THE COURT OF APPEAL

Record Number: 2021/296

High Court Record Number: 2016/8777P

Barniville P.
Pilkington J.
Allen J.

Neutral Citation Number [2022] IECA 181

BETWEEN:

JOSEPH SLATTERY

PLAINTIFF/
APPELLANT

- AND -

THOMAS SLATTERY

DEFENDANT/
RESPONDENT

Judgment (*ex tempore*) of Ms. Justice Pilkington delivered on the 14th day of July 2022

1. The background to this appeal concerns an unfortunate dispute between two brothers over a portion of land comprising less than five acres, specifically 4.144 acres, in the County of Clare which has been the subject of protracted litigation since 2011.

2. The appellant to this appeal represents himself with his brother, the respondent, being legally represented. For ease of reference I will refer to the parties as the appellant and respondent throughout.

3. This is an appeal from an Order of O'Connor J. dated 28 July 2021, which in turn relates to an Order made by the same judge on 14 June 2017.

4. For reasons set out in more detail below, O'Connor J. in an Order of 14 June 2017, in acceding to the respondent's motion to have the appellant's proceedings struck out, the Court ordered;

(a) That the plaintiff's claim is dismissed having already been determined by as being *res judicata* following determination by the Circuit and High Court in proceedings E524/2011 and that accordingly the issued raised within the present proceedings were *res judicata*; and

(b) an Isaac Wunder Order restraining the appellant *" ... from instituting any proceedings against the said Defendant herein either before this Court or before the Circuit Court in respect of the Defendant's property comprised in Folio 8741F of the Register of Freeholders of the County of Clare or in respect of the further property of the defendant comprised of 0.2 acres or thereabout in the townland of Dough in the Barony of Corcomroe in the County of Clare per the terms of the orders of the Circuit Court in proceedings before the South Western Circuit for the County of Clare Record No. 2014/00102 and as affirmed by the High Court on Circuit by Order of the 10th May without first obtaining leave from this Court."*

5. In order to put this appeal into context it is necessary to recite its procedural history.

6. The genesis of this dispute is a Deed of Transfer of 29 December 1981 whereby the parents of the parties Matthew and Anne Slattery executed a Deed of Transfer in respect of certain lands then within Folio 17096. In doing so, the parents reserved a right of residence to themselves (by way of inhibition on the title) and the present Folio 8741F (the subject matter of the present dispute) was carved out of the parent Folio 17096. Matters came to a head upon the death of the last surviving parent, Anne Slattery in December 2010. Arising

from her death Thomas Slattery became entitled be and later was registered as full owner of Folio 8741F and thereafter this litigation commenced.

7. The first step was proceedings commenced by the respondent, Thomas Slattery in 2011, in the Circuit Court South Western Circuit County of Clare (Record No. 2011/524). That application sought injunctive relief against this appellant for trespass. Within those proceedings the appellant filed a defence and counterclaim claiming he was the legal owner of the lands and was entitled to be registered as such. On 8 May 2012 His Honour Judge Ó Donnabháin, made an order restraining this appellant from trespassing on Folio 8741F and dismissed the appellant's counterclaim. That Order was then appealed to the High Court and was heard by the High Court on Circuit (Butler J.) who, following a hearing. dismissed the appellant's appeal on 26 May 2014. At the hearing of the appeal before Butler J. the appellant had the opportunity to cross examine his brother in relation to all of the issues in relation to the dispute.

8. As pointed out by Baker J. in a subsequent Court of Appeal decision (e*x tempore)* delivered on 29 March 2019, (Peart J. and Whelan J. concurring) as a matter of law once that appeal was dismissed by Butler J. the question of ownership of this land was therefore finally determined.

9. However, the litigation did not stop there. On 22 December 2014 the appellant issued subsequent Circuit Court proceedings in 2014 (record no 2014/00648) seeking rectification of the title to Folio 8741F to reflect his claim to ownership of these lands. The indorsement of claim on the Civil Bill was precisely the same as the counterclaim he had made in the earlier proceedings, which had been dealt with by Judge O Donnabháin and finally disposed of by Butler J. In that regard, the respondent then brought a motion to have the proceedings struck out as being *res judicata* and an abuse of process. By Order of the Circuit Court (His Honour Judge Donohoe) those proceedings were dismissed on 28 April 2015 on the basis

that the issue was *res judicata*: that it to say, in English, that the claim had already been heard and determined.

