APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2024/88

High Court Record Number: 2018/5922P
Neutral Citation Number [2024] IECA 276

Allen J.
Butler J.
Meenan J.

BETWEEN/

ULSTER BANK IRELAND DAC, PAUL MCCANN AND PATRICK DILLON

PLAINTIFFS/RESPONDENTS

- AND –

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 19th day of November 2024

Background: -

1. In July 2007 the appellants (the McDonaghs) borrowed some €21.5M from the first named respondent (Ulster Bank) to purchase certain lands at Kilpedder, Co. Wicklow ("the lands"). It was proposed that a data centre would be built on the lands. However, that never came to pass.

2. The McDonaghs never repaid the loan nor any part of it. Litigation ensued involving Ulster Bank, receivers (the first and second named respondents), CBRE (who had given a valuation for the said lands), Promontoria (Aran) Limited and Link ASI Limited. This litigation involved numerous court applications, lengthy hearings in the High Court, and subsequent appeals to this Court. The McDonaghs have been almost entirely unsuccessful both in the legal proceedings they have initiated and defending proceedings that have been brought against them. There was considerable overlap in the issues raised by the McDonaghs in their defence to the six actions brought by Ulster Bank and the receivers to recover the debt and enforce the security, and the claims and allegations subtending the four actions brought by the McDonaghs against Ulster Bank and the receivers challenging the entitlement of Ulster Bank and the receivers to enforce the security. Eventually, an application was made by Ulster Bank and the receivers for an *Isaac Wunder* order. Such an order was granted by the High Court (Quinn J.) following the delivery of his judgment on 30 January 2024 ([2024] IEHC 36). This is the appeal against the judgment and making of that order.

3. For the purposes of determining the appeal, it is necessary to highlight some aspects of the lengthy litigation and the stances that were taken by the McDonaghs in various proceedings. It will become clear that these stances in respect of certain issues that arose were, to say the least, inconsistent and contradictory.

4. Following their default, on 13 March 2013 the McDonaghs and Ulster Bank entered into what was referred to as the "*Compromise Agreement*". This agreement was not adhered to by the McDonaghs and there then then followed the inevitable litigation.

5. Under the "*Compromise Agreement*" the McDonaghs agreed to sell a number of properties, including the lands, by a target date of 31 July 2014 and Ulster Bank agreed to accept the proceeds of those sales (estimated to realise €5M) in settlement of the

McDonaghs' liabilities, which then stood at a sum in the region of €25M. The balance of the debt was to be written off.

6. On 11 April 2018 Ulster Bank formally demanded the repayment of a sum of €27,470,404.15. On 2 July 2018 the High Court (Twomey J.) granted Ulster Bank judgment in the sum of €22,947,202.85. On 6 April 2022 the Court of Appeal upheld the findings of Twomey J. concerning, *inter alia*, breach of the *"Compromise Agreement"* and the validity of the appointment of the receivers.

7. In addition to not repaying the monies they borrowed or honouring the *"Compromise Agreement"*, the McDonaghs engaged in deception. Under the "*Compromise Agreement*" the McDonaghs were required to sell the lands by 31 July 2014. In the said proceedings before Twomey J. the McDonaghs asserted that on 13 June 2014 they had sold the lands by signing a document described as a "*Heads of Agreement*". Under this agreement, the McDonaghs were purporting to sell the lands for a price of €1,501,000 to a company called "Granja Limited". Twomey J. held that Granja Limited was a "*front*" for Mr. Brian McDonagh and therefore the *"Heads of Agreement"* was not a contract for a true sale of the lands as was required by the *"Compromise Agreement"*. He also held that the *Heads of Agreement* had not been created or executed on the date it was purportedly signed but had been created at a later date and backdated to a date which, if the agreement was a valid contract for the sale of the lands, would have brought it within the terms of the *Compromise Agreement*.

