THE COURT OF APPEAL

2015 No. 581

Peart J.
Irvine J.
Sheehan J.

BETWEEN

DAVID RICKARD

PLAINTIFF/RESPONDENT

AND

MARK RICKARD, GERARD RICKARD AND STEPHEN RICKARD

DEFENDANTS/APPLICANTS

JUDGMENT of the Court delivered by Ms. Justice Irvine on 1st day of June 2016

1. This is the defendants' appeal against the judgment and order of the High Court (Keane J.) dated respectively 17th and 16th November, 2015. By his order Keane J. varied the terms of an earlier order of Feeney J. in the High Court of 6th June, 2013, which had directed the sale of certain lands by public auction, so as to permit them to be sold by private treaty. Thereafter he approved the sale of those lands in the sum of €3,450,000.

Background facts

2. The plaintiff, his mother and three brothers were the joint owners of some 448 acres of farmland ("the lands") in Co. Meath. His brothers are the defendants to these proceedings. The lands were the subject matter of a partnership agreement made in 1994. After the death of his mother in 2006, the plaintiff decided to cease farming and realise his share of the assets. Thus, in July, 2007, he commenced proceedings by way of plenary summons seeking a declaration that the partnership had terminated on the death of his mother in December 2006.

3. On 16th December, 2010, the declaration sought by the plaintiff was granted.

4. The plaintiff sought an order for sale of the lands in early 2011 and that application was opposed by the defendants on the grounds that it was premature given that "accounts and enquiries" had not been conducted. Accordingly the application was adjourned to allow an arbitrator conduct that exercise. Regrettably, the appointed arbitrator, Mr. Pat Gillen, FCA, who had advised that he would likely complete his role within three months, asked to be relieved of his appointment having regard to the lack of co-operation from the defendants.

5. As a result of the aforementioned matters, on 12th April, 2013, the plaintiff renewed his application for an order for sale. He also sought an order terminating the appointment of Mr. Gillen and an order directing that the examiner conduct the taking of accounts and enquiries.

6. On 6th June, 2013, Feeney J. directed that the lands be sold by public auction and in such lots as might be advised by the auctioneer to be appointed and at the reserve that he might specify. Further, he ordered the defendants to vacate the lands by 7th October, 2013, to facilitate that sale.

7. In March, 2014 Messrs. Ganly Walters Auctioneers were appointed to have carriage of the sale. Mr. Ganly advised a reserve of €5,000 per acre to the examiner in September, 2015.

8. In passing, I should state that the defendants did not vacate the lands as per the order of Feeney J. As a result, numerous court applications ensued. Suffice to state that each of the defendants were found guilty of contempt of court and were committed to prison. They were only saved from that plight by the fact that a stay was placed on those orders based on undertakings given by them not to re-enter the lands. It is relevant to note in this regard that the defendants' obstructive conduct came before the Court on no less than seven occasions in 2014.

9. In June, 2015 Mr. Ganly recommended that the lands be offered for sale by way of public auction on 29th September, 2015, with a closing date for any proposed sale to be fixed for 1st December, 2015.

10. It is material to record that at approximately 2 a.m. on the morning of the auction, the plaintiff's solicitor Mr. Curran, who had joint carriage of the sale with Mr. Martin the solicitor for the first named defendant, received an offer from the defendants. The plaintiff was not willing to accept that offer as it did not address a number of issues which he considered to be fundamental to the resolution of the dispute.

11. It is not disputed that the lands were extensively advertised and that the auction itself was well attended. Neither is it in dispute that, with the exception of a bid of €1 made in respect of each of the lots, no other bids were forthcoming. It is agreed that following the commencement of the auction the aforementioned bidder intervened to inform those present that the land on offer was a family farm, was the subject matter of a family dispute and that anybody buying it would have bad luck.

12. It is accepted that when no further bids were made the auction was brought to an end without Mr. Ganly specifically advising those present that he was willing to enter into negotiations in respect of a sale of these lands by private treaty, subject to court approval. However, it is common case that when the auction ended Mr. Ganly and Mr. Curran were approached by five interested parties. Thereafter, a bidding process was conducted amongst these parties with the result that a memorandum of agreement was signed in respect of each of the three lots of land. In each case the memorandum was signed by a solicitor in trust for his client and was accompanied by a deposit of 10% of the proposed purchase price taken. The total sale price achieved, subject to court approval was €3.45m.

