

APPROVED

[2023] IEHC 407



THE HIGH COURT
CIRCUIT APPEAL

2020 No. 35 CA

BETWEEN

KENNETH PRICE

PLAINTIFF

AND

ANN DOUGLAS
(AS PERSONAL REPRESENTATIVE OF PATRICIA O'CALLAGHAN)

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 July 2023

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court in respect of a garnishee application. The appeal is confined to the question of costs only. The appellant submits that the proceedings became moot as the result of an external event, and that, accordingly, the appropriate order should have been that each party bear its own costs. The order of the Circuit Court had, instead, directed that the appellant pay the costs.

NO REDACTION REQUIRED

2. For the reasons which follow, the appeal is allowed, and the costs order made by the Circuit Court will be set aside.

PROCEDURAL HISTORY

3. The costs order, the subject-matter of this appeal, was made in the context of a garnishee application. The procedural history leading up to the making of the garnishee application is complicated. For the purposes of the present appeal, it can be summarised as follows.
4. On 14 June 2012, the plaintiff herein, Kenneth Price, had obtained judgment in earlier Circuit Court proceedings against Patricia O’Callaghan. The judgment had been in the sum of €21,000, together with an order for taxed costs. For ease of exposition, Mr. Price will be referred to hereinafter as “*the creditor*”, and Ms. O’Callaghan as “*the debtor*”. As explained below, the debtor has since deceased and her personal representative, Ann Douglas, has been substituted as defendant. Ms. Douglas is the sister of the late Ms. O’Callaghan and will be referred to as “*the debtor’s personal representative*”.
5. The creditor sought to enforce the outstanding balance of the judgment debt by way of a garnishee application made *ex parte* on 13 December 2019. The garnishee application relates to a dwelling house at Churchtown, County Dublin (“*the dwelling house*”). The dwelling house had originally been owned by the mother of the late Ms. O’Callaghan and Ms. Douglas. The mother predeceased both her daughters. Under the terms of the mother’s last will and testament, the dwelling house was to be held in trust for the benefit of the debtor. The executor and trustee under the will is a solicitor, John Larney (“*the trustee*”). The terms of the trust are as follows:

“To hold my house at [...] Churchtown and its contents in trust for my daughter Patricia O’Callaghan until the house is sold and at that time to distribute the sale proceeds to Patricia O’Callaghan for her own use absolutely. I hereby confirm however that my Trustee shall have absolute discretion as to how and when the house will be sold.”

6. The creditor was frustrated by the fact that the continued existence of the trust meant that he could not seek to recover his judgment debt by an enforced sale of the dwelling house. The creditor had made an earlier unsuccessful attempt to enforce against the dwelling house as follows. The creditor registered a judgment mortgage against the dwelling house on an unspecified date. Thereafter, the creditor instituted well charging proceedings before the Circuit Court seeking to enforce the judgment mortgage by way of a sale of the dwelling house. The well charging proceedings were dismissed by the Circuit Court by order dated 18 June 2014. An order for costs was made against the creditor. The proceedings were dismissed in circumstances where the creditor was unable to establish that the debtor had a proprietary interest in the dwelling house.
7. For reasons which have never been fully explained, the judgment mortgage was not vacated at that time. The absence of a proprietary interest would have been fatal to the validity of the registration of the judgment mortgage.
8. The next significant event in the chronology occurred on 28 November 2019. On that date, Mr. Larney, who it will be recalled is the executor and trustee of the debtor’s mother’s estate, wrote to the creditor’s solicitor as follows:

“I refer to previous correspondence dated 6th October 2017. My understanding is that your client had an arrangement with Patricia O’Callaghan which entails periodic payments being made.

My client might be in a position to pay off a lump sum of €10,000 in full and final settlement of the debt, and you might let me know whether this would be of any interest to your client.”

