paragraph terms of settlement, including the default clause at paragraph 6. That has been decided and is clear beyond doubt. The plaintiffs are, in my view, estopped from seeking to relitigate those issues of fact against any party.
28. The second broad issue which arises on this application is whether the plaintiff can have any complaint against the defendants. It is clear that some tampering of the record of the 2006 proceedings, as settled on 11 February, 2008, occurred. The question is whether that gives rise to any cause of action in favour of the plaintiff against any of the defendants. Two fundamental points militate against the plaintiffs having any cause of action on the basis of the interference with the court record. First, no loss was occasioned to the plaintiffs as it has been determined that the proceedings were settled on the basis that judgment could be entered if the entire sum of €1.1m was not paid by the plaintiffs to Mr. O'Shea by 11 September, 2008. Secondly, the Supreme Court has ensured a full investigation, by way of plenary trial, as to which was the correct record and whether anything flowed from the findings on that point. The tampering with the record was not something which was ignored or swept under the carpet.
29. Bearing those points in mind, I now turn to examine the reliefs sought in the plenary summons for the purpose of determining the defendants' application.

Consideration of the application

30. As previously stated, the plenary summons now contains a very lengthy indorsement of claim. Paragraph 24 relates to further and other relief, and paragraph 28 relates to costs. I will not deal with those as they do not add anything to the cause of action which the plaintiffs attempt to put forward in the plenary summons. They stand or fall with the remaining 26 paragraphs.
31. To deal first with the paragraphs which seem to be more specific, para. 22 has already been set out above. It hopefully is clear from the introduction to this judgment that this,

in effect, asks this Court to set aside the findings in the earlier proceedings, including findings of the Supreme Court. That is not something which this Court can, or should, do. The plaintiff had an appeal to the Supreme Court which was remitted back to Kelly P., which then concluded in the Supreme Court in 2021. All of this is set out above. When any litigant is dissatisfied with a High Court judgment, he or she has a right of appeal in accordance with law. The plaintiffs exercised that right and were not successful in their appeal. The matter cannot simply be reopened in this Court simply by issuing a plenary summons against different defendants, seeking to set aside the orders in the earlier proceedings, which have concluded. No cause of action exists which will permit the plaintiffs to obtain the order as in paragraph 22 of the indorsement of claim. That claim must now be struck out as being doomed to fail.

32. In addition, it is also an obvious abuse of process as it is attempting to re-litigate issues determined in earlier proceedings. The jurisdiction to strike out a claim of abuse of process on the ground that it seeks to re-litigate a matter which has already been decided by a court of competent jurisdiction is well established, as is clear from the discussion in *Delany and McGrath on Civil Procedure* 4th ed. at para. 16-70 to 16-75. It is very evident that, in reliance on the fact that the earlier proceedings found that there had been tampering with the record of the High Court, and that the then procedures in the Central Office were less than satisfactory, the plaintiffs now seek to go behind the decisions and orders of the High Court and the Supreme Court made in the 2006 plenary proceedings. This is not something that they can do. If the tampering with the order was in fact evidence that no settlement had been reached, then Kelly P. would have so found.
33. However, as he pointed out in his judgment, the Order should not be confused with the settlement itself. There was clear evidence that the plaintiff settled his case and that this was negotiated by senior counsel on his behalf in Dundalk High Court on 11 February, 2008. The fact that there was subsequent tampering with the Order recording the settlement read in court on 11 February, 2008, does not alter that fact. The substance of the Order in the 2006 proceedings is to record the settlement, and the substance of the Order in the 2010 well charging proceedings is to declare the judgment subsequently entered as being well charged in the plaintiff's lands, which I understand have been sold.
34. There has been no substantive injustice here of any kind. On the contrary, the allegations in relation to the possible non-existence of the settlement and relating to the tampering with the Order, have all been investigated in a very full and thorough manner by the High Court, with oral evidence given by the individuals directly involved in the negotiation of the settlement and the recording of what went on in Dundalk High Court on 11 February, 2008.
35. As regards the other paragraphs in the plenary summons, it follows from what I have just said that many of these cannot succeed. Paragraphs 20, 21, 25, 26 and 27 all seek damages or "reparation of damage", against the State, because there was tampering with the public record. However, it is very evident from the earlier proceedings that no loss whatsoever has been caused to the plaintiff, because he did in fact settle his case for €1.1

million, and indeed he has paid a considerable part of that sum to Mr. O'Shea, the counterparty to the settlement.

