THE SUPREME COURT

Clarke C.J.
O'Donnell J.
MacMenamin J.

[Supreme Court 2009/228]
[Record No. 2006/4849P]

BETWEEN:

MICHAEL AND THOMAS BUTLER LIMITED, MICHAEL BUTLER AND WILLIAM BUTLER

PLAINTIFFS

AND

BOSOD LIMITED, CROHAN O'SHEA AND THOMAS O'DRISCOLL

DEFENDANTS

[Supreme Court 2010/89]
[Record No. 2006/4849P]

BETWEEN:

MICHAEL AND THOMAS BUTLER LIMITED, MICHAEL BUTLER AND WILLIAM BUTLER

PLAINTIFFS

AND

BOSOD LIMITED, CROHAN O'SHEA AND THOMAS O'DRISCOLL

DEFENDANTS

[Supreme Court 2011/60]
[Record No. 2010/39SP]

BETWEEN:

CROHAN O'SHEA

PLAINTIFF

AND

MICHAEL BUTLER AND WILLIAM BUTLER

DEFENDANTS

[Supreme Court 2019/153]
[Record No. 2006/4849P]

BETWEEN:

MICHAEL AND THOMAS BUTLER LIMITED, MICHAEL BUTLER & WILLIAM BUTLER

PLAINTIFFS

AND

BOSOD LIMITED, CROHAN O'SHEA AND THOMAS O'DRISCOLL

DEFENDANTS

AND

CROHAN O'SHEA AND MICHAEL BUTLER AND WILLIAM BUTLER

DEFENDANTS

Judgment of Mr. Justice John MacMenamin dated the 10th day of September, 2021

1. This ruling arises from an order of this Court, made on the 18th October, 2017 ([2017] IESC 65), and should be read in conjunction with the judgment and order of that day, where this Court held that two of the appeals named in the title, 228/2009 and 60/2011, which had been brought by the appellants against judgments and orders made by McGovern J. and Dunne J. respectively, should be dismissed, save that a new trial should be had, confined to the question of whether or not a settlement, purportedly entered into by the parties on the 11th February, 2008, contained a default Clause 6, and if so, whether the appellants were, and are liable thereon, and for further determination by the High Court of all or any further questions or issues that appeared material to the High Court arising from, or ancillary to, its determination, relating to the existence or otherwise of the said Clause 6 in the settlement.

2. Kelly P. subsequently heard the remitted matter over five days, and delivered judgment on the 11th December, 2018 ([2018] IEHC 702). The then President found that the settlement agreement did contain the default Clause 6 referred to, and that the appellants were, therefore, liable to any sums outstanding under the agreement. The President also found that a purported, second, "settlement agreement", which did not contain the default clause, was a forgery, created by using a copy of the actual settlement agreement. But he concluded that, on the evidence, he was unable to say when, and by whom, that interference with the record occurred.

3. Despite the fact that this matter had been remitted by this Court for the trial of that issue with the stipulation that it should thereafter be returned to this Court, the appellants chose to appeal Kelly P.'s order to the Court of Appeal. This is now Appeal No. 2019/153 in this judgment. All the matters now properly come before this Court for the following purposes:

(i) To consider the appeal from, and deal with the consequences of Kelly P.'s determination;

(ii) To also deal with Appeal No. 89/2010, which was ordered to be retained and listed again after the hearing of the issue before Kelly P.;

(iii) To therefore finally conclude each of the matters named in the title of these proceedings.

(iv) Costs

What follows from the order of Kelly P.

4. For the purposes of this ruling, it is unnecessary again to rehearse all the details of this long and drawn-out litigation. The background is summarised in Kelly P.'s judgment which, in turn, refers to the first judgment of this Court, mentioned earlier. In this appeal, the appellants here sought to raise a series of new issues, but what is fundamentally relevant is the central issue as originally identified by this

Court. It is whether or not Kelly P. was correct in reaching his conclusions on the settlement agreement.

5. In *Hay v. O'Grady* [1992] 1 I.R. 210, this Court made clear that, on appeal, it did not engage in a complete rehearing of a case, but, rather, proceeded on facts as found by a trial judge, and the judge's inferences based on those facts. This Court held that, if findings of fact made by a trial judge were supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere, therefore, with findings of the High Court, where findings of primary fact are not supported by evidence, or could not in all reason be supported by the evidence. Furthermore, the Court will be slow to substitute its own inferences of fact for those of the trial judge, where such inferences would depend upon oral evidence or recollection of fact. However, when drawing inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge to do so.

