THE COURT OF APPEAL

Record Number: 2024/18
High Court Record Number: 2022 No. 16 SP
Neutral Citation Number [2024] IECA 193

Binchy J.
Pilkington J.
O' Moore J.

BETWEEN/

ROBERT ALAN ROBERTS

APPELLANT

-AND-

DAVID IAN ROBERTS & JANICE ROBERTS

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 22nd of July, 2024

1. This is an appeal against a well charging order made by the High Court (Nolan J) on the 12th of December 2023. These proceedings have their origins in a dispute between two brothers, Robert Roberts and David Roberts. Their father, Thomas, died on the 10th of August 2006. His will, dated the 14th of July 2006, failed to make a bequest of the property in which Thomas lived at the time of his death. That property was 87 Bold Street, Leigh, Lancashire, England ("the Property"). Because of this failure in the will, the Property (or,

more precisely, the proceeds of the sale of the Property) should have been divided equally between David and Robert. Robert complains, however, that David sold the Property to third parties for Stg £70,000 and then kept the net proceeds. On foot of this complaint, Robert issued proceedings in the High Court of England and Wales claiming;

1. An account of the sums received by the sale of [the Property]

2. Payment to [Robert] of one-half of the net proceeds of the said sale.

3. An Order for the Administration of the estate of Thomas Roberts deceased with all necessary and proper accounts, directions and enquiries.

Other adjectival reliefs were also sought.

2. On the 28th of January 2010 Robert obtained an order in the English proceedings debarring David from further defending the claim, a Declaration that Robert was entitled to one-half of the net proceeds of sale of the Property, a direction that David serve an account of the sums realised from the sale of the Property and disclosing all documentation relevant to the calculation of the sale proceeds. In the event that the account was not provided or the relevant documentation not disclosed, Robert was awarded judgment against David in the sum of Stg £35,000 together with interest at 8% from the 26th of January 2007 (the date when the Property was sold) to the 19th of February 2010. In accordance with this order, Robert maintains, he obtained judgment against David on the 5th of March 2010 in the amount of Stg £ 43.591.78.

3. On foot of this judgment, Robert registered a judgment mortgage over the interest of David in property in Wexford. Robert now seeks in the current proceedings to have this amount (together with continuing interest) well charged on the same property in Ireland. As David's wife, Janice, is the registered owner of the Irish Property she has also been joined

to this well charging action. Two immediate and quite basic issues arise in such an application. Firstly, does David have any interest in the Irish property? Secondly, is the English judgment enforceable in Ireland by means of a European Enforcement Order for Uncontested Claims Certificate, issued on the 12th of May 2010.

1. Does David Roberts have an interest in the Irish property?

4. The High Court made the well charging order sought by Robert. In doing so, the trial judge decided that David had an interest in the Irish property. A summary of his conclusions is helpfully to be found at page 6 of the transcript of page 6 of his ex tempore judgment;

> "I'm also satisfied of the funds to purchase the property in Wexford. They were put into the Goodman account by the sale of the property of the late Mr. Roberts, in the sum of £ 64,516.46, and the sale of the house jointly owned by Mr. and Mrs. Roberts in the sum of £ 316,376. Those monies were then mixed with perhaps other monies. But it is not at all clear to me that there were in fact any other monies. They were put into the Goodman account for reasons which have not been explained…However, I am satisfied that monies from that account were then used building the first and second defendant to purchase the property in Wexford. I do not accept that [David] in some way assigned the monies to his wife to pay for the failure of {Robert] to purchase shares. That seems to me to be a far-fetched notion.
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> "Therefore I am satisfied that monies of [David] found their way into the joint account and then found their way to the Goodman account, which then purchased the family home in which the defendants live."

