

**APPROVED
NO REDACTION NEEDED**



**THE COURT OF APPEAL
CIVIL**

Appeal Number: 2021/296

Allen J.

Neutral Citation Number [2023] IECA 117

BETWEEN:

JOSEPH SLATTERY

PLAINTIFF/ APPELLANT

AND

THOMAS SLATTERY

DEFENDANT/ RESPONDENT

RULING of Mr. Justice Allen delivered on the 12th day of May, 2023

1. This is an application made by Mr. Joseph Slattery, who is the subject of an *Isaac Wunder* order, for leave to issue proceedings against his brother, Mr. Thomas Slattery, in relation to lands at Lahinch, County Clare.
2. By order of the Court of Appeal (Barniville P., Pilkington and Allen JJ.) made on 14th July, 2022, Mr. Slattery was restrained from instituting any such proceedings, or issuing any appeal or motion, in any court, except with the prior leave of the Court of Appeal, such leave to be sought by application in writing addressed to the Registrar of the Court of Appeal.
3. Mr. Slattery made his application on 17th April, 2023 by filing an *ex parte docket* and affidavit. I have been assigned by the President of the Court of Appeal to deal with the

application as a single judge, with the proviso that if I consider that it raises any issues of substance or difficulty, it would be open to me to refer the application to a panel of three judges. I am satisfied that the application is one which can properly be disposed of by a single judge.

4. The relief sought by Mr. Slattery as set out on his *ex parte* docket is an order:-

“1. For permission to seek a hearing by the applicant in order to obtain a miscarriage of justice order as required by condition of the Court of Appeal on 14th July, 2022 Record No. A:AP:IE 2021:000296 and Supreme Court Determination on 20th January, 2023 Record No. S:AP:IE 2022:00099.

2. Permission for an order of transcript of Court of Appeal. I am ordered to send this application to the Registrar of the Court of Appeal.

3. The injunction order quashed.”

5. The order of 14th July, 2022 was made these proceedings, in which Mr. Slattery was the plaintiff and appellant and Mr. Thomas Slattery was the defendant and respondent.

6. Mr. Slattery’s affidavit is not absolutely clear by itself but the nature and substance of his application is quite clear when the affidavit is read in the light of the *ex tempore* judgment of Pilkington J. (with which Barniville P. and I agreed) delivered on 14th July, 2022 ([2022] IECA 181); the Determination of the Supreme Court (O’Donnell C.J., Woulfe and Murray JJ.) made on 20th January, 2023 and referred to in *ex parte* docket and in the title to Mr. Slattery’s affidavit ([2023] IESCDET 6); and an earlier Determination of the Supreme Court (O’Donnell, McKechnie and Dunne JJ.) of 12th December, 2019 ([2019] IESCDET 293), to which I will come.

7. The lands at Lahinch, County Clare, the subject of this application have been the subject of protracted litigation since 2011. By deed of transfer dated 29th December, 1981 Mr. Slattery’s parents, Matthew Slattery and Anne Slattery, transferred to Mr. Thomas

Slattery a parcel of land measuring 4.144 acres which was then part of the property in Folio 17096, County Clare. The lands were transferred to a new Folio 8741F, County Clare and Mr. Thomas Slattery registered as the owner of the lands on 22nd July, 1982. Mr. Matthew Slattery died in 1987. According to Mr. Slattery, his mother later signed a form of transfer to him on 22nd August, 1988 of all of the property in Folio 17096. In his affidavit grounding this application, Mr. Slattery has deposed that the property then transferred to him included the 4.144 acres which had previously been transferred to Mr. Thomas Slattery but it clearly did not. By then the 4.144 acres had been carved out of Folio 17096 and re-registered in the name of Mr. Thomas Slattery in Folio 8741F. Mrs. Slattery died in December, 2010.

8. On 19th July, 2011 Mr. Thomas Slattery commenced proceedings in the Circuit Court, South Western Circuit, County Clare (Record No. 2011/524) claiming an injunction restraining Mr. Slattery from trespassing of the lands in Folio 8741F. Mr. Slattery delivered a defence in which he denied that Mr. Thomas Slattery was the registered owner of the land and he counterclaimed for a declaration that he, Mr. Slattery, was entitled to be registered as such. On 8th May, 2012 an order was made by His Honour Judge Ó Donnabháin restraining Mr. Slattery from trespassing on the lands and dismissing his counterclaim. An appeal by Mr. Slattery to the High Court was dismissed by Butler J. on 26th May, 2014.