10. In the meantime, a separate action had been brought by the respondent by which he claimed an injunction to restrain trespass on a sliver of land measuring about 0.2 acres adjoining the 4.144 acres, which, it appears, had previously been part of the West Clare Railway line. That action was dealt with by His Honour Judge O' Donohoe who, in his judgment delivered on 28 April 2015, found in favour of the respondent. The appellant's appeal against both of the Circuit Court orders of 28 April 2015 were heard by the High Court on Circuit (Murphy J.) and both appeals were dismissed on 9 May 2016.

11. The appellant then issued separate proceedings in the High Court bearing Record Number 2016/8777P. These are the proceedings that form the basis of the orders granted by O'Connor J. on 14 June 2017 as set out above. The appellant issued plenary proceedings on 3 October 2016 seeking various reliefs to the effect that he was the rightful owner of Folio 8741F. On 6 February 2017 the respondent again brought a motion to have the proceedings struck out as being *res judicata*, vexatious and/ or an abuse of process and also seeking an Isaac Wunder Order. The Order made by the Court has been recited above, in summary striking out the proceedings on the basis of *res judicata* and making an Isaac Wunder Order.

12. Consequent upon that judgment, the appellant unsuccessfully appealed to the Court of Appeal and was heard before Peart J, Whelan J and Baker J. with an *ex tempore* judgment being delivered by Baker J. on 29 March 2019, with which all members of the court agreed. Thereafter this appellant unsuccessfully sought leave to appeal to the Supreme Court, on 24 April 2019 for the reasons set out within its determination [2019] IESCDET 293

13. In the determination by the Supreme Court on 12 December 2019, [O'Donnell J. (as he then was), McKechnie J. and Dunne J.], upheld the *ex tempore* decision of Baker J. and in particular noted:

(a) The Court of Appeal's complete agreement with the decision of the High Court judge.

(b) That the issues raised that been conclusively decided and determined by the High Court in 2014, a fact which ought to have been viewed as very significant in terms of the analysis of litigation and in furtherance of the protection of the legal rights of both parties.

(c) The finding that the evidence which the appellant had sought to adduce before the Court of Appeal was for the most part unstateable even affording a certain leniency to this appellant as a lay litigant.

(d) That a line now needed to be drawn within the litigation and the Court was satisfied that the orders made by O'Connor J. were necessary for that to occur.

14. All of those matters as endorsed by the Supreme Court are matters to which this court has had careful regard.

15. Notwithstanding the judgment of the High Court and the determination of the Supreme Court to refuse leave in this case, that was not an end of the matter. In March 2020, this appellant again sought (it appears initially by way of an *ex parte* motion) before O'Connor J. to have the same claim litigated before the High Court. The matter was not listed until July 2021 (the appellant having been required to serve documentation in the interim and owing to the delays occasioned by the COVID pandemic) and both parties were before the Court for the application.

16. A transcript of the hearing before O'Connor J. on 28 July 2021 has been furnished. The appellant agreed with the Judge that within that application he was seeking to set aside the order of *res judicata* made by the Court in June 2017 and liberty to issue fresh proceedings. The High Court Judge, noting the previous litigation and in particular the appeal to the Court of Appeal and application for leave to appeal to the Supreme Court made

it clear, by virtue of these appeals pursuant to his judgment of 14 June 2017, he was *functus officio*. The Court also had regard to Isaac Wunder Order. It does appear that to some extent the Court did entertain this appellant and permit him to make submissions to the Court. That is reflected in the Court Order of 28 July 2021, reciting the appellants application to set aside the order of *res judicata* and to issue fresh proceedings and refusing those reliefs. Accordingly, it is against the judgment of O'Connor J. delivered on 28 July 2021 that this appellant now appeals.

Grounds of appeal

17. The appellant contends:

(a) That he was already granted liberty by O'Connor J. to lodge his motion and affidavit as per his order of 24 April 2020;

(b) As his appeal makes clear, on the 28 July 2021 when the appellant's case was called, it was only then that the learned trial judge had had an opportunity of considering and indeed read out his previous order of 14 June 2017. The judge did not consider that he had given the appellant permission for the hearing. The appellant contends that he lodged a new motion to the Central Office seeking a new hearing but was advised that his only option was to lodge an appeal to this court which he has done. In any event I do not see now how this issue is now relevant to any issue before this court.