13. Whilst initially disputed, it was later accepted that Mr. Martin, the solicitor who had joint carriage of the sale, was only contacted by Mr. Curran after Mr. Ganly had reached an agreement with the intended purchasers. Mr. Martin's attendance was sought for the purposes of getting him to sign the various memoranda. At that stage he objected to the negotiations on the basis that the Court order had directed that the lands be sold by public auction.

14. By notice of motion dated 8th October, 2015, returnable before the Court on 13th October, the plaintiff sought an order varying the order for sale of the partnership lands made by Feeney J. on 6th June, 2013. He sought an order that they be sold by private treaty and an order approving of their sale for a total sum of €3.45m.

15. The defendants opposed the relief sought by the plaintiff and an extensive exchange of affidavits took place. On behalf of the plaintiff affidavits were sworn by Mr. Ganly and Mr. Curran and on the defendants' behalf by Mr. Martin and Mr. Stephen Rickard. The thrust of the defendants' objection was that the negotiations that had taken place post auction were unlawful as they had not been authorised by the High Court. Further, they were flawed and unfair to the defendants as other interested parties had been excluded from the process. In addition, they submitted that the Court could not be satisfied that the best possible price had been achieved and that in such circumstances the sales ought not be approved and the lands should be put back on the market to be sold by private treaty. In addition to the aforementioned objections, the defendants also applied for liberty to cross examine Mr. Ganly and Mr. Curran based upon a submission that the same was necessary for the fair disposal of the issues before the Court and in particular their contention that the negotiations which had taken place after the auction were flawed and unfair and that the purchase price proposed was at an undervalue.

16. It would appear likely that the application was adjourned to facilitate the exchange of the affidavits already referred to. On the 9th November, 2015, the High Court Judge refused the defendants' application for liberty to issue notices of cross examination directed to Mr. Joseph Curran and Mr. Robert Ganly. The Court order also records that given the third named defendant's interest in purchasing the land comprised in folio 20219 in the County of Meath, that he be given until noon on 12th November, 2015, to establish, by the means stated in the order, his ability to purchase those lands.

17. When the matter came before Keane J. on 16th November, 2015, he once again refused the defendants' application for liberty to issue notices to cross examine Mr. Curran and Mr. Ganly and proceeded to grant each of the reliefs sought in the notice of motion. He then adjourned the matter to the following day to give his reasons.

18. On 17th November, 2015, in a detailed ex tempore judgment the High Court judge expressed himself satisfied that the Court appointed auctioneer had not engaged in a process which was impermissible or unlawful and that the spirit of the order which had been made by Feeney J. on 6th June, 2013, should be read so as to imply that he had authority to negotiate in the manner in which he did. He also expressed himself satisfied that the negotiations which had been carried out by Mr. Ganly and Mr. Curran following the failed auction had been carried out in an open, fair and transparent manner and that the process had not been unfair to the defendants. He concluded that there was no evidential basis for Mr. Martin's assertion that those who approached Mr. Ganly after the auction were in some sense to be properly characterised as "preferred bidders". The judge was satisfied that anybody who had an interest in purchasing the lands could have approached Mr. Ganly after the auction had they been so interested.

19. As to the defendants' assertion that the best price achievable for the lands was likely not obtained by the manner in which the negotiations had been conducted following the failed auction, the trial judge was happy to conclude that the best sale price possible had been achieved by Mr. Ganly having regard to the circumstances in which the lands were sold. In so concluding he noted that the defendants had produced no evidence to gainsay Mr. Ganly's opinion as to the true market value of the lands or to suggest that a greater sum was likely to be obtained if the Court were to refuse to approve of the proposed sale.

20. It should also be stated that in advance of reaching his conclusions on the facts before him the trial judge expressed himself satisfied it was not necessary for the proper determination of the issues before him to grant the defendants leave to serve notices to cross examine on Mr. Curran and Mr. Ganly. He was satisfied that the facts material to the issues before him were not in dispute and that accordingly it was not necessary for the proper administration of justice that such a cross examination be permitted.

Order of Feeney J., 6th June 2013. A final order which could not be varied?

