

THE HIGH COURT

CIRCUIT APPEALS

[2023] IEHC 434

Record No. 2022/257 CA

BETWEEN

KIERAN EGAN AND MICHAEL EGAN JUNIOR

PLAINTIFFS

AND

HELEN EGAN AND ALAN EGAN

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 20th day of July, 2023

INTRODUCTION

1. According to the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 36 at para. 8, to take an ‘*overly meticulous approach*’ to costs ‘*would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs*’.

In that case, the Supreme Court was concerned about the fact that because a broad approach was not taken to costs, that the costs hearing ended up taking ‘*over an hour*’ and so even more costs.

2. In this case, the costs hearing took twice that length of time, as it took two hours, even though in most cases, as is clear from *Connelly*, the winner and losers in litigation are plain and for this reason costs hearing should only take a few minutes, without the need for any written submissions.

3. This judgment relates to a costs' application arising from the judgment in *Egan v. Egan* [2023] IEHC 259 (“**Principal Judgment**”) and it is a perfect example of the point being made by the Supreme Court in *Connelly*, that costs hearing which do not take a broad approach to who won/lost the case end up incurring further legal costs and expending scarce court resources.

4. It is important to emphasise that that no criticism is made of the defendants' lawyers in how they ran the costs application, since if one does not take a broad approach to costs, it is almost always possible to find some criticism about how the ‘winner’ conducted the case. In resisting an order for costs in favour of the winner in this litigation, the defendants' lawyers were, no doubt, acting on the instructions of the defendants.

ANALYSIS

5. In the Principal Judgment, the defendants lost the issue in dispute between the parties, *i.e.* whether Mr. Egan Snr or Mr. Egan Jnr owned the half share in the Farm.

6. This Court held that Mr. Egan Jnr owned that half-share, since the alleged Release by Mr. Egan Jnr of his share of the Farm in favour of Mr. Egan Snr was not valid. (Definitions which are used in the Principal Judgment are applicable herein.)

7. The substantive hearing took two and a half days, yet instead of the costs hearing lasting a few minutes, it took a further half-day of scarce court resources for the costs hearing. Thus, this was a case where *circa* 20% further time, after the hearing had finished, was spent incurring further legal costs arguing about who should pay the legal costs (without taking account of the time incurred in reading submissions or preparing a reserved judgment).

8. At the costs hearing, the defendants (who represent the estate of Mr. Egan Snr) argued that, although they had lost on who owned the Farm, this Court should nonetheless not order costs against them - that the parties should go ‘back to back’ on costs.

9. They took this approach to costs because at para (i) of the Indorsement of Claim in the Equity Civil Bill, Mr. Egan Jnr claimed that the Release was:

“invalid and/or **forged** and/or void ab initio and are of no legal effect”. (Emphasis added)

Thus forgery was one of the alternative reasons relied upon by Mr. Egan Jnr for his claim that the Release was ineffective. This Court held that Mr. Egan Jnr’s signature was not forged.

10. However, this Court relied on one of the alternative claims of Mr. Egan Jnr, i.e. that the Release was of ‘no legal effect’, and so it did not achieve its purported aim of disclaiming Mr. Egan Jnr’s inheritance of a half-share in the Farm in favour of Mr. Egan Snr.

11. Thus, this Court decided the only dispute between the parties, i.e. whether Mr. Egan Jnr or Mr. Egan Snr was the legal owner of the half share of the Farm, in favour of Mr. Egan Jnr.

12. It is important to point out that while this Court concluded that Mr. Egan Jnr’s signature was not forged on the Release, it was not necessary for this Court to make any determination regarding the very curious Release document and how it came to be that Mr. Egan Jnr’s signature was on this document.

Orders sought to be inserted which were never sought on pleadings

13. However, at the costs hearing the defendants made, what counsel for Mr. Egan Jnr claimed was an unprecedented application for two orders from the Court, namely:

“A Declaration that the “Deed of Release” was not executed by [Mr. Egan Snr].

A Declaration that the signature of [Mr. Egan Jnr] on the “Deed of Release” was not forged.”