36. Much of the rest of the indorsement of claim is directed at a complaint about the Courts Service, the fact that the Courts Service was established, and that this somehow constitutes an unlawful derogation of duty by the defendants, and in particular the third defendants.
37. Various declarations are sought in relation to ss. 9, 13 and 29 of the Courts Service Act, 1998, as well as the Act as a whole. Section 9 provides that no function conferred on or power vested in the Service, the Board or the Chief Executive should be exercised so as to interfere with the conduct of that part of the business of the Courts required by law to be transacted by or before one or more judges or to impugn the independence of a judge in the performance of his or her judicial functions or a person other than a judge in the performance of limited functions of a judicial nature conferred on that person by law.
38. Section 13 provides that the Courts Service Board is to consider and determine policy in relation to the Courts Service and to oversee the implementation of that policy by the Chief Executive, and s. 29 transfers certain functions to the Courts Service from the Minister.
39. At the hearing of this application, the first plaintiff confirmed that the focus of his attention was the tampering with the order on the file of the 2006 proceedings and the fact that he contends that the settlement never included the ninth provision which was para. 6 providing for judgment in default of payment. He also appears to continue to dispute the fact that settlement with Mr. O'Shea was ever reached in Dundalk on 11 February, 2008.
40. Sections 9, 13 and 29 of the Courts Service Act, 1998, have absolutely nothing to do with the issues which arose in relation to the recording on the court file of what occurred in Dundalk High Court on 11 February, 2008, or whether a settlement was ever reached. In particular, insofar as it is contended that the Courts Service somehow altered what the judge did – as the references to the functions of the Courts Service and the independence of the judiciary would appear to imply - it is clear that this is not so. It is evident from the judgment of Kelly P. that he was dissatisfied with the copies of the Order of 11 February 2008 and directed his mind to the evidence as to what actually occurred in court on that date and what the judge actually stated in pronouncing his Order in open court. The determination of the issues of fact as to whether the plaintiffs were parties to a settlement at all on that date and, if so, whether the terms of settlement included the default clause at para. 6 was not affected at all by the error on the court file: on the contrary, the matter was decided by the substance of what actually occurred, and the Order actually made by the High Court judge on 11 February, 2008 (as opposed to the unsatisfactory record of that Order on the court file).
41. Whoever tampered with the record may have been attempting to undermine the Order actually made by the judge. However, this attempt did not succeed, because Kelly P.

looked at the substance of what occurred, both as to the nature of the settlement reached and what had been said in open court to the judge when the Order was made, and that is what has taken effect in law on foot of the decision of Kelly P. and the subsequent judgment of the Supreme Court. The attempt at tampering has therefore completely failed.

42. In any event, none of the three provisions of the Courts Service Act, 1998, referred to above, in any way seek to put the Courts Service in a position where it could interfere with the Order of any judge. Indeed, s. 9 makes it absolutely clear that this is not to occur. There is therefore no basis for the declaration sought in relation to ss. 9, 13 and 29 at paras. 2, 3, 4, 7, 8, 9, 10 or 11 of the indorsement of claim.
43. There is no basis for the declaration at para. 17 that the State has failed to respect the plaintiff's property rights in accordance with the Constitution and that they had suffered loss and damage. Such a claim is doomed to fail and is frivolous or vexatious because it is clearly based on a rejected assertion that the case was never settled and the plaintiff does not owe any money. That has been found not to be the case.
44. The declarations at paras. 1, 5, 6, 12, 14 and 18 all seek to assert that the State defendants did not oversee the Courts Service in the performance of its functions in this matter and have failed to afford the plaintiffs access to an independent court system. However such declarations are manifestly contrary to the true facts, and there is no basis whatsoever for seeking them.
45. Paragraphs 15, 16 and 23 then seek such general declarations that they could not give rise to any cause of action in favour of the plaintiff. For example, para. 16 seeks a declaration that, inter alia, the Minister for Justice is an "emanation of the State". It is clear that the first defendant is an emanation of the State and that he is subject to all relevant laws (Articles 6 (1) and (2) of the "EU Treaty" are some of the laws cited in this respect). However, that does not get the plaintiff anywhere unless he can show that he has somehow been wronged by the State, which he clearly cannot.
46. Similarly, the declaration at para. 19 that the State and the Minister for Justice has allowed the plaintiff to be wronged by the manipulation of the public record, is actually incorrect because the courts system in this country has afforded not just an effective remedy to the plaintiff, but a bespoke one whereby the Supreme Court directed trial on particular issues so as to investigate more fully matters which had been set out by the Courts Service on affidavit before the Supreme Court, but which that Court thought merited further investigation. As a result, the then President of the High Court conducted a hearing over five days and it is clear from its judgment that the plaintiff sought not only to litigate the issue for determination before him, but also many other issues.
47. The fact is that the Supreme Court had decided all other relevant issues, and Kelly P. then entered into a detailed and authoritative investigation of what had occurred in relation to the court Order. Having heard evidence from relevant witnesses, including the stenographer who was independent of both parties and having listened to the digital

audio recording of the court proceedings, the learned President expressed his dissatisfaction with what had occurred in relation to the subsequent written record, and decided that a person or persons unknown had attempted to tamper with the file. Most critically from the point of view of the plaintiffs' complaints in these proceedings, Kelly P. found as a fact that the plaintiff had settled his case with Mr. O'Shea, and the terms on which that was done.

48. The plaintiff therefore has been afforded full procedural rights and an effective process to investigate what occurred with the court order and to decide the legal ramifications of that. The plaintiff does not like the outcome of those proceedings but there is no doubt that both the Supreme Court and this Court were alive at all times to the serious issues which had come to light, which is that somebody (to this day unidentified) tampered with the High Court file. That effort however, which appears to have been fraudulent in nature, failed. The reason for that was because in effect an inquiry was conducted by this Court as to what had occurred in court so as to ascertain the true nature of the order in fact made by McGovern J.
49. It is quite evident that the case was in fact settled and the subsequent attempt to manipulate the record of settlement has utterly failed. While it is unsatisfactory that there appears to have been an opportunity for such manipulation of the record, the courts, and indeed the representatives of the Courts Service who gave evidence, appear to have taken the matter very seriously at all times. In any event, the fraudulent efforts of whoever tampered with the High Court files have come to nothing.
50. All of the claims in the plenary summons may be said to be an effort to re-litigate factual and legal issues which have already been determined in the earlier proceedings by means of issuing against different defendants. The plaintiffs are estopped from relitigating those issues and the attempt to do so is an abuse of process of the court and may also be regarded as being frivolous and vexatious.
51. I have no hesitation in dismissing the proceedings on the basis that they constitute an abuse of process of this Court and should not be allowed to proceed further.