6. As is set out in Kelly P.'s judgment, the Butlers and Mr. O'Shea were involved in a building development in Clonmel. A dispute arose. Ultimately, the two sets of proceedings were brought, one by Mr. Crohan O'Shea, the other by Michael and Thomas Butler Ltd., Michael Butler, and William Butler. Those proceedings are named in the title of this ruling.

7. It is necessary to briefly outline the evolution of the appellants' case. When this Court first heard the appeal, the Butlers, and in particular Mr. Michael Butler, claimed that they had been pressured by their lawyers on the 11th February, 2008 into settling their case in Dundalk, which was ruled on that day by McGovern J. But they also claimed that the actual terms of the "Dundalk Settlement" had subsequently been altered to their detriment, to include the default clause, and that those altered terms were appended to the court order and placed in the Central Office file, with the collusion and connivance of a person or persons unknown, but allegedly including court officials.

8. It is hardly necessary to point out that there, even when the matter was first before this Court, there was a significant difference between the appellants accepting there had been a settlement that they had been pressurised into agreeing by their lawyers, on the one hand; and on the other hand, asserting that there was never a settlement, and that what was put before the Court was a complete forgery. The appellants do not appear to have acknowledged this inconsistency.

The Nine Clause Settlement

9. The nine clause settlement provided:-

> *"(1) Crohan O'Shea will transfer to Michael Butler and William Butler ("Butlers") his shareholding in Bosod Limited for the total consideration of*

€1.1 million, together with all interest that he may have in the partnership, within 10 days. Crohan O'Shea shall give an undertaking to this object to the court with liberty to apply to enforce the term.

(2) Crohan O'Shea shall resign as a director of Bosod Limited with immediate effect.

(3) Michael Butler and William Butler shall pay Crohan O'Shea the sum of €100,000 within 28 days hereof.

(4) Michael Butler and William Butler shall pay Crohan O'Shea the sum of €1 million out of the proceeds of sale of the properties identified in the Appendix hereto in the sums identified in the Appendix. Michael Butler and William Butler hereby give and undertaking to this effect to the court with liberty to apply to enforce this term.

(5) Michael Butler and William Butler agree to supply information on the progress of the sale of the properties identified in the Appendix hereto at four weekly intervals."

It provided at Clause 6 that:

"(6) ***In the event of the sum of €1.1 million not being discharged on a time before the 11th September, 2008, Michael and William Butler shall consent to a joint and several judgments against each of them in a sum then***

outstanding pursuant to this agreement. In the event that judgment is so entered the undertakings at (4) above are released.

(7) This settlement is in full and final settlement of all claims arising out of the within proceedings.

(8) Any amendment to the pleadings required to implement these terms is hereby deemed effected.

(9) Michael Butler and William Butler agree to indemnify Crohan O'Shea in respect of all liabilities or claims, howsoever arising, in respect of Bosod Limited, or the partnership, following the transfer set out in (1)." (Emphasis added on Clause 6)

10. As the first judgment delivered by this Court explains, almost the entire edifice of the Butlers' appeal was in reality based upon the proposition that there never had been a default Clause 6, and that there was no binding agreement. Michael and William Butler then contended before this Court that the documents said to embody the default clause the terms of the settlement with Crohan O'Shea were null, void and illegal; and that the settlement document was a dishonest forgery, made at the behest of the respondent. They said that the default Clause 6 of the settlement was never part of the agreement, and that the correct "Clause 6" of the agreement was, in fact, what was contained in Clause 7. The respondents' case was clear: there

was a settlement; the appellants had acted on it by making a substantial part payment of hundreds of thousands of Euro; and the appellants' case lacked any substance.

11. For this reason, this Court ordered that a trial in the High Court be confined to the issue of whether or not the settlement, purportedly entered into by the parties on the 11th February, did actually contain the default clause, and whether the appellants were, and are, liable thereon.

12. It is necessary to emphasise that, subject to that one *proviso*, this Court ordered the two appeals be *dismissed*. As a consequence, the only issue remaining was as to the validity of the settlement, ultimately dealt with by Kelly P.

Part Payment under the Settlement

13. It is to be recalled that, when the appeal was first heard in this Court, neither Michael nor William Butler denied that they had been present in Dundalk for the High Court hearing. In light of the case subsequently made by the Butlers, they have never explained why, if there was never any settlement, they nonetheless subsequently paid out the sum of €446,168 to Mr. O'Shea, leaving a balance of €653,832, which was the judgment sum obtained before McGovern J. on the 12th May, 2009.

