



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 212

**Kelly J.
Irvine J.
Hogan J.**

2014/266

2014/267

High Court 2010/3063P

Supreme Court 142/11

Supreme Court 141/11

Cecilia Griffin and Caroline Barnes

Plaintiffs

and

Kerry County Council

Defendant

Ex tempore Judgment of Mr. Justice Kelly delivered on the 22nd day of June 2015

1. The court has before it this afternoon two appeals which have been brought by Cecilia Griffin and Caroline Barnes in litigation which they took against Kerry County Council.
2. The appeals relate to orders which were made by Murphy J. in the High Court. He heard an application brought by Kerry County Council seeking to strike out the litigation which has been in being since 2011 and on the same day he had before him an application for judgment in default of defence against Kerry County Council.
3. He decided to hear the application to strike out the litigation first. He acceded to that application and consequently there was no necessity and no basis upon which he could go on to consider making an order requiring delivery of a defence in proceedings which were no longer in being.
4. Criticism has been made of the trial judge that he took the applications in that order, but logically it made sense to do so. I do not believe that he can be the subject of any legitimate criticism in that regard.
5. The hearing today has been largely concerned with the conclusion that the judge reached to the effect that he ought to exercise his jurisdiction to strike out this litigation on the basis that it had no reasonable prospect of success. To examine that it is necessary to refer briefly to the claim which is made in these proceedings and to the factual background attendant upon it.
6. The statement of claim in the action is short. It recites that the first plaintiff resides at Cahernard, Castleisland, Co. Kerry and is a pensioner and that the second plaintiff resides at Ballybrown, Careena in Limerick and is a niece of the first plaintiff and a company director. The meat of the claim is contained at para. 3. It says the plaintiffs claim is for damages for fraudulent misrepresentation on the compulsory purchase by the defendant of a disused railway line situate at Keelgorm Castleisland, Co. Kerry owned and leased by the first and second plaintiff for the purpose of constructing a link road connecting the N21 Tralee Road to the N23 Killarney Road.
7. The prayer in the statement of claim seeks first, an order for discovery, second, an order for the restoration of the plaintiffs' lands and thirdly, an injunction restraining the defendants from trespassing and interfering with the land following reinstatement.
8. The factual position is that the lands which are the subject matter of the litigation were compulsorily purchased by Kerry County Council. Compulsory purchase is a process which goes on for a long period of time and this case was no exception in that as far back as October 2001, public consultations were being held in respect of the matter. Those public consultations gave rise ultimately to a compulsory purchase order being made. In that regard there were public hearings which took place before an Inspector appointed by An Bord Pleanála on the 21st and 22nd February, 2006. Neither of the plaintiffs appeared before that hearing. The compulsory purchase procedure continued to its finality and in due course the compulsory purchase order was confirmed and the plaintiffs' lands were entered upon.
9. There is no doubt but that they have a very great affection for the lands. They have been in the family for some considerable period of time. There is a lot of history attached to them and a description of the lands which has been given in court, suggests that they provided a very pleasant and comfortable living for the plaintiffs. They perceive that that has been considerably disrupted as a result of the works which were undertaken and the construction of this road. They also have an equally deep seated feeling that the road was an unnecessary element for the development which was taking place.
10. Unfortunately the time for making all of those complaints is over, because the works have been completed and the road is now open. The question therefore arises is what rights do the plaintiffs have in respect of all that has happened.
11. Insofar as this action is concerned, I am of the view that the trial judge was correct in concluding as he did, that it has no reasonable prospect of success. I come to that conclusion for two reasons.
12. First, the land which was formerly owned by the plaintiffs is now owned by the County Council. Any rights that the plaintiffs have in that regard are translated into an entitlement to monetary compensation. Monetary compensation is available to them under the scheme of compensation which is provided for in the legislation of 1919, dealing with compensation payable for compulsory acquisition of lands.

