



THE COURT OF APPEAL

REDACTED

Neutral Citation Number [2021] IECA 218

Appeal Number: 2019/475

**Whelan J.
Faherty J.
Collins J.**

BETWEEN/

SHAWL PROPERTY INVESTMENTS LIMITED

RESPONDENT

- AND -

A. AND B.

APPELLANTS

Ruling of the Court in relation to costs delivered on the 30th day of July 2021

Introduction

1. The principal judgment in this appeal was delivered on 19 February 2021.
2. The High Court orders of Allen J. made on 16 October 2019 under appeal included a declaration that the appellants, A. and B. (or either of them), did not have any estate, right, title or interest in certain properties described in the schedule to his order. Extensive prohibitory injunctions were granted restraining A. and B., their servants and/or agents and all other persons having notice of the orders from interfering with the properties and the user, occupation and enjoyment of same by the respondent. The counterclaim was dismissed under O. 19, r. 28 on the grounds that it disclosed no reasonable cause of action and was frivolous and vexatious.
3. There being no appearance by or on behalf of the first appellant, A., and no communication by him with the court, the court held that it would strike out his appeal, affirm the orders of the High Court and make an order against A. for the respondent's costs of this appeal on a party and party basis when ascertained.
4. The second named appellant, B., a litigant in person, was unsuccessful save in respect of one narrow ground of appeal against the order. The defence ran to 55 paragraphs. No argument or contention therein succeeded. At paras. 88 and 89 of the principal judgment it was held that B. had not identified any basis for interfering with the declaratory and injunctive reliefs granted by the High Court in these proceedings. The counterclaim ran to

approximately 15 paragraphs advancing various contentions. One argument alone survived as stateable and its merits or otherwise fall to be determined by plenary hearing. All other aspects of her defence and counterclaim were held to have been correctly struck out by the High Court.

5. As the judgment was delivered electronically on account of the Covid-19 pandemic, the court proposed that the order for costs made against B. in the High Court be set aside. Instead, in light of, *inter alia*, the gravity of the B.'s conduct, the nature of the interim and interlocutory orders made against her in January and February 2019, her failure to disclose to this court the judgment and order of Donnelly J. made in March 2020 and given the very limited nature of success in this appeal, the court proposed to make an order for one half of the respondent's costs in the High Court against B. In respect of the appeal, the court proposed to make no order as to costs.
6. The parties were granted liberty to apply if either wished to contend for an alternative order as to costs. In default of receipt of such application, the proposed order as to costs would be made.
7. Due to an administrative oversight, submissions filed by B. were not received by the members of the court until early May 2021. No submissions were filed on behalf of the respondent.

B.'s submissions

8. B. does not "consent to any order or application for costs" on three bases.

i. Official assignee point

9. Firstly, B. contends that the respondent has "misrepresented its title in the properties and failed to make the full disclosure relied upon and required" pursuant to the judgment of Allen J. of 16 October 2019. B. alleges that the respondent has failed to disclose that the scheduled properties vested in the official assignee on 4 April 2017 by operation of law when A. was adjudicated bankrupt. B. says that this was confirmed by the official assignee in a letter dated 20 July 2017 wherein it was stated that all of A.'s estate vested in the official assignee when he was adjudicated bankrupt. She says that this "raises serious questions about the conduct of all parties claiming possession of the properties following bankruptcy". She refers to a "background document", comprised of an Excel spreadsheet apparently created by herself, which, she asserts, outlines the chain of events which the respondent failed to disclose to the court, including "proofs that EBS was on notice of my Family Law Settlement."

ii. Alleged data breach point

10. The second basis on which B. resists the proposed costs orders is the proposition that these proceedings have given rise to "a valid claim of data breach" which she intends to pursue. She asserts that these proceedings were not brought in good faith by the respondent and that it was aware that it was disclosing private information when it produced an unredacted judgment referring to *in camera* family law proceedings. She claims that the respondent's failure to comply with unspecified legislation amounts to an abuse of process.

11. In addition to the complaint in relation to the disclosure of the unredacted judgment, it appears that this "claim of data breach" now extends to the manner in which the principal judgment of this court considered the appellants' family law proceedings and settlement. B. asserts that those family law proceedings have been "collaterally attacked" and that "a narrative has been attached suggesting they were not brought in good faith". She contends that this affects her rights to privacy and those of her adult children.

iii. Order was obtained by receiver

12. Finally, B. disputes this court's reliance on the judgment and order of Donnelly J. of 4 March 2020 on the basis that same was granted to the receiver appointed by the original lender, EBS. B. alleges that this shows that, as of 4 March 2020, the said receiver was receiver of certain assets of A., including the scheduled properties. She asserts that this is an issue which goes to title and warrants "a review before further costs are incurred".