21. Having considered the submissions of the parties on this appeal, I am quite satisfied that the High Court judge was correct in law when he concluded that Mr. Ganly, notwithstanding the provisions of the order of the 6th June, 2013, had implicit authority, the auction having failed, to negotiate with such purchasers as expressed an interest in the land with a view to concluding an agreement subject to court approval. Accordingly I reject the submission that, the auction having failed, it was incumbent upon the plaintiff to return to court to seek a further order permitting a sale of the lands by private treaty.

22. The first thing to say about this issue is that the defendants advanced no legal authority in support of their proposition.

23. Secondly, I reject their submission that the order could not be varied because it was a final order. That aspect of the order which directed that the sale should be by public auction was an ancillary order and did no more than specify the mechanism by which effect would be given to the substantive order. Accordingly, I see no reason why that aspect of the order would not be amenable to amendment or variation, if indeed variation was required. As a matter of fact I note that the order of the 6th June, 2013, had already been varied by order of the Court made on 20th April, 2015, when the lands comprised in folio 2597 were excised from the order for sale.

24. Thirdly, I am quite satisfied that when a court makes an order for the sale of lands, such as was made by Feeney J. in the present case, it is implicit that the court appointed auctioneer is authorised to conduct that auction in the same manner as is considered professional and prudent when engaged to sell a property at public auction otherwise than pursuant to court order. In other words, if a reserve is not reached or no bid is made, it is implicit that the auctioneer is authorised to open negotiations with interested purchasers who make themselves known following the close of the auction. It goes without saying, that any agreement concluded in such circumstances can only be agreed subject to court approval. That an order for sale, with an ancillary order directing that the sale take place by public auction, should be so interpreted is clearly reflected in the letter written by Mr. Ganly to the Examiner dated 17th September, 2015, wherein he advised that in the event of the reserve not being reached and the properties being withdrawn that negotiations would take place privately thereafter.

25. Fourthly, the procedure for which the defendants advocate is one which would not inure to the benefit of the interested parties and would to my mind prove costly, inefficient and potentially damaging. As is apparent from Mr. Ganly's evidence in the present case the lands were extensively advertised for sale by public auction. The approach proposed by the defendants would lead to the generation of additional costs, such as the costs attendant upon a further court application, additional professional fees and further advertising costs. All of these would have to be discharged out of the purchase monies and would be incurred in circumstances where

there would be no guarantee that any purchaser would be found. Indeed, as was stated by Mr. Ganly in his affidavit, to pursue such an approach would not be in the interests of those concerned with the outcome as parties who were willing to negotiate after auction might in the intervening period lose interest.

26. Fifthly, I reject the defendants' submissions that the fact that the plaintiff applied to vary the order of the High Court of 6th June, 2013, constitutes an acknowledgment that the actions of Mr. Ganly in negotiating a sale by way of private treaty subject to court approval was unlawful. To my mind it was unnecessary for the plaintiff to bring a motion seeking to vary the order that was made by Feeney J. for the reasons already outlined. All that was required was an order of the Court permitting the sale of the lands by way of private treaty at the purchase price which had been agreed subject to court approval.

27. Finally, the decision in *Re Bartlett* [1880] 16 Ch.D. 561, a decision to which I will later refer in some detail, lends support to the plaintiff's submission that where a court directs that property is to be sold by auction and this objective is not achieved, a court appointed auctioneer may continue to conduct negotiations, and, if the reserve is achieved in the course of those negotiations, is authorised to conclude an agreement for the sale of those lands subject to court approval. When approval is sought for the proposed sale interested parties may at that stage voice any objections they have to the relief sought.

Bids v. Contract subject to court approval?
28. Mr. Condon, S.C., on behalf of the third named defendant, conceded that it would have been permissible for Mr. Ganly to have taken bids from any interested purchaser after the auction. Having done so he would have been entitled to seek authorisation from the Court to enter into a binding contract with any such purchaser at a particular contract price. However, he submitted that it was impermissible for Mr. Ganly to have entered into binding contracts for the sale of the lands subject only to court approval.