8. In 2021 the McDonaghs commenced proceedings against a number of parties, including CBRE. The McDonaghs alleged that CBRE were negligent and in breach of duty in reaching the valuation which they put on the said lands. CBRE brought an application seeking an order that the McDonaghs' action against them was statute barred. In the course of that hearing, the McDonaghs acknowledged that the agreement for the sale of the lands

to Granja Limited was a "*sham*". The High Court (Quinn J.) granted the order sought by CBRE. This order was appealed by the McDonaghs to this Court.

9. The McDonaghs were unsuccessful in their appeal. In giving judgment, the Court stated: -

> *"27. The appellants further submitted that the trial judge was not entitled to rely on the 'Granja' agreement as it was a 'sham' agreement. This submission was made even though the appellants themselves devised and participated in this 'sham' agreement."*

Judgment of the High Court: -

10. By notice of motion dated 3 November 2022, the respondents sought, *inter alia*, the following relief:

> *"An order pursuant to the inherent jurisdiction of the High Court restraining Brian McDonagh, Maurice McDonagh and Kenneth McDonagh (the 'McDonaghs'), or any of them, without prior leave of the President of the High Court (or such judge of the High Court as nominated by the President of the High Court, (such as the judge for the time being presiding in the commercial division of the High Court) from instituting or re-entering any proceedings as against:*
>
> *(a) Ulster Bank Ireland DAC its servants or agents, including but not limited to Norman Ginnelly;*
>
> *(b) Grant Thornton, Paul McCann or Patrick Dillon;*
>
> *(c) Promontoria (Aran) Limited, its servants or agents; and*
>
> *(d) Link ASI Limited, its servants or agents, including but not limited to Conor Maher or Alan Monaghan;"*

11. The motion then listed some eleven issues or claims that were to be covered by the order sought. Included in the list were the following: -

"vii. The purported Heads of Agreement dated 13 June 2014 as between the McDonaghs and Granja Limited.

viii. The acquisition by Promontoria (Ireland) Limited from Ulster Bank DAC of the loan facility and any security pertaining thereto."

12. The judgment of the High Court listed the numerous proceedings that had been taken by and against the McDonaghs. Among them was an action which had been brought by Granja Limited claiming specific performance of the *"Heads of Agreement"*. The trial judge stated: -

"24. The Granja proceedings were defended by the bank and the receivers and a trial commenced in March 2018. On the fifth day of the hearing, one of Granja's witnesses, Mr. Gerard Fehily, a director of Granja who had been giving evidence, became unwell. He was hospitalised and was unable to continue his evidence the next day. The court was then informed that Granja was discontinuing the action."

and: -

"27. --- Twomey J. held, inter alia, that the Heads of Agreement was not a binding contract, that Granja was a front for Mr. Brian McDonagh and that the claim that it had entered into a binding agreement to acquire the lands at Kilpedder was made only for the purpose of seeking to assert compliance with the Compromise Agreement and to defeat the bank's entitlement to rely on breaches of the Compromise Agreement and to demand repayment of the loan and to appoint the receivers …"

13. The trial judge referred to correspondence that passed between the McDonaghs and Ulster Bank prior to the issue of the motion. On 21 June 2022 the solicitors instructed by Ulster Bank wrote in the following terms to the McDonaghs: -

"… [G]iven the misleading approach taken by you to date in all proceedings, and your continued appetite to issue motions, appeals and proceedings without thought, merit

or any legal basis, our client has instructed us to issue a motion seeking Isaac Wunder relief against you. Such an application will seek to indefinitely prevent you together or individually from instituting legal proceedings against all or any of our clients named above …"

In response, on the following day, 22 June 2022, the McDonaghs replied: -

"We have no intention of issuing further proceedings, however this excludes matters remaining before the Court of Appeal or any matters resulting therefrom including a Supreme Court application if required. As for fresh proceedings there (sic) shall not be taken."

Notwithstanding the reply, Ulster Bank proceeded with the motion. It is fair to say that Ulster Bank's decision not to accept the McDonaghs' word was abundantly justified by their response to the application.