Ruling

13. The respondent, in addition to obtaining a declaration that A. and B. had no estate, right or title in the scheduled properties obtained ten separate permanent prohibitory injunctive orders against them. B. in this appeal has failed to disturb or vary any of the said injunctions. Before adjudicating on the liability for costs in this appeal, it is worth recalling the terms and tenor of the said injunctions which are in each case directed equally towards B. (as well as A.), her servants and/or agents and all other persons having notice of the order:

- (a) B. is prohibited from trespassing or entering upon any portion of the scheduled properties without the prior written consent of the respondent;
- (b) B. is prohibited from causing damage to any portion of the scheduled properties;
- (c) B. is prohibited from impeding and/or obstructing the respondent, its servants and/or agents in their efforts to enter the scheduled properties;
- (d) B. is prohibited from impeding or obstructing the respondent, its servants and/or agents in its efforts to secure the scheduled properties;
- (e) B. is prohibited from harassing, threatening, intimidating or abusing the officers, shareholders, servants and/or agents of the respondent;
- (f) B. is prohibited from making or causing to be made to any person whether orally or in writing by any medium whatsoever any statement which is designed to provoke violence, harassment, threats, intimidation or abuse of the officers, shareholders, servants and/or agents of the respondent;
- (g) B. is prohibited from collecting or attempting to collect rent or other payments in respect of any portion of the scheduled properties;
- (h) B. is prohibited from holding herself out as having any estate or interest in, title to or rights in relation to the scheduled properties;

- (i) B. is prohibited from holding herself out as having any entitlement to sell, rent or otherwise grant any entitlement to possession of any portion of the scheduled properties; and,
 - (j) B. is prohibited from making contact with any current or prospective tenant or purchaser of any portion of the scheduled properties.
- 14. The conduct giving rise to the proceedings was particularly egregious and involved the forcible entry onto premises and the ejectment of lawful occupiers and licensees together with damage to, destruction and in some cases loss of the personal effects, chattels and property of the said occupiers and the respondent.
- 15. B. contends that since A. became a bankrupt the title to the scheduled properties vested in the official assignee. This is the repetition of an unfounded argument made in the appeal. The mortgagee obtained an order for possession against A. on 29 October 2009. Further, the mortgagee obtained judgment against A. on foot of the mortgages on 9 September 2013 in the sum of €9,433,173.79. On 4 April 2017 A. was adjudicated a bankrupt. He was discharged from bankruptcy on or about 4 April 2018. There is absolutely no evidence that the official assignee asserted any interest in or over the scheduled properties at variance with the clear right to possession of the mortgagee.
- 16. No data breach arises from or was caused by the principal judgment delivered herein on 19 February 2021. The judgment is entirely anonymised. The prior court orders were referenced by B. in the course of her appeal. They were considered and referred to in the judgment because they were relevant and they required to be dealt with.
- 17. Donnelly J. referred to and discussed the family law proceedings at paras. 15, 16, 39, 66 to 75 and 81 to 99 of her judgment of 27 April 2015.
- 18. The facts as found by Donnelly J. in her April 2015 judgment were referred to in subsequent judgments and determinations, including those of this court dismissing the appeal against the May 2015 order of Donnelly J. and B.'s subsequent appeal against her committal for failure to comply with Donnelly J.'s order.
- 19. Donnelly J. has since confirmed, in an application brought by B. and not disclosed to this court but of which the respondent had become aware, that the 2015 and 2020 hearings were not *in camera* proceedings.
- 20. The arguments being advanced now distort the true issue of concern to the court which was whether the mortgagee was on notice of proceedings brought between A. and B., which apparently concerned the scheduled properties, such that the mortgagee might be bound by any terms of same. That inquiry was wholly legitimate and necessary. Though B. asserts in submissions that the mortgagee was on notice, that assertion is unsubstantiated. The raising of such inquiries was necessary to establish simple, relevant facts. They do not infer lack of good faith as is asserted. Neither can such considerations be characterised as a "collateral attack" of any kind. There is no basis for the contention that a "a narrative has

been attached suggesting they were not brought in good faith". The judgment is anonymised and accordingly could not be said to affect rights to privacy of B. or any party as she contends. Care must be exercised so that the *in camera* rule is not itself used as an instrument to defeat the interests of justice.

21. The orders made by Donnelly J. including on 4 March 2020 are certainly relevant and this court was entitled to have regard to same. The receiver was a party to same having been appointed by EBS, the original mortgagee, in the first instance. All issues as to the title of the scheduled properties are concluded and the declaration that A. and B. have no estate, right or title in the properties stands. The receiver has no estate in the scheduled properties now, contrary to what is asserted. The properties belong to the respondent. No issue is identified which goes to title or warrants "a review before further costs are incurred" as contended.

Conclusions

22. The principles to be applied to the costs of proceedings are contained in ss. 168 and 169 of the Legal Services Regulation Act 2015 and O. 99 (recast) of the Rules of the Superior Courts and were discussed by Murray J. at para. 19 of *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183.
23. In light of those authorities and having regard to the serious conduct of B. which precipitated the institution of the within proceedings, the various matters averred to by Martin Sadlier in his affidavits of 30 January 2019 and 14 June 2019 in respect of which B. filed no replying affidavit, and the fact that all but one net issue has been unsuccessfully appealed resulting in one stateable issue remaining for the determination of the trial court, in addition to the reasons identified in para. 163 of the principal judgment of this court, the proper allocation of costs in this appeal is that B. pay one half of the respondent's costs of the claim and counterclaim in the High Court together with one half of all interim and interlocutory costs on a party and party basis when taxed and ascertained. No order as to costs be made in favour of either party in respect of this appeal.