COURT OF APPEAL

RECORD NUMBER: 2015/6

Ryan P.
Peart J.
Irvine J.
BETWEEN:

FRANK EGAN AS TRUSTEE OF THE TUBBER WATER SCHEME, AND TUBBER WATER LIMITED

PLAINTIFFS/RESPONDENTS

AND

MARTIN BYRNE

DEFENDANT/APPELLANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF JANUARY 2016:

1. This is an appeal against the order made by Donnelly J. on the 12th November 2015 refusing an order for the attachment and committal of persons named in the defendant's Notice of Motion dated 3rd March 2014 for their alleged breach of certain undertakings contained within terms of settlement annexed as a schedule to an Order of the High Court (Laffoy J.) made on the 2nd May 2012. On that date the proceedings between the parties were compromised on terms which were reduced to writing, signed by the parties and handed into court. Having received these terms of settlement the Court proceeded to make two declarations which appear in the order, and apart from making an order that the proceedings be struck out with liberty to apply, made no further order. The Court's perfected order does not state that the settlement is being made a Rule of Court. It simply notes the Consent and attaches a copy of same as a schedule to the order, and makes the two declarations as provided for in the terms of settlement, and then orders that the matter be struck out with no further order, but with liberty to apply. I should add that at no stage thereafter did either party seek to go back into court in order to make an application for correction of the order under the slip rule or otherwise. However, it is only fair to say, as noted by the trial judge at para. 32 of her judgment, that in the court below there was a concession by counsel for the company that he was arguing the case on the basis that the settlement had been made a rule of court. I should say for the sake of clarity that I am of the view that even if the settlement terms had been made a Rule of Court, and not simply received and filed as they were, it would make no difference to my overall conclusion that the undertakings therein remain undertakings given by the plaintiffs to the defendant, and not to the Court.

2. Within the terms of settlement are certain undertakings by the plaintiffs, namely that the plaintiffs would cease drawing water from the well located on the defendant's land within four months from 1st May 2012, and further that they would vacate the said lands on which that well is located and cease extraction of water no later than 1st October 2012.

3. There is no need to describe in detail in this judgment the precise manner in which the defendant alleges that these two undertakings have been breached by the plaintiff, because in order to determine the appeal this Court has to conclude a relatively net legal issue only, namely whether these undertakings given by the plaintiff to the defendant, by having been contained in the written terms of settlement received and filed and annexed to the court's order, have become undertakings to the Court itself, such that a breach of same might give rise to an application for attachment and committal.

4. In the Court below, Ms. Justice Donnelly in a comprehensive and careful judgment concluded that while the settlement contained certain undertakings given by the plaintiffs to the defendant, they were not undertakings given to the Court, and therefore that the persons whose attachment and committal was sought by the defendant could not be considered to have breached any order of the court made on the 2nd May 2012.

5. In so far as it had been argued before her that the undertakings by the plaintiffs to the defendant in the terms of settlement could by implication now be seen as undertakings given to the Court, since they were attached to the Court's perfected order, she expressed herself as satisfied that no implied undertaking was given to the Court, and indeed went on to state, and correctly in my view, given the seriousness of such a matter, that *"it would be wrong to even consider that an undertaking could ever be implied by the Court. An undertaking is either given or it is not".*

6. It was for these reasons that she refused to make the order sought for attachment and committal.

7. Having considered carefully the submissions made by both parties on this appeal, I am satisfied that the trial judge did not err either in relation to such findings of fact as she made, or as to the law. She correctly identified the essential issue which had to be determined namely, as she put it:

> *"whether the terms of the settlement between the parties amount to Orders of the Court, including in particular, undertakings to the Court. Or are the Orders of the Court merely limited to the declarations as set out above?"*

8. She then identified the following factual matters as being relevant:

> a) the settlement does not state that any undertaking was to be given to the Court
>
> b) the order does not record that any undertaking was given to the Court
>
> c) the order records that the matter was listed for a ruling
>
> d) the order records that the terms of the Consent (i.e. the settlement of the parties) are annexed as a Schedule to the order
>
> e) the terms of the said Consent are noted to be received and filed in court
>
> f) the court made two orders by way of declarations regarding the defendant's title to the land and the lack of

entitlement of the plaintiff to a right of way over those lands.

9. In her judgment, Donnelly J. referred to a number of cases to which she had been referred by the parties as set forth in her judgment, and reached her conclusion that on the wording of the terms of settlement, such undertakings as are contained therein on the part of the plaintiffs are undertakings given inter partes, and not to the Court, and therefore that she was not entitled to make orders of attachment as sought where it was alleged by the defendant that these undertakings had been breached.

10. Much the same legal territory has been fully traversed by Counsel for both parties as was traversed in the Court below. I do not propose now to set out the very helpful submissions that have been made before this Court. They mirror to a large extent those that were made in the court below and which have been set forth by the trial judge in her judgment. I will just say that in so far as Mr Smyth for the defendant appellant has placed reliance on the judgment of the Court of Appeal in England and Wales (Mummery LJ) in *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2007] EWCA Civ. 111 – a case referred to also in the judgment in the court below – I would, as did Donnelly J. – and as was discussed *in arguendo* before us – that there is an essential factual distinction in that case from the case before this Court, namely that the written terms of settlement under examination in *Independiente* made specific reference to the fact that the undertakings are to be undertakings given to the court and the court's order itself noted them to be given to the court. That in my view is a fundamental distinction to be drawn, and one that I regret to say is fatal to the defendant's reliance upon it.

11. In the present case the defendant may well have considered that once the undertakings were contained within the written terms of settlement, and once those were received and filed in court and attached as a schedule to the Court's order, this was sufficient to entitle him to an order for attachment and committal of any person who breached the undertakings. I have no doubt but that he did. However, I agree with the conclusion reached by Ms. Justice Donnelly that that is not the correct position under the law. Those undertakings remained undertakings *inter partes*. They were not given to the Court, and there can be no question of them being considered to be such by way of implication. A Court order must be absolutely clear in its terms if a person is to know what action or inaction on his part may result in him being in breach of the order and render him liable to attachment and possible committal to prison for contempt of the order.

12. A breach of the undertakings contained in the terms of settlement in the present case would undoubtedly entitle the defendant to seek to have them enforced by separate proceedings, however tedious that may seem to the defendant. I certainly would have every sympathy for him in that regard. I have no doubt that once the settlement terms were agreed and reduced to writing and received by the Court he considered that the dispute was resolved and that it would not be necessary to bring any further proceedings to enforce the undertakings given to him. However, regrettably, that is not the situation. A useful summary of the distinction between terms of settlement being received and filed, and where they are made a rule of court is contained at paras. 19-22 and 19-23 of Delaney & McGrath: Civil Procedure in the Superior Courts (Third Edition), Roundhall. But as I have said, while that distinction exists, and albeit that in the court below Counsel conceded that the case was not being argued on a failure to make the settlement a rule of court, the distinction matters not to my conclusion that the trial judge was correct to refuse to make orders for attachment and committal on the defendant's motion in that regard.

13. It is of course unnecessary to reach any conclusion as to whether as a fact the plaintiffs have breached any of the undertakings contained in the terms of settlement. That question will have to await another occasion on which it may return to the courts for determination.

14. For these reasons I would dismiss this appeal.