14. In the course of his judgment, the trial judge considered the jurisdiction of the court to grant *Isaac Wunder* orders, citing the following authorities: *Údaras Eitlíochta na hÉireann (the Irish Aviation Authority) and DAA Public Limited Company v Monks* [2019] IECA 309 (Haughton J., Donnelly and Collins JJ. concurring; and Collins J., Donnelly and Haughton JJ. concurring) and *Kearney v Bank of Scotland plc & Anor.* [2020] IECA 92 (Whelan J., Baker and Collins JJ. concurring).

15. In applying the principles derived from these authorities, Quinn J. stated: -

"101. The defendants have a history of commencing proceedings against a variety of parties, followed by discontinuance against some parties when required to engage at the stage of entry applications before the Commercial Court, and later seeking to re-enter proceedings against the same party."

and: -

"103. The court cannot ignore the findings made by Twomey J. in his judgment in the judgment proceedings, that the defendants had been party to the forgery of documents in efforts to conceal that Granja was a front for Mr. Brian McDonagh in an attempt to circumvent the provisions of the compromise agreement and thwart enforcement of its security by the bank.

104. The court is required to balance the constitutionally protected right of access to the court against firstly the protection of parties from persistent allegations being made in new proceedings which repeat claims which have been disposed of in previous proceedings and judgments and secondly, and more importantly in this case, the need to avoid further waste of court time and resources on matters previously determined."

16. In granting the order sought, limited to the institution of further proceedings, the trial judge concluded: -

"112. Firstly, the restriction will relate only to institution of new proceedings. The re-entry of existing proceedings will in any event require an application to court on notice to the relevant parties. On such an application the McDonaghs would be required to demonstrate that there is good reason for re-entry and that doing so is not vexatious or an attempt to reopen matters previously determined by the court."

Notice of appeal: -

17. Even though the order that was made by the High Court was in accordance with their initially stated position that they would not institute new proceedings, the McDonaghs appealed. They were initially unrepresented. The Notice of Appeal stated the following grounds of appeal: -

"1. The trial judge failed to take cognisance of his previous observations in the Granja proceedings where he observed that the Heads of Agreement was not placed before Twomey J. in December 2019.

2. *The circumstances of this appeal are unique in that since the High Court decision much evidence of deliberate non-disclosure has come to light. This Honourable Court of Appeal is asked to set aside the High Court decision on the basis of the actions of Ulster Bank since 2018."*

It should be noted that no details of the so-called *"actions of Ulster Bank since 2018"* were disclosed.

18. The Notice of Appeal was supported by written submissions filed by the McDonaghs, in person. The submissions were somewhat general in nature in maintaining that the trial judge failed to correctly apply the appropriate principles to the application. The written submission listed and gave a brief description of various proceedings involving the McDonaghs, including *"... It is respectfully submitted that imposing an Isaac Wunder Order against appellants would be inappropriate and unjust. It would penalise the defendant for merely exercising the right to defend themselves against claims and potentially block access to legal recourse for future legitimate pursuits."* Two observations should be made. Firstly, the *Isaac Wunder* Order does not prevent the McDonaghs defending claims made against them. Secondly, as has been referred to before, the McDonaghs had explicitly stated that they had no intention of issuing new proceedings.

Hearing of appeal: -

19. The McDonaghs were represented at the hearing of the appeal by solicitor and counsel. The appeal opened with an application for an adjournment by the McDonaghs. In the normal course, an application for an adjournment would not feature in a judgment on the appeal. However, the adjournment application is worthy of note, as it is yet another indication of how the McDonaghs conduct litigation.

20. In applying for an adjournment, counsel for the McDonaghs referred to the following passage from the judgment of Quinn J.: -

"The court cannot ignore the findings made by Twomey J. in his judgment in the judgment proceedings, that the defendants have been party to the forgery of documents in efforts to conceal that Granja was a front for Mr. Brian McDonagh in an attempt to circumvent the provisions of the compromise agreement and thwart enforcement of its security by the bank."