9. On 22nd December, 2014 Mr. Slattery issued Circuit Court proceedings against his brother claiming rectification of the Land Registry Folio. The indorsement of claim on the Civil Bill was precisely the same as the counterclaim which Mr. Slattery had made in the earlier proceedings and which had been dismissed. On the application of Mr. Thomas Slattery, an order was made by His Honour Judge O'Donohoe on 28th April, 2015 dismissing the action on the grounds that the claim was *res judicata*, that is, that Mr. Slattery's claim had already been heard and had been finally disposed of in the 2011 proceedings.

10. On the same day, in a further action which had been brought by Mr. Thomas Slattery, Judge O’Donohoe granted a permanent injunction restraining Mr. Slattery from trespassing on a sliver of land measuring about 0.2 acres adjoining Folio 8741F.

11. An appeal by Mr. Slattery to the High Court against both of the orders made on 28th April, 2015 was dismissed by Murphy J. on 9th May, 2016.

12. On 3rd October, 2016 Mr. Slattery issued High Court proceedings (Record No. 2016 No. 8777P) in which he claimed – for the third time – that he was the owner of the lands in Folio 8714F, County Clare. On the application of Mr. Thomas Slattery, that action was dismissed by O’Connor J. on 14th June, 2017 on the grounds that the claim was *res judicata* and that the action was vexatious and an abuse of process. O’Connor J. also made an *Isaac Wunder* order against Mr. Slattery restraining the institution of further proceedings unless by leave of the High Court.

13. An appeal by Mr. Slattery to the Court of Appeal against the judgment and order of O’Connor J. was dismissed on 29th March, 2019 for the reasons given in an *ex tempore* judgment delivered by Baker J., with which Peart and Whelan JJ. agreed.

14. On 12th December, 2019 the Supreme Court (O’Donnell, McKechnie and Dunne JJ.) dismissed an application by Mr. Slattery for leave to appeal. ([2019] IESCDET 293)

15. The *ex tempore* judgment of Baker J. does not appear to have been published but the substance of it is set out in the Determination of the Supreme Court, which shows that:-

“11. Baker J., in an ex tempore judgment was in complete agreement with the decision of the High Court judge. She pointed out that the issues raised had been conclusively decided upon by the High Court in 2011 [recte. in the 2011 proceedings] a fact which ought to be viewed as very significant in terms of finality of litigation and in furtherance of the protection of the legal rights of both parties.

12. *She found that the evidence which the applicant had sought to adduce before the Court of Appeal was for the most part unstateable, even with a certain amount of leniency being afforded due to his being a lay litigant. The essential argument made by him was: that there was a deed in 1981 which during a reexecution had been in some way compromised through a falsehood. However, the deed was submitted for registration to the Land Registry and the title registered. The learned judge on this basis could not avoid the conclusion that such registration was conclusive of title. There was nothing in the documents before her which could point towards any oddity in the transfer or the registration.*

13. *She concluded by saying that this was a matter in which a line needed to be drawn, and that she was satisfied that the orders made by O'Connor J. were necessary for this to happen."*

16. The decision of the Supreme Court was that:-

"The judgment of Baker J. makes the point that there is great weight to be placed on the finality of litigation and this is entirely correct. Her judgment thoroughly goes through the history of the proceedings and comes to the conclusion that the matter had been conclusively determined once the applicant's appeal from the decision of the Circuit Court was heard by the High Court in 2011. [recte. in 2014] There is nothing in her decision which could give rise to any uncertainty that the principles applied by her and indeed by O'Connor J. in the High Court were anything but correct. The Isaac Wunder order 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."

17. Notwithstanding the Determination of the Supreme Court, on 12th March, 2020 Mr. Slattery applied to the High Court "to set aside the order of *res judicata*" and for leave to

issue fresh proceedings. That application, which was made on notice to Mr. Thomas Slattery, was refused by O'Connor J. on 28th July, 2021 and Mr. Slattery's further appeal to the Court of Appeal was dismissed on 14th July, 2022. With a view to – or at least in the hope of – forestalling any further vexation or expense to Mr. Thomas Slattery, the Court of Appeal varied the *Isaac Wunder* order to spell out that any leave application should be made by notice in writing to the Registrar of the Court of Appeal and not on notice to Mr. Thomas Slattery.

18. To complete the picture, on 19th August, 2022 Mr. Slattery applied to the Supreme Court for leave to appeal against the judgment and order of the Court of Appeal of 14th July, 2022. That application was refused by the Supreme Court (O'Donnell C.J., Woulfe and Murray JJ.) on 20th January, 2023. ([2023] IESCDET 6) The decision of the Supreme Court was that:-

“The Courts have already ruled that this matter had been conclusively determined once the applicant's appeal from the original decision of the Circuit Court was heard by the High Court back in 2014. No issue of general public importance has been raised by the applicant, and on the application filed by him there is no evidence whatsoever which suggests that he has been denied a fair, full and impartial hearing of the facts in dispute. Therefore, there is no issue arising which would make it necessary to grant leave in the interests of justice.”