13. No owner likes to have lands compulsorily acquired and that is particularly so in this case. I have a good deal of sympathy for the position in which the plaintiffs find themselves. But they did not participate in any of the procedures which would have given them a platform and an opportunity to make their case against the compulsory purchase order and in particular, for reasons best known to them, chose not to appear before the planning Inspector who conducted the hearing way back in 2006.

14. So the compulsory purchase mechanism proceeded to finality and there was no objection taken by the plaintiffs in that regard.

15. They cannot now seek to effectively undo what has already been done. Their remedy is one which sounds in compensation. That is readily available by applying for compensation under the relevant legislation which to date they have not done. Secondly, in any event having regard to the nature of the claim here, which is a claim of a fraudulent misrepresentation, the statement of claim is silent as to whom that representation was made and equally it is silent as to whether anybody acted to their detriment as a result of it.

16. However as a result of the particulars which were sought and were furnished, it is clear and Murphy J. came to a firm conclusion on this, that there could be no element of fraud or fraudulent misrepresentation involved. It may well have been a mistake, but it was simply that. Even if there was some form of misrepresentation, there is not the slightest evidence that the plaintiffs acted to their detriment in respect of it, because they were aware of the true position which obtained in respect of these lands.

17. I have come to the conclusion that the trial judge was correct in making the order which he did in striking out this piece of litigation.

18. I want to say this by way of assistance to the plaintiffs and I do hope that they will take this to heart. There is available to them a mechanism for recovering compensation. They would be foolish indeed not to avail themselves of that because that money is there almost for the asking. They have an apprehension that they would be forced to deal with Kerry County Council on some unfair basis. They are not at all dependent upon Kerry County Council. Well and good if they can reach an accommodation with them, but if they cannot, they can go before an independent arbitrator who will fix the amount of compensation to which they are entitled. There are well defined headings which seek to compensate a person who is the subject of a compulsory purchase order in full for the loss sustained by them.

19. Kerry County Council have made it very clear that they are not going to raise any time point against the plaintiffs because all of this happened years ago and this claim for compensation should be over and done with at this stage. They have given them time and will give them until the 1st September of this year within which to apply. I do hope that Ms. Griffin and Ms. Barnes avail themselves of that opportunity. If I may I would like to advise them that they ought to obtain professional help in order to bring this claim for compensation. It is a rather tricky area and it is not straightforward, but there is no doubt but that there is compensation available to them if they would only apply under the relevant legislation.

20. They must do so within the time which is stipulated, that is before the 1st September and I would not be waiting until the end of August or the end of July before I would seek advice and make my claim. I would be doing it straightaway because that compensation is there, as I say, almost for the asking.

21. But insofar as this piece of litigation is concerned, for my part I have to come to the conclusion that Murphy J. was correct. I would dismiss the appeal which is brought against the order which he made dismissing this claim and I would likewise dismiss the appeal against the order which he made declining to make an order requiring delivery of a defence to litigation which he had already at that stage struck out.

Ms. Justice Irvine: While I also sympathise with the position in which the plaintiffs find themselves concerning the compulsory purchase order of their farmland, I fully agree with the ruling and indeed the advice which has just been tendered by Mr. Justice Kelly and for those reasons I would dismiss both appeals.

Mr. Justice Hogan: I also agree with the judgment which has just been delivered by Mr. Justice Kelly and the comments of Ms. Justice Irvine. I would further add that while all members of the court express their sympathy with the dilemma faced by Ms. Griffin and by Ms. Barnes, the remedy which is provided for in law is that contained in the 1919 Act. Ms. Murphy for the Council has very fairly indicated that the Council will not take any time objection if the application is made before the 1st September of this year. I think if I may respectfully say so that the appellants would be very foolish to reject or repudiate that avenue which is open to them at this stage and I would respectfully endorse the comments made by Mr. Justice Kelly and Ms. Justice Irvine that both Ms. Barnes and Ms. Griffin would be very well advised to get professional legal advice to enable them to formally claim under the 1919 Act and to do so straight away. That is the remedy which is available to them, but for the reasons given by Mr. Justice Kelly I fear their action is unsustainable and I agree with the ruling of Mr. Justice Kelly.