Subsequent steps taken by the Respondents

14. On the basis of later orders, judgment was registered on lands owned by the Butlers, and by order of the 20th December, 2010, the registered judgment was declared well charged, and there was an order for sale. The properties were subsequently sold.

The Existence of the Settlement

15. As Kelly P. sets out, he heard evidence on the making of the settlement, and the issue regarding the order. Mr. John O'Donnell, S.C., one of the counsel who represented the Butlers in Dundalk on the 11th February, 2008, testified that there was an agreement entered into between the Butlers and Mr. O'Shea, and that the Butlers were aware that they had made that agreement. Kelly P. had before him a transcript of the hearing of the 11th February, 2008. The stenographer, who had been in attendance in Dundalk on that day, gave evidence, and proved the transcript. An audio recording of the hearing was played in court, which demonstrated that the transcript was correct in all aspects, and recorded the appellants' counsel opening the terms of the settlement to McGovern J. for the purpose of ruling. That transcript accorded with the settlement agreement, containing the nine clauses, and *specifically referred to the default Clause 6*. Kelly P. noted that the fact that Mr. O'Shea did

receive payments totalling €446,168 could only be consistent with the terms of the agreement entered into.

The Forged Court Order

16. On the claim of forgery, Kelly P. set out the evidence of Mr. Kevin O'Neill, Principal Registrar, who produced the court file, and testified that the original court order was not actually there. There was, however, a copy of a perfected order dated the 28th March, 2008, which had attached to it an *eight* clause "settlement agreement". His evidence was, however, that the electronic version of the order contained the original settlement agreement, which contained *nine* clauses.

17. The High Court heard evidence from Mr. Anthony Stockton, a specialist in the scientific examination of handwriting, signatures and disputed documents. He testified before Kelly P. that the eight clause "agreement" had been created by copying the nine clause document, and then removing the default clause. It was, he stated, a crude "cut and paste" operation. The appellants did not call any forensic evidence.

18. On this basis, Kelly P. determined that the eight clause agreement had been created as Mr. Stockton described, and that the file had been interfered with in such a manner that the forged document was placed on the file. Each one of these findings

was based on findings of primary fact, and fully supported by credible evidence. Those findings of fact, based on evidence, are binding on this Court.

19. A number of points arise from Kelly P.'s judgment which indicate inconsistency in the appellants' case. At para. 16, Kelly P. observed that, in giving evidence before him, Mr. Michael Butler was asked whether he had signed the *eight* paragraph document, which did not include the default Clause 6? He answered that he most certainly did not sign that document, and described it as a fraud document. But that, in fact, it was that document which supported his case. It suggested there had not been any default clause. Yet Mr. Butler nonetheless repudiated that document. Mr. Michael Butler was then asked if he signed a similar document with nine paragraphs annexed to the High Court order of 11th February, 2008, which did not include the default Clause 6. He answered that he most certainly did not sign that document, and described it, too, as a fraud document. He was then asked if he signed a similar document with nine paragraphs annexed to a High Court order of 11th February, 2008. He denied that he signed that document also. On the second day of the trial, he asserted in evidence that no agreement had been reached by way of settlement of the proceedings with Mr. O'Shea.

20. But this testimony, given in the High Court before Kelly P., was at variance with the position previously adopted in this Court, and recorded in the judgment of O'Donnell J. when he wrote at para. 4: "*The appellants do not deny that the case*

was listed for hearing in Dundalk on the 11th February, 2008, or ***indeed that a settlement was arrived at and a court order made pursuant to that settlement.*****"** (Emphasis added)

21. Kelly P. pointed out that the allegation of no agreement having been reached was not only in complete contrast to the evidence from Mr. John O'Donnell, S.C., but also in complete conflict with the transcript of what had been said to McGovern J. on the occasion that the cases were ruled. When the settlement was announced, counsel had actually referred to the existence of the default clause in open court in Dundalk. Kelly P.'s judgment contained a narrative of Mr. O'Donnell's evidence, setting out what happened on the day the settlement was entered into after negotiation. Mr. O'Donnell, S.C. told Kelly P. that the Butlers had subsequently sued him, his junior counsel, and instructing solicitor in respect of the matter, but those proceedings had been struck out.