29. For the reasons already stated I am satisfied that this submission is not correct as a matter of law. However, I also fail to see the logic of this argument. Both options involve an application to court to obtain court sanction and in either instance it would be open to be the defendants to oppose the sale if in a position to demonstrate that the lands were being sold at an undervalue. Thus, I fail to see any prejudice arising to the third named defendant by reason of the fact that Mr. Ganly pursued the normal course for an auctioneer following upon a failed auction. Further, the procedure proposed by Mr. Condon would be both costly and uncertain. The bidder whose bid it is suggested would be brought to court for approval would have no contractual commitment to buy. The court might the particular bid and the bidder might then withdraw.

Was the process of negotiation post auction fair and transparent or was it unfair to the defendants?
30. The trial judge was not satisfied that the principles laid down in *Mahomed Kala Mea v. A V Harperink* [1908] 25 TLR 180 applied to the present case in circumstances where that judgment was directed to the rights of a purchaser purchasing under a court sale. However, even if the principles laid down in that case were to be applied in the present case, and it would take some small leap to consider that the defendants were in quite the same situation as the purchaser in that case, I am nonetheless satisfied that the defendants have failed to demonstrate any evidence of impropriety as would justify the Court refusing to approve of the sales as proposed by Mr. Ganly.

31. It is not necessary to recite in any great detail the facts in the aforementioned case. Suffice to say that the purchaser of property which was being sold pursuant to a court order was tricked into buying the equity of redemption in the lands in question when he had been advised that he was buying the lands themselves. An application was made to set aside the sale which Lord MacNaghten described as "a lamentable miscarriage of justice." Regarding court sales, he went on to say the following:–

> "But over and above all this there is involved in this case a principle of supreme importance which the learned Judges of the Chief Court entirely disregarded. It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgement. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusionary and so unconscientious as this".

32. While it was not suggested on this appeal that any officer of the Court had acted in a fraudulent or deceitful manner, the Court was urged to consider that what had occurred after the auction was tainted with suspicion to the point that the Court should not approve of any agreement concluded in such circumstances.

33. I am quite satisfied that any party wishing to rely on the aforementioned principles, would bear the burden of proof of establishing, by credible evidence, that the conduct of Mr. Ganly and / or Mr. Curran falls to be considered as tainted with suspicion and further that this conduct had caused them significant prejudice as had occurred to the purchaser in *Mahomad Kala Mea*. That is a burden that I am satisfied they failed to discharge.

34. As to the conduct that the High Court was urged to consider as suspicious, the third named defendant relied upon the fact that negotiations took place after the auction. This he maintained was unfair to him as he was not invited to engage in the process. I view that assertion to be entirely without merit. At para. 10 of his affidavit sworn on 23rd October, 2015, he stated as follows:-

> "When going into the auction, I was asked by a representative of Ganly Walters as to which property I was interested in and I told him that I was interested in the 86 acres at Mitchelstown. After the public auction was over, I became aware that there were negotiations underway between Mr. Ganly and some potential buyers. I was not asked if I wished to make a bid or invited to the negotiations even though Mr. Ganly, as is clear from para. 21 of his affidavit, was aware that I had a keen interest in the lands."

35. It is accordingly clear that the third named defendant, having chosen not to bid at auction for lands in respect of which he states he had a keen interest, and notwithstanding the fact that he was fully aware that Mr. Ganly was conducting negotiations with other interested parties, chose not to pursue his alleged interest by asking to participate in those negotiations. Had he so participated he would have been in a position to bid for the lands which were of interest to him on the same terms as the other interested parties.

36. It is noteworthy that none of the defendants maintain that they were acting under the mistaken belief that the property could not be sold privately by Mr. Ganly following the failed auction. Further, the second and third named defendants make no assertion that they were unaware of the private negotiations or that they would have wished to participate in them had they known of them.

37. I should state in passing that I view with grave suspicion the averment made by Mr. Stephen Rickard in his affidavit that the

reason he did not bid at the auction was because he believed that the plaintiff was willing to settle his claim on the terms proposed by the defendants in the e-mail sent to the plaintiff's solicitor at 2 a.m. on the morning of the auction. If that was his belief why did he attend or sit through the auction? Why did he not ask Mr. Martin, who had joint carriage of the sale and who had made the offer on the defendants' behalf, if it had been accepted? Why did he not ask the representative of Ganly Walters, who approached him immediately in advance of the auction to ascertain the nature of his interest in the lands, why the auction was going ahead in light of the resolution of the dispute? Further, he sets out no basis for his belief that the plaintiff was willing to settle the dispute on the terms proposed. What he states at para. 9 of his affidavit is that they were happy to settle the matter on terms which had been agreed between themselves.