21. The court was then informed that the McDonaghs had brought a motion before Twomey J. seeking that he revisit his findings concerning the "*Heads of Agreement*" which provided for the so-called purchase of the lands by Granja Limited. Counsel stated that the parties had agreed, and Twomey J. approved, a timetable for the hearing of the motion.

22. Leaving aside the fact that the application for an adjournment could and should have been made long before the day of the hearing of the appeal, there are two fundamental problems. Firstly, the judgment of Twomey J. was appealed to the Court of Appeal which upheld the judgment. It was difficult to identify what jurisdiction Twomey J. could possibly have had to consider the application. The respondents informed the court that they would be strenuously contesting the issue of jurisdiction. Secondly, the McDonaghs had submitted to this Court at the hearing of the appeal in the CBRE litigation that the Granja agreement was a *"sham"*: which is entirely consistent with the findings of Twomey J. as was upheld by the Court of Appeal. Between then and now, the McDonaghs' motion was heard by Twomey J. and – for the reasons set out in a trenchant judgment delivered on 30 October ([2024] IEHC 609) in which the application was described as *"bizarre"* – refused.

23. Needless to say, the application for an adjournment was refused and the appeal proceeded.

Consideration of appeal: -

24. At the outset it should be noted that the McDonaghs did not question the authorities relied on by the trial judge. In his submission to the Court counsel on behalf of the

McDonaghs only made passing reference to the grounds of appeal and dealt briefly with the written submissions. Rather, reliance was placed on the application then pending before Twomey J. It was suggested that the outcome of this application could have a bearing on the making of the *Isaac Wunder* order.

25. For the reasons already stated in refusing the application for an adjournment, the then-existence of the application before Twomey J. is not a statable ground of appeal.

26. I have already mentioned correspondence that passed between the McDonaghs and the solicitors for Ulster Bank prior to the issue of the motion. As stated earlier, a letter from the McDonaghs asserted that they had no intention of issuing fresh proceedings. Presumably, the letter was sent in the hope of fending off the application for an *Isaac Wunder* Order. It did not. The order that was made by the trial judge was consistent with the declared position of the McDonaghs. They can hardly now argue any unfairness in the making of the order which they now challenge.

27. The McDonaghs expressed the fear that the making of the *Isaac Wunder* Order would in some way interfere with or limit their ability to defend or deal proceedings already in being. The order complained of has no such effect. Indeed, the trial judge made this clear at para. 112 of his judgment which I set out at para. 16 above. An *Isaac Wunder* order requires the person subject to it to seek the leave of the court before instituting any proceedings or applications against any of the persons listed in the order or in relation to the subject matter with which it is concerned. It does not prevent the institution of proceedings *per se*, rather it imposes a screening mechanism to ensure that the party for whose benefit it is made is not subjected to further vexatious proceedings. Clearly if a person subject to an *Isaac Wunder* order can satisfy a court that they have a *bona fide* cause of action, the court will grant leave for the institution of proceedings reflecting that cause of action. Further, the existence of an *Isaac Wunder* order does not impose any restriction on the defence of

proceedings by the person subject to it, whether those proceedings are in being at the time of the making of the order or are issued subsequently.

28. In the course of his submissions, counsel for the McDonaghs questioned the acquisition by Promontoria (Aran) Limited from Ulster Bank of the McDonagh loan facility and any security pertaining thereto. No detail was given nor was the matter elaborated upon so as to come close to a stateable ground of appeal.

29. I am satisfied that the McDonaghs have established no grounds to disturb the judgment and order of the High Court. I therefore dismiss the appeal.

30. On the matter of costs, as the respondents have been entirely successful in opposing the appeal, the provisional view of the Court is that they are entitled to an order for their costs. Should the McDonaghs wish to contest this view, they may do so by filing submissions (not more than 1,000 words) within 14 days of the date of the delivery of this judgment. Should the respondents wish to reply they may do so by way of written submission (also not more than 1,000 words) to be delivered within 14 days thereafter.

31. As this judgment is being delivered electronically, Allen and Butler JJ. have authorised me to record their agreement with it.