22. Kelly P. concluded:-

> *"36. To hold in favour of the Butlers' assertions would, in the light of the evidence, be perverse. Not merely would it mean that I would give preference to the rambling and unconvincing evidence of Mr. Michael Butler over the precise and focused evidence given by Mr. O'Donnell which was backed up by all of the contemporaneous material but would also lead to the inference*

that when counsel announced the terms of settlement to McGovern J. they were participating in an elaborate and dishonest hoax. That charade would involve them not merely breaching the most basic of their ethical obligations to the court and their clients but also in confecting a false document containing detailed terms and forging the Butlers' names to it. I am quite satisfied that counsel did no such thing. Instead, the Butlers were advised by competent counsel that the case which they had brought was a very poor one. On advice they decided to settle it. The settlement negotiations went on through most of the day and resulted in the agreement which I have already reproduced. Having so settled the case the Butlers subsequently thought better of it. For many years now they have engaged in a war of litigation in an effort to evade their responsibilities to Mr. O'Shea. In the course of that campaign they have been prodigal with allegations of fraud, conspiracy and deceit and have not merely litigated with Mr. O'Shea but also unsuccessfully with the legal representatives who appeared for them."

"37. It is, I think, time that this lengthy and expensive litigation should come to an end with the Butlers accepting what is the truth of the position namely that they did settle the litigation with Mr. O'Shea in February of 2008 in accordance with the terms of the agreement which I have already set forth."

23. Having made this finding, Kelly P. then went on to find that the Butlers were, and had been since the 12th September, 2008, liable to Mr. O'Shea in the sum of €653,832. The orders of McGovern and Dunne JJ. were properly made against the Butlers.

24. Kelly P. observed that in written closing submissions, apparently drafted by someone with some knowledge of case law other than the Butlers, allegations were made alleging unlawful behaviour on the part of this Court, High Court Registrars, and on the part of Mr. O'Shea, as well as, for the first time at the conclusion of the case, asking Kelly P. to recuse himself because of his membership of the Courts Service Board, a fact which must, at all times, have been known to the Butlers. He observed that no reasonable person with a knowledge of the issues to be tried would have had a reasonable apprehension that the Butlers would not have had a fair hearing simply because of the fact that he happened to be a member of the Courts Service Board. The Courts Service was not a party to the proceedings. It had made non-party discovery, and an official of the Courts Service gave evidence before him, but the Board was not a defendant in the proceedings. No relief was sought against it. The President pointed out that the recusal application was part of a pattern of events where, as was known to the court, the Butlers had made applications to many judges at many levels to recuse themselves, even, on one occasion, requesting a female member of the judiciary to recuse herself on the grounds that she was a

woman. On the 18th October, 2017, O'Donnell J. delivered a ruling rejecting earlier applications to members of the panel of this Court assigned to recuse themselves.

25. The judgment of the President, delivered in open court after a hearing in open court, is to be seen in the light of the appellants claims of "conspiracy", or a "cover up" by the Courts Service. Kelly P.'s judgment makes crystal clear that the evidence pointed one way only: The Butlers settled the case, regretted it afterwards; and then tried to rewrite history.

McKenzie Friend

26. The Butlers were accompanied in the High Court by Ms. Angela Farrell, who was struck off the Roll of Solicitors some years ago. In the course of his judgment, Kelly P. commented that the entire five day hearing which led to his judgment was an extremely difficult one to preside over. This was due to the failure on the part of Messrs. Butler and Ms. Farrell, either wittingly or unwittingly to address their minds to the two issues which were directed to be tried by the Supreme Court. He stated that the trial took much longer than was necessary, and that the Butlers, aided by Ms. Angela Farrell, stated to be a McKenzie friend, made the trial difficult to control. In seeking to range over many issues they attempted to place irrelevant and inadmissible evidence before the court, and made allegations of wrongdoing, forgeries and Masonic conspiracies without the slightest evidence in support of them.

27. A number of other observations may be made briefly. The appellants' notice of appeal and submissions to this Court on the appeal contained a substantial amount of entirely irrelevant material. Some of the matters contained therein simply did not make sense. The Butlers expanded on allegations made against officials who were not given the right to defend themselves. These claims were made without any evidence. Questions of jurisdiction of the High Court and this Court were raised which had no basis. Suggestions were made that the Courts Service acted irregularly, similarly without any evidential basis. It was claimed wrongly that the appellants had been denied a right of appeal. It was variously suggested that there had been breaches of the Data Protection Act, 2008; Directive 2005/60 EC; and the Criminal Justice (Money Laundering & Terrorist Financing) Act, 2010. No such issues of data protection, money laundering or E.U. law arise. While there are many other similar contentions, I select these as simple illustrations of the fact that the appellants have raised what can only be described as tendentious and irrelevant issues, when the actual issues before this Court are now quite simple ones, *viz.* did the Butlers enter into the settlement, or not, and what are the consequences? There is no basis for concluding Kelly P. erred. The remitted issues have now been conclusively dealt with by Kelly P.