The application for these orders is most curious, since there was no counterclaim by the defendants seeking such orders and nowhere in the pleadings are any such declarations sought by the defendants *or* by the plaintiff.

14. Accordingly, it is hard not to avoid the conclusion that the only reason that the defendants were seeking these declarations at the costs hearing was in order to bolster their application for costs for winning on the forgery point, even though such declarations make no difference to the only dispute that matters – who owns the Farm.

15. As a matter of first principles, this Court rejects the application that the final orders should contain either of these declarations. This is for the simple reason that no such orders were ever sought in the proceedings by either party, but in particular by the defendants, and so there is no possible basis for the Court to insert such orders in the final Court Order now (in the absence of consent on the part of the plaintiff).

Costs to reflect fact that defendants won on the forgery point?

16. As regards the defendants' claim that there should be no order as to costs for winning on the 'forgery' claim, this seems removed from reality.

17. This is because it must be remembered that the Release purported to be a disclaimer by a son barely out of his teens of his share in the Farm, in favour of his father with whom he had a strained relationship. Furthermore, the Release was a one sentence document drafted in terms, unlikely to be understood by the son, which was not dated, witnessed, sealed or stamped and which appeared out of nowhere on a solicitor's file.

18. Accordingly, although the defendants won on the claim that the Release was not forged, the Release did not get a 'clean bill of health' from this Court.

19. Yet, because this Court was able to decide the case on a legal issue (that it was not legally possible for Mr. Egan Jnr to disclaim his inheritance in favour of his father), it was not necessary for this Court to make any findings about how it was that Mr. Egan Jnr's signature

ended up on this most curious of documents – i.e. whether he had signed a blank document, signed a document without understanding its effect or otherwise.

20. Thus, while Mr. Egan Jnr denied signing ‘that document’ which he *incorrectly* claimed was forged, it was clear from the Principal Judgment that his concerns about that document were not completely misplaced.

21. More importantly, since the whole purpose of the proceedings was to establish whether or not Mr. Egan Jnr was entitled to be registered as the half owner of the farm, it seems very clear that, on any analysis of the case Mr. Egan Jnr was the winner.

22. Yet the defendants spent a half day and so *circa* 20% of the hearing time of the substantive case arguing about the costs.

Incurring legal costs and expending court resources arguing about legal costs

23. In expressing concern about the amount of court time involved in arguing this issue, this Court adopts the statement of Humphreys J. in *Cork County Council v. Minister for Housing* [2022] IEHC 473 regarding the undesirability of the costs of a costs hearing adding to the costs of litigation. At para. 6 (iv), he stated that:

“If the issues on which the winning side was unsuccessful did not add significantly to the costs of the proceedings, that is if the costs of the proceedings without the losing sub-issue would not in fact have been significantly less than the costs of the proceedings as they actually ran, then the court can award the winning party full costs. **In adopting such an approach the court can have regard to the undesirability of a micro-specific approach which would encourage additional costs in litigating the costs issue itself:** see *Connelly v. An Bord Pleanála* [2018] IESC 36, [2018] 7 JIC 3002 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, Dunne, O'Malley and Finlay Geoghegan JJ. concurring), 30th July, 2018), *Flannery v. An Bord Pleanála* at

para. 34. In *Connelly*, in giving the vast bulk of costs to a party that won only one issue out of 10, Clarke C.J. said for the court at para. 2 that “The Court is anxious to minimise the risk of further disputes between the parties arising from the process which the Board follows hereafter. At the same time the Court is mindful of the fact that, by being overly prescriptive, the Court might make matters worse rather than better”. At para. 8 he said: “an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings. **In making that assessment it will rarely be appropriate to attempt either a very precise calculation of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs.** In that context it is worth noting that **the hearing this morning took over an hour.**” He went on to say at para. 9 that “Rather a broad brush approach should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost.” Clearly if there is no specific paperwork that would not have been required, if there was no wasted interlocutory hearing, and if the case would have run for the same number of days, it is much harder to say that the losing issues added in any significant way to the costs, and there is a much less compelling case for any discount.” (Emphasis added)

24. It seems to the Court that this is exactly the situation here, where instead of it being clear that the winner should be paid all his costs, the defendants argued that they should not have to pay any costs to the plaintiff.