5. The contention of counsel for Robert, accepted by the trial judge, was simple. It is summarised at pages 6 and 7 of David's written submissions to this court. Put briefly, and assuming that two written instruments (dated 2006 and 2007 respectively) are valid it is this;

a. The joint account operated by David and Janice received several payments in 2007. One of these payments constituted the net proceeds of sale of the Property (Stg £ 64,516.31). Another (in the sum of Stg £ 60,032.57) was described by David as a gift to Janice. Importantly, a third payment (Stg £ 316,376.80) was from the sale of property owned jointly by Janice and David in Harrogate.

b. On the 26th of June 2007 some 400,000 euro was transferred from the joint account to the Goodmans Account – an account operated by a company (Goodmans Limited).

c. On the 27th of November 2007, the sum of 337,500 euro was transferred from the Goodmans Account to a solicitors account in Dublin, from which the purchase of the Irish property was funded.

d. The net proceeds of sale of the Property, taken in conjunction with his share of the proceeds of the Harrogate property, meant that David was the owner of some Stg £ 130,204.71 of the monies paid into the joint account in 2007.

6. In her evidence, Janice disputed this analysis. She averred (at paragraph 29 of her first joint affidavit with her husband) that;

"…Goodmans was the source from which I bought the Irish property. The amount I held in loan capital was bolstered in June 2007 by my £ 260,000 recorded agreement

> share from [the Harrogate property], our last main UK property. I paid £ 253,000 (347,000 euro) for the Wexford property from my management account recorded loan capital account in Goodmans, without any gift of funds, loan, or any form of financial contribution beforehand from my husband before, or on the date my purchase funds were transferred on 27 Nov 2007. All this was disclosed in [earlier proceedings] to prove I bought my property. Goodmans surviving management accounts show my husband had 32,800 euro at 1 Dec 07, after I wired the property purchase sum to Dublin. [Roberts'] claim he had £ 130,000 is unproveable nonsense."

7. At the hearing of the appeal, counsel for Robert accepted that the trial judge did not expressly consider this evidence in his decision. It is therefore impossible to know why it was not accepted. As counsel also acknowledged, a more fundamental point is whether this evidence could be rejected on the hearing of an application such as the one before the High Court, absent cross examination.

8. The account of Janice is supported, at least to some extent, by three documents. The first is a Goodmans ledger entry bearing the date 31st of July 2007. It shows a series of lodgements and withdrawals in 2006 and 2007 totalling a net lodgement to the account of £ 433,000. It is stated to be agreed by "all main signatories to this agreement." The document is mentioned in the judgment, at pages 4 and 5, Having summarised the ledger entry, the trial judge outlines some contradictory statements made by David about the Goodmans account, its purpose and the payments into it. The trial judge goes on;

> "The reality is, there are no statements. And without statements, there is nothing to prove his assertion…Exactly what Goodmans of Harrogate is, is still a mystery. But

> what is not a mystery is that monies were paid into that account and that monies were set out in the submission by [counsel for Robert]."

9. The second relevant document is a reconciliation, dated the 1st of August 2007, of the Goodman Shareholders Euro Loan Ledger Account. This appears to be the same Goodmans account considered elsewhere in the papers. It shows a Disposition of Loan Capitalin Janice's name of £ 320,000 as of the 1st of July 2007. The sterling sum was converted into 457,000 euro. Of that, 10,000 euro was transferred to Sherry Fitzgerald on the 17th of August 2007 and 337,500 euro was wired to the Irish solicitors acquiring the Irish property on the 27th of November 2007. As of the 1st of August, David and his two daughters had loan capital standing to their credit, but in much smaller amounts than Janice.

10. This document, not mentioned in the judgment, supports the account of Janice. It shows a total of 347,500 euro moving from her share in the Goodmans account to Sherry Fitzgerald and the Irish solicitors in the second half of 2007. This is entirely consistent with the third document, namely a letter to Janice from the same solicitors of the 18th of October 2007 setting out the total purchase price at 347,000 euro.

11. It may be, of course, that Janice's account will not withstand a future challenge. However, the implied rejection of her evidence should have followed cross examination. As Hardiman J made clear in a frequently quoted passage in Boliden v Tara Mines [2010] IESC 62;

> "It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which have been deposed to. In a case where there is no contradictory evidence an attack on the evidence must include

> cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."

12. I do not exclude the possibility that there could be cases where affidavit evidence is so inherently implausible that the court might consider its rejection without cross examination. For example, evidence given in a case such as the present could well involve an averment that a specific sum left an identified account on a certain day, but the bank statement exhibited by the deponent giving this evidence tells a completely different story. In those circumstances, it may appear otiose to insist on cross examination, but even in such an extreme situation the court should facilitate what would inevitably be a brief questioning of the deponent. In any event even such singular circumstances require a judge considering the rejection of such evidence to set out in some detail why the testimony is not to be accepted..