(c) The appellant claims he was denied due process and natural justice in the Circuit Court trial on 8 May 2012 by His Honour Judge Ó Donnabháin on various grounds which he recites in some detail.

(d) He makes the same point with regard to his appeal before Butler J. on 26 May 2014.

(e) In respect of both he says that both the Circuit Court hearing and the consequential appeal should be regarded as a mistrial and a new trial ordered.

(f) He then, in additional handwritten submissions, makes certain allegations about collusion amongst counsel (some of which may be scandalous) and fraud in respect of certain family members including the respondent.

18. The respondent denies all of the claims and seeks the dismissal of the appeal. By way of cross appeal he seeks a variation to the Isaac Wunder Order granted by the High Court and this point is considered below.

19. In his Notice of Appeal and submissions, this appellant seeks additional orders with regard to the overturning of all costs orders by way of compensation for the loss for what he alleges to be his entitlement to the lands over the previous ten years, that any and all other orders be quashed and he also seeks that any injunction against him be quashed and the restraining order, if any, be, in fact, made against the respondent and a new trial directed *"only if the court requires it"*. I interpret the later submission to mean that a new trial is sought unless this Court accedes to his application and in essence determines his entitlement to the registered lands.

20. The appellant claims that as a lay litigant he does not have full access to authorities but relies upon his entitlements to a right of access to the courts and his submissions that his rights and obligations must be determined in accordance with due process which, in his view, means a right to a fair and complete hearing on all issues of law and fact which he contends he has not received to date.

21. However, the appellant's arguments are of a circular variety because all of his claims with regard to lack of due process and indeed any other consequential orders and reliefs (up to and possibly including a full rehearing) come back to the issues raised before the Circuit Court in 2012 and before the High Court on Circuit in 2014 in the proceedings that have

already been the subject of court adjudication at first instance and on appeal. As pointed out above Baker J. (with the confirmation of the Supreme Court in its determination) this matter must come to an end as consideration must also be afforded to the rights of the respondent as well as the appellant who has been involved in significant litigation with his brother in respect of which the same issues have been ventilated on a number of occasions.

22. The respondent relies upon the principle set out in *Henderson v. Henderson* (1843) 3 Hare 100 [as known as approved in this Court by, for example, the Supreme Court in *BULA Limited (in receivership) and Ors. v. Crowley & Ors.* [2009] IESC 35 where Denham J. quoted with approval from *Woodhouse v Consignia Plc* [2002] 1 WLR 2258 as follows (para 56):

> *"The rationale for the rule in Henderson v. Henderson that, in the absence of special circumstances, parties should bring their own case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that the defendant should not be oppressed by successive suits where one would do."*

23. In the Court's view, this passage quoted from the Supreme Court judgment applies directly to the facts of this case.

24. In *Riordan v. Ireland (No. 4)* [2001] 3 IR 365 Keane C.J. stated:

> *"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the*

holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

25. These findings of the former Chief Justice are especially apposite to the facts of this case. The case itself is also considered alone in respect of the Isaac Wunder Order

26. The respondent, in his submissions, has pointed to the fact that he is elderly and in poor health, pointing also to the failure of this appellant to discharge any of the costs orders which have been made against him in respect of the entirety of the proceedings set out above.

27. Any fair reading of the affidavits, submissions and other documentation which this Court has considered comprehensible filed by this appellant makes it clear that this appellant is repeatedly seeking to raise the same issues, particularly in respect of his numerous complaints with regard to the proceedings before His Honour Judge Ó Donnabháin and the appeal of that judgment before Butler J. Those complaints are set out in considerable detail in the appellant's submissions, both written and oral.

28. He also reiterates the issues that he has with regard to the registration of the December 1981 Deed of Transfer in the Land Registry although, as has already been clearly pointed out by Baker J. in her *ex tempore* judgment, the registration of that interest remains conclusive proof of the respondent's title.

29. It is very difficult to discern the grounds upon which this appellant now seeks to appeal beyond his complaints that no court has properly considered the issues he wishes to raise and more importantly to draw the proper conclusion, as he sees it, arising from those issues. Litigation has never been envisaged as entitling any person to continue in seeking to make the same application (possibly in a slightly different guise) before different judges in the hope of obtaining a different result.