9. Mr. Larney's letter to the creditor's solicitor enclosed, presumably inadvertently, a copy of a letter which had been sent to Dun Laoghaire Rathdown County Council. This letter stated that Mr. Larney acted on behalf of the debtor and explained that she was in the course of selling the dwelling house. The letter went on, then, to seek the consent of the local authority to the assignment of the property to the proposed purchasers.
10. This correspondence is, of course, entirely inconsistent with the notion that the dwelling house was the subject of a trust and that the debtor had no proprietary interest. The position previously adopted had been that only the trustee had power to sell the dwelling house. By contrast, the correspondence indicated that the property was being sold by the debtor as vendor.
11. It was against this background that the creditor made an *ex parte* application for a conditional garnishee order on 16 December 2019. The grounding affidavit sets out the history of the dispute in great detail. It also exhibits, *inter alia*, the two letters described above and a screenshot from the daft.ie website which describes the dwelling house as "*sale agreed*". Replying affidavits were filed in January 2020 by Mr. Larney and by the debtor. Relevantly, Mr. Larney attributes the events which led to the debtor instructing estate agents to sell the property as having been the result of a "*miscommunication*". Mr. Larney avers that the debtor does not have any interest in the dwelling house and emphasises that, *qua* trustee, he is the only person who could sell the property. The affidavit goes on to explain that Mr. Larney is now "*minded not to sell*" the dwelling house but intends, instead, to leave matters as they had stood for the past twenty years or more.

12. The application to make the conditional order of garnishee absolute came on for hearing before the Circuit Court (Her Honour Judge Linnane) on 24 January 2020. The following orders were made on that date:

“THE COURT DOTH ORDER That the Conditional Order of Garnishee made by this Honourable Court on the 16th day of December 2019 be vacated.

THE COURT DOTH REFUSE to make absolute the Conditional Order of Garnishee.

THE COURT DOTH ORDER Mr Neil Buckley, Solicitor, to take steps immediately to remove the defective Judgement Mortgage registered against the Defendant.

THE COURT DOTH GRANT Costs to Fingleton and Company, Solicitors on behalf of Patricia O’Callaghan, as against the Plaintiff to be adjudicated in default of agreement.”

13. The decision to award costs against the creditor appears to have been influenced by the Circuit Court judge’s view that the omission, from the grounding affidavit, of an express statement to the effect that the earlier well charging proceedings had been dismissed constituted a material non-disclosure.
14. The creditor lodged an appeal against the Circuit Court order on 31 January 2020. The appeal is confined to the question of costs.
15. The debtor subsequently died on 26 November 2020. An order was made by the High Court (Meenan J.) on 24 March 2022 substituting Ann Douglas as defendant. It will be recalled that Ms. Douglas is the personal representative of the late Ms. O’Callaghan. Thereafter, there were complications in relation to the service of the proceedings. This is the subject of an earlier written judgment, *Price v. Douglas* [2023] IEHC 247. The proceedings were subsequently served in accordance with the form of substituted service directed.

16. The appeal ultimately came on for hearing before me on 10 July 2023. Ms. Douglas did not participate in the appeal. A letter from Ms. Douglas' solicitor dated 3 July 2023 was put before the court which explained that her side were "*neutral*" on the outcome of the appeal. Ms. Douglas was neither objecting nor consenting to the orders sought.

DISCUSSION AND DECISION

17. Counsel on behalf of the creditor submits that, for costs purposes, the proceedings should be treated as having become moot once the trustee changed his mind about completing the sale of the dwelling house. It is further submitted that, in accordance with the principles in *P.T. v. Wicklow County Council* [2019] IECA 346, a court will ordinarily lean in favour of making no order as to costs where mootness is attributable to a factor outside the control of the parties.
18. The approach contended for on behalf of the creditor is, perhaps, overly generous to the debtor. It is at least arguable that the debtor had some agency in the proceedings becoming moot. The garnishee application was precipitated by the actions of the debtor in purporting to enter into a sale of the property. The debtor ultimately conceded, in her affidavit of 20 January 2020, that her actions were "*wrong*" in that they were inconsistent with her asserted status as beneficiary under a trust.
19. The factors to be taken into account in allocating costs are specified under Section 169 of the Legal Services Regulation Act 2015. The primary factor to be considered is which party has been successful in the proceedings. In the present case, it might be said that the debtor was successful in resisting the garnishee application. However, the circumstances of the case are more