13. In the current case, as was effectively accepted by Robert's counsel at the appeal hearing, the affidavit evidence of Janice was not fully considered in the judgment. In my view, the testimony given on affidavit by Janice could not be rejected without cross examination. In addition, relevant documents supporting the position of David and Janice do not appear to have been taken into account by the trial judge. For these reasons, the appeal will be allowed and the well charging order (and the associated costs order) be set aside.

2. Is the European Enforcement Order Certificate to be recognised?

14. David raised a number of objections to the recognition of the Certificate issued by His Honour Judge Sheldrake of the Birmingham County Court. However, this issue can be considered by reference to exchanges which took place between the court and counsel for Robert at the appeal hearing.

15. Regulation 805/2004, upon which counsel relied, provides (under the heading "Scope" at Article 2) that the Regulation shall not apply to;

> "(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;"

16. Counsel did not vigorously dispute the possibility that the relevant judgment of the High Court of England and Wales is one in respect of "rights in property arising out of …succession."

17. Article 6, headed "Requirements for certification as a European Enforcement Order", stipulates that the relevant type of judgment "shall…be certified as a European Enforcement Order…" where certain conditions are met. At (d) it is provided;

> "the judgment was given in the Member State of the debtor's domicile within the meaning of Article 59 of Regulation (EC) No 44/2021 in cases where
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> - a claim is uncontested within the meaning of Article 3 (1) (b) or (c); and
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> - it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession; and
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> - the debtor is the consumer."

18. Questioned about this last requirement, counsel appeared to accept that it was not satisfied in the current proceedings. While the position of counsel for Robert was that the Certificate could only be rectified or withdrawn in the State in which it was issued, when asked if (in this case) such a withdrawal would be available to David for the asking should he apply in England counsel agreed that this was the case.

19. The current proceedings contain claims for both a well charging order and an order for sale. While only the well charging order was actually sought in the High Court, this is clearly an application made in preparation for an eventual application for an order for sale in the future. Such an order is discretionary; see the judgment of Laffoy J in Irwin v Deasy [2006] IEHC 25 and the judgment of Keane J in Quinns of Baltinglass Limited v Smith [2017] IEHC 461, as applied in my judgment in Manning v Manning [2023] IEHC 659 – itself another long running row between two brothers. It is very unlikely that, in exercising its discretion, any court would facilitate the enforcement of a Certificate which (as counsel for Robert accepts) would almost certainly be set aside by the courts of the State which issued it.

20. It is not necessary to decide anything about the Certificate, given the conclusion which I have reached on the question of the High Court's finding that David has an interest in the Irish property.

21. In the Notice of Appeal, David and Janice seek orders quashing the well charging order made by the High Court, as well as the judgment mortgage of the 13th of June 2016 registered in favour of Robert. The second of these reliefs is not available to David or Janice, as we have not been brought to any formal or properly constituted application for such an order. The well charging order will, as noted earlier, be set aside. The Notice of Appeal does not seek an order striking out the Special Summons proceedings. I therefore propose that the appeal be allowed, the order of the High Court be set aside, and the matter be remitted to the High Court for plenary hearing. In doing so, I would emphasise that concessions very properly made before this court were not made at the hearing before the High Court judge, who did not have the benefit of them.

22. The parties should reflect on whether these proceedings serve any useful purpose. The sum at issue is modest yet has already lead to a hearing before the High Court and a full appeal to this court. Undoubtedly, very significant further costs will be racked up which someone will have to pay. In addition, a legal dispute involving two brothers which has dragged on for well over a decade should be settled on sensible terms if this is at all possible.

23. I will list this matter for mention at 9.30 am on the 30h of July 2024 to deal with any outstanding issues, including the question of costs. The hearing will take no more than 15 minutes. It would be helpful if the parties had, before that date, meaningfully considered the sentiments which I have just expressed. Binchy J and Pilkington J agree with those views, as they also do with the balance of this judgment.