28. The misconduct criticised by Kelly P., unfortunately, persisted. When the matter came before this Court for case management, the question was raised as to

whether or not Ms. Farrell was entitled to appear, either as a McKenzie friend, or as a solicitor. There was no satisfactory answer to that question. Instead, the response was evasive.

29. Before the full appeal hearing, on instructions, the Registrar of this Court wrote to Mr. Michael Butler, who represented all the appellants, indicating that the Court would not be disposed to allow Ms. Farrell to assist him. Ms. Farrell was specifically asked whether she was entitled to practise as a solicitor, and whether her name was on the Roll of Solicitors. Any oral response and the written answers in correspondence given to that question were neither full nor candid. On the day the case came on for hearing, Ms. Farrell nonetheless attended. She was informed the Court would not hear her. The Chief Justice made the position very clear. In the appeal, Ms. Farrell nonetheless sought to raise objections to the manner in which the appeal was being dealt with remotely. This is a matter governed by statute. (See Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020.) Mr. Michael Butler, representing all the appellants, and Ms. Farrell, had to be asked to leave the court. The Court rose. After the Court resumed, Mr. Butler then re-entered court by himself, and was invited to make any submissions as he wished. He made brief further submissions in the appeals. These did not add to the case.

30. This litigation has now been in existence for many years. It is unnecessary to set out again what Kelly P. wrote about the case, quoted earlier in this judgment.

This case is now at an end. The issues which were remitted have been resolved fully by the hearing before Kelly P. The appellants' appeals now stand dismissed.

Appeal 89/2010

31. As recorded earlier, it was McGovern J. who granted judgment in Dundalk. However, it subsequently emerged that there was an error on the face of the order, in that the order in question was recited to have been an order made by Clarke J. (as he then was), rather than McGovern J. It appears that a solicitors' firm acting on behalf of Mr. O'Shea sought consent to amend the order, but that Mr. Michael Butler indicated he was unwilling to consent to this. McGovern J. later made a corrective order.

32. Clerical mistakes may be corrected at any time pursuant to Order 28, Rule 11, of the Rules of the Superior Courts. The substantive issue of whether there was a binding settlement has now been determined. Any question which arose from Appeal No. 89/2010 is, in fact, now immaterial, in that it is clear the appellants are bound by the settlement and order ruled before McGovern J. Were it necessary, the order will be amended to read McGovern J. The Court will simply strike out the appeal 89/2010.

33. The effect of this judgment is that the outstanding appeals and matters are now finally and conclusively determined. The appellants' case has been entirely

unsuccessful. The nine clause settlement, containing the default clause, is a valid settlement upon which the respondent was entitled to proceed, and is binding on the appellants. The order made by McGovern J. in Dundalk is a valid order.

***Isaac Wunder* Order**

34. This Court will not, at this stage, make an *Isaac Wunder* Order prohibiting the appellants from bringing any further proceedings, directly or indirectly related to this claim. However, the Court would not want this decision to be misinterpreted. The appellants must now be well alive to the fact the courts have found they made allegations which were reckless, damaging, vexatious, and wrong, and which simply should never have been made. The appellants must realise that they did enter into the settlement, although they may subsequently have regretted it. The fact that they entered the settlement is reinforced by the absence of any meaningful response to the coercive evidence in the High Court.

35. In the event that the appellants seek to re-litigate any matter related to these cases further, the appellants, or any person purporting to advise them, or act on their behalf, would be well-advised to bear in mind that the respondents would, in such event, be entitled to apply immediately to the High Court for an order restraining the further prosecution of such proceedings. This litigation has now ended. These cases

have now finally concluded, save for the question of costs. My colleagues have authorised me to state they are in agreement with this judgment.

Costs

36. The default position which would follow from this judgment is that the respondents would be entitled to the costs of these appeals to include the costs of the hearing before Kelly P. The appellants will, accordingly, be permitted 7 days to make short written submissions as to why such an order for costs should not come into effect at the expiry of 7 days from the date of delivery of this judgment. In the absence of such written submissions, such an order for costs will automatically then come into effect. Any submissions *must* be no more than on four A4 pages, and confined *only* to the issue of costs. Unless some compelling reason is shown, the issue of costs will be dealt with on the papers, without the need for oral hearing.