nuanced. The reason that the garnishee application was refused is that there had been a change in position on the part of the trustee and the debtor. It was decided not to complete the proposed sale of the property. It followed that there would be no sale proceeds which might be attached by way of a garnishee order.

20. In allocating costs, the court is entitled, in accordance with Section 169(2) of the LSRA 2015, to have regard to the conduct of the proceedings by the parties, including their conduct before and during the proceedings. The court is also entitled to consider whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. Here, it was entirely reasonable for the creditor to bring a garnishee application. The copy letter to Dun Laoghaire Rathdown County Council and the reference, on the daft.ie website, to the property having gone “*sale agreed*” were evidence of the proposed sale of the dwelling house. The creditor had good grounds for thinking that an agreement had been reached for the sale of the dwelling house, and that the sale proceeds were to be paid over imminently to Mr. Larney, whether in his capacity as trustee, or, alternatively, as solicitor for the purported vendor, i.e. the debtor. In either capacity, Mr. Larney would have been required to pay the sale proceeds over to the debtor. Any sale proceeds would, therefore, have been capable of being attached, by way of garnishee order, to satisfy the outstanding judgment in favour of the creditor.
21. Indeed, the garnishee application would have been unanswerable had it not been for the subsequent change of position on the part of the trustee and the debtor. Having regard to the conduct of the debtor in purporting to enter into an agreement to sell the property as vendor, there would have been good grounds for saying that the creditor was entitled to recover at least some of the legal costs

of the garnishee application from the debtor. However, the creditor has not pressed for such an order and submits, instead, that each party should bear their own costs. This is very fair on his part. I am satisfied that the interests of justice are met by vacating the costs order made by the Circuit Court and directing instead that each party bear its own costs.

22. For completeness, it should be recorded that there is no reasonable basis for suggesting that there had been material non-disclosure at the time of the *ex parte* garnishee application. The grounding affidavit provides a comprehensive chronology of the events leading up to the garnishee application. Express reference is made to the earlier well charging proceedings, and the affidavit filed on behalf of the trustee in those proceedings is exhibited. The judge hearing the *ex parte* application would have been fully aware of the existence of the trust and also aware that the stated position of both the trustee and debtor had been that the latter had no proprietary interest in the dwelling house. The precise purpose of the grounding affidavit had been to highlight the apparent change in position whereby, as of November 2019, both the trustee and the debtor were acting on the basis that the latter was now entitled to complete a proposed sale of the property in her own name. There can be no question of the judge who heard the *ex parte* application having been misled in any way by the creditor. The circumstances of the case are distinguishable from those of *Kanwell Properties Ltd v. Salthill Properties Ltd* [2008] IEHC 3.

CONCLUSION AND FORM OF ORDER

23. For the reasons explained, I have decided, in the exercise of my discretion under Section 169 of the Legal Services Regulation Act 2015, that each party should

bear its own costs of the proceedings before the Circuit Court. Accordingly, the appeal is allowed, and the costs order made by the Circuit Court on 24 January 2020 will be set aside.

24. As to the costs of the appeal itself, my *provisional* view is that, in circumstances where the defendant did not contest the appeal, no order of costs should be made. If either party wishes to contend for a different costs order than that proposed, they should file written legal submissions in the Central Office of the High Court within 14 days. A copy of any such submissions should be served on the other side and a copy sent to the registrar assigned to this case.

Appearances

Fintan Hurley for the plaintiff instructed by Neil Buckley Solicitor

No appearance on behalf of the defendant

Approved
Gareth S. Mans