25. Again no criticism is made of the lawyers for the defendants, as they were no doubt operating on instructions, but such a position simply meant that the prospect of a short five minute application on costs was never a likelihood in this case. Indeed, the costs hearing ran over two hours, which is twice the length of the hearing about which Clarke C.J. complained in *Connelly*.

26. The defendants' claim that there should be no order as to costs ignores the reality of what occurred in the case for several reasons.

27. First, it ignores the fact that this case was only really about one thing, who owns the half share of the Farm and Mr. Egan Jnr won that issue.

28. Secondly, the forgery claim was but one of the alternative claims made by Mr. Egan Jnr to support his claim that he owned the half-share.

29. Thirdly, from the very opening of the hearing, counsel for Mr. Egan Jnr was very mindful of the nature of the forgery allegation and he did not press this claim. In particular, he presented evidence to the Court from *his own* handwriting expert which undermined that claim, since it provided in effect that on the balance of probabilities the signature on the Release was that of Mr. Egan Jnr and so was not forged. This meant that the entire focus for counsel for Mr. Egan Jnr's, during the hearing, was not on the alleged forgery, but the unusual nature of the document.

30. Fourthly, while it is true that Mr. Egan Jnr did not withdraw the forgery claim, it was also clear that the focus of his claim, and that of his legal team, was on the very unusual wording and format of the Release and the circumstances of its appearance out of nowhere on a solicitor's file.

31. Fifthly, Mr. Egan Jnr's concerns about how his signature came to end up on Release were justified, *albeit* that this Court held that his signature was not forged.

32. Nonetheless, the defendants rely on the principle that it is an abuse of process to plead fraud without a sufficient basis and accordingly this Court should order costs against a party who was otherwise successful, but who made an allegation of fraud which was not upheld (see *Regal Hastings v. Gulliver* [1967] 2 A.C. 134).

33. However, in considering this point, it is also important to note that this Court did not make any findings regarding the manner in which the Release came into existence, as it was *not necessary to do so* for it to reach its conclusion in the Principal Judgment, particularly as this Court understood very well from the compelling evidence of Mr. Egan Snr's children, the financial pressures on him in raising 12 children, who wanted for nothing, on a factory worker's wage.

34. It is ironic however that, because the defendants have now sought an order for no costs, as they won on the forgery claim, this Court is forced to point out that, as should be clear from the Principal Judgment, it had a number of significant concerns about how the Release came into existence and how Mr. Egan Jnr's signature came to be on the document.

35. Indeed, this Court referenced at para. 43 of the Principal Judgment the possibility that Mr. Egan Jnr may have signed a blank document or signed a very curious document which he was unlikely to have understood, in favour of his father.

36. For the purposes of this costs hearing, it is necessary to highlight these issues which show that this is not a case, where it was an abuse of process for Mr. Egan Jnr to make claims that his signature was forged (which claims were not pursued by him to any degree at the hearing), because this was a most curious document allegedly disclaiming a son's inheritance, from his uncle, in favour of his father.

CONCLUSION

37. Accordingly, this is a case where this Court determines that Mr. Egan Jnr was entirely successful in accordance with s. 169(1) of the Legal Services Regulation Act, 2015. While his claim originally contained a claim of forgery, the manner in which the trial was conducted (with little or no weight being put on this part of his claim), the fact that he did not win on this point is not sufficient to merit any deduction in the costs (pursuant to s. 169(1), i.e. whether it was reasonable for a litigant to pursue a particular issue *etc.*) in light of the very curious document upon which his signature appears, which gave rise to concerns about how it came into existence, but which were not necessary for this Court to decide.

38. Accordingly, the plaintiff will be awarded his costs in this case and it seems to this Court that this is an example of a case, like the *Connelly* case, where if parties look at the ‘big picture’ in relation to costs, rather than taking an ‘*overly meticulous approach*’ (since it is nearly always possible to make an argument that a point here or a point there should have been conceded), it is likely to lead to a saving in their costs and a saving in court time.