19. By his affidavit filed in support of this application, Mr. Slattery says that he wishes to apply for a “*miscarriage of justice order.*” He asserts ownership of all of the property originally comprised in Folio 17096 by virtue of the form of transfer said to have been signed by his mother on 22nd August, 1988, years after his parents had transferred the property to Mr. Thomas Slattery and after Mr. Thomas Slattery had been registered as owner.

20. Mr. Slattery says that the judge – he does not name the judge but he obviously means Judge Ó Donnabháin – granted an injunction without looking at what he calls his legal deed of transfer of 22nd August, 1988 and that the judge refused to allow any of his witnesses. He says that the same judge failed to look at or consider the relevant facts on Mr. Thomas Slattery’s deed of transfer dated 29th December, 1981 and he suggests that the map attached to that deed when it was sent to the Land Registry for registration was not the map which was attached to it when it was executed.

21. Mr. Slattery refers to his property marked “7A” on his Folio 17096 and a map attached to the deed of transfer to Mr. Thomas Slattery dated 29th December, 1981 showing the parcel marked “7A”. He suggests that the solicitor dealing with Mr. Thomas Slattery’s registration application altered the map and the deed but the substance of what he says is that the Folio is wrong and that:-

“If the judge at the Circuit Court in 2012 looked at both deeds and considered the relevant facts he should not have ordered the injunction removing me from my legally owned property in ‘7A’.”

22. The order made by Judge Ó Donnabháin on 8th May, 2012 was an injunction restraining Mr. Slattery from trespassing on the lands comprised in Folio 8741F, County Clare, which – as the judgment of Pilkington J. shows – was carved out of the parent Folio 8741F, and the registered owner of which is Mr. Thomas Slattery. Thus, Mr. Slattery’s reference to his legally owned property in “7A” can only be to the lands in Folio 8714F. Plainly, what Mr. Slattery seeks to do is to re-open the issue of ownership of the lands and to go behind the registration of Mr. Thomas Slattery as the owner of the lands in Folio 8714F. This is precisely what he sought to do in the counterclaim he filed to Mr. Thomas Slattery’s 2011 Circuit Court proceedings which was finally decided against him by Butler J. on 26th May, 2014.

23. There are various other criticisms of the conduct of the case before the Circuit Court in 2012 and the High Court on Circuit in 2014 but they are not material to the core issue. It is worth noting, however, that Mr. Slattery refers to a claim canvassed on the hearing of the appeal to the High Court that he has been in undisturbed adverse possession of the lands from January, 1988 to 13th June, 2011 and to a ruling by Butler J. – said to be missing from the transcript of the DAR – that Mr. Slattery was not, in cross-examining Mr. Thomas Slattery, entitled to make allegations of fraud which had not been pleaded.

24. Mr. Slattery concludes his affidavit by suggesting that Butler J. erred in dismissing his appeal on the grounds that the case he wished to make based on fraud could have been accommodated by his plea that the registration of Mr. Thomas Slattery as the owner of the lands “*arose through mistake, misunderstanding or otherwise*”, and that he should have been allowed to put it to his brother than the transfer to Mr. Thomas Slattery on 29th December, 1981 and the map attached to it had been altered. Mr. Slattery now appeals to justice but it would have been quite wrong, and unjust to Mr. Thomas Slattery, for the judge to have allowed Mr. Slattery to make – and require Mr. Thomas Slattery to answer – an allegation of fraud based on a plea that the entry on the register had arisen by mistake, misunderstanding “*or otherwise.*”

25. I doubt that it will make any difference if I repeat what I previously said by my concurrence with the judgment of Pilkington J. on 14th July, 2022 and what has been repeatedly said by Judge O’Donohoe, Murphy J., O’Connor J. (twice), six judges of the Court of Appeal, and five judges of the Supreme Court (including the Chief Justice, twice) but the question of ownership of the lands in Folio 8714F was finally and conclusively determined by the order of the High Court (Butler J.) by which Mr. Slattery’s appeal against the order of Judge Ó Donnabháin made on 8th May, 2012 was dismissed and by which Mr. Slattery was permanently enjoined from trespassing on those lands.

- 26.** The fresh proceedings which he wishes to issue would be vexatious and an abuse of process.
- 27.** Mr. Slattery's application for leave to issue further proceedings must be refused.
- 28.** Mr. Slattery offers no reason why he wants the transcript of the hearing – presumably the hearing on 14th July, 2022 – before the Court of Appeal. It cannot be for the purpose of an application to the Supreme Court for leave to appeal because that application has already been made and determined. Absent a reason, that part of his application must also be refused.