30. In my view, O'Connor J. was unquestionably correct in his finding that the issues raised or attempted to be raised, or attempted to be raised, by this appellant had already been determined by the courts and accordingly that as far as the terms of the Order of 14 June 2017 were concerned the judge was *functus officio*. The decisions of the Court of Appeal and Supreme Courts make this clear and in my view the matter could simply have been disposed of on that basis.

31. This appellant appears to maintain his entitlement to set aside the 2017 proceedings (it appears on the basis that the doctrine of *res judicata* does not apply) and for liberty to issue fresh proceedings.

32. In my view this is a clear case of *res judicata* a fact that had been pointed out to this appellant in all court applications after his unsuccessful appeal before Butler J. in 2014.

33. Delaney & McGrath on Civil Procedure (4th ed.) at para.16.70 defines *res judicata* and confirm it '*provides that the final judgment of a judicial tribunal of competent jurisdiction is conclusive and, therefore, a party is precluded from re-litigating the matters decided in the judgment or giving evidence to contradict it in subsequent proceedings.'* It is generally regarded and described as an instance of abuse of process on the court.

34. It is difficult to envisage a clearer textbook example of the applicability of the doctrine of *res judicata*. These issues have been adjudicated and determined by the courts and indeed it could be argued that this appellant has been afforded some latitude in his conduct of this litigation. Finality must be brought to this litigation as reflected within the Isaac Wunder Order and this elderly respondent should not have to face the ongoing trouble and expense of dealing with proceedings which have already, in the opinion of this Court, been definitively adjudicated.

35. The Supreme Court in its determination refusing leave was entirely satisfied that the matter had been conclusively determined upon the appeal of the Circuit Court proceedings heard in 2014. It concluded with reference to the Court of Appeal decision (para 21);

> *'There is nothing in her decision which could give rise to any uncertainty that the principles applied by her or indeed by O'Connor J. in the High Court were anything but correct. The Isaac Wunder is a necessary mechanism to be utilised in particular situations and there is no issue with the manner and circumstances in which it was employed by O'Connor J.'*

36. Accordingly, I would dismiss the appellant's appeal in respect of the Order delivered by O'Connor J on 28 July 2021.

37. In respect of the respondent's cross appeal in respect of the Isaac Wunder Order reliance has been placed upon the final paragraph of the Supreme Court in *O'Riordan v Ireland (No. 4)* [2001] 3 IR 365 where Keane C.J., as he then was, stated in the final paragraph at p.370;

> *"This court is extremely reluctant, as the High Court has been, to restrain the access of any citizen to the courts. The stage has clearly been reached, however, where the proper administration of justice requires the making of such an order as against the applicant. Accordingly, in addition to dismissing the present motion the court will, in exercise of its inherent jurisdiction, order that the applicant be restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to these proceedings or the holders of any of the offices named as defendants or against the Oireachtas, the Government or any member thereof or Ireland (other than in relation to the taxation of costs), whether in the High Court or*

the Supreme Court, except with the prior leave of this court, such leave to be sought by application in writing addressed to the Registrar of the Supreme Court."

38. Accordingly, the Court will vary the High Court Isaac Wunder Order, in accordance with the Supreme Court judgment above, save that the direction is to encompass the institution of proceedings in the Circuit Court, High Court, Court of Appeal and Supreme Court and that the reference to the institution of any proceedings by way of appeal or otherwise includes, for the purposes of these proceedings, the institution of any motions. In addition, the requirement that leave be sought by an application in writing addressed to the registrar of the Supreme Court, amendment of that leave, and in respect of the quotation should read that ……. 'Such leave to be sought by application in writing addressed to the 'Registrar of the Court of Appeal'.

39. The Court will hear the parties in respect of any application for costs.

40. Barniville P.: I have just listened carefully to the judgment given by Ms Justice Pilkington and I completely agree with the terms of the judgment and the Orders she proposes. I agree therefore that the appellant's appeal should be dismissed and the respondent's cross appeal should be allowed to the extent that the Isaac Wunder Order made by the High Court should be varied in the terms just indicated by Ms Justice Pilkington in her judgment.

Allen J.: I have also listened to the judgment of Ms Justice Pilkington and I would emphasise that in advance of the hearing of the appeal the Court has carefully considered all of the papers filed and carefully discussed the disposition of the appeal. I agree that the appeal should be dismissed. I agree also that the cross appeal should be allowed so as to vary the Isaac Wunder Order which was made by O'Connor J. in the High Court.