38. Having considered the submissions of the parties, I am quite satisfied that the High Court judge was correct to conclude that what happened after the auction was a standard procedure that was conducted in an open, fair and transparent manner. In this regard the High Court judge had the expert evidence of Mr. Ganly that when a property fails to sell at auction it is common practice for any interested parties to approach the auctioneer immediately afterwards if they wish to pursue their interest in that property. There was nothing, as the trial judge noted, to support the assertion of Mr. Martin that the parties who expressed interest post auction were to be considered some type of "preferred purchasers." None of the defendants claimed to have been unaware of the negotiations, even if Mr. Martin was not aware of the negotiations until they were almost concluded and only the third named defendant asserted any interest in bidding and he chose not to participate at the auction or the negotiations conducted thereafter.

39. For the aforementioned reasons I have no difficulty in concluding that the trial judge was quite correct as a matter of law and fact when he concluded that the defendants had not established that the dealings as between Mr. Ganly and the intended purchasers were tainted with any degree of suspicion whatsoever such as might justify the Court refusing to approve of the sales.

The assertion that the best price was not achieved.

40. The defendants' argued on this appeal that the High Court judge could not have been satisfied that the sales proposed were at full value and in such circumstances he had no power to lend sanction to what was proposed.

41. The defendants' first submission in this regard was premised on an averment made by Mr. Ganly to the effect that there were plenty of parties interested in the lands. Having regard to that statement and in circumstances where it was accepted that he had failed to announce his intention to negotiate after the auction the defendants submitted that the Court could not have been satisfied that there were not other parties who had left the auction who were likely to have been willing to negotiate a purchase at figures higher than those put before the Court.

42. It is relevant to recall that Mr. Ganly, in his affidavit of 3rd November, 2015, maintained that the relevant negotiations were conducted in an area where the same would have been readily obvious to anybody interested in the auction. For my part I am satisfied that the High Court judge was asked to make a quantum leap when he was urged to conclude on the basis of the defendants' affidavits, that the circumstances were such that he would be satisfied that the best price was not achieved.

43. Having considered the decision in *Re Bartlett* to which I will shortly refer, I am satisfied that the onus was on the defendants to establish to the High Court Judge that it was likely that sanction was being sought for sale at an undervalue and that if put back on the market that an alternative purchaser would likely be found who would pay a higher price. I think this is a convenient point at which to return to consider the import of the decision in *Re Bartlett*.

44. *Re Bartlett* was a case concerning the sale of a house on foot of a court order made in the course of the administration of the estate of a Mr. George Bartlett. It would appear from the judgement of Malins V.C. that the Court ordered that the sale be by way of public auction. A reserve price of £18,500 was fixed by the Court based upon the evidence of a valuer. The auction took place on 5th August, 1880. The highest bid was that placed by a Mr. Walker but the bid was below the reserve. A few weeks later he made a formal offer to purchase the property for the sum of £18,000, subject to the sanction of the court being obtained within 10 days. A conditional contract was entered into between the auctioneer on behalf of the parties and Mr. Walker.

45. As was the practice, a summons to confirm the contract was taken out before the Chief Clerk for hearing on the 24th September, 1880. From the judgment I am satisfied that the summons was equivalent to the notice of motion brought before Mr. Justice Keane in the present case. On 24th September, Mr. Aird, a solicitor acting for the parties who were entitled to three quarters of the estate, objected to the confirmation of the contract by the Chief Clerk maintaining that the property had a much greater value than £18,000. The Chief Clerk was urged to postpone confirmation of the contract for a fortnight to allow an alternative purchaser to be found. However, because of the 10 day time limit attached to Mr. Walker's offer the matter was only adjourned to 29th September. In this regard I would consider that Mr. Aird's clients were in a situation not dissimilar to those of the defendants when the plaintiff's application came before Mr. Justice Keane. When the hearing resumed before the Chief Clerk on 29th September Mr. Aird advised that he was in negotiation with a potential purchaser who, he asserted, was willing to buy at a greater price than that offered by Mr. Walker and he sought a further adjournment to allow those negotiations to be completed. However, the Chief Clerk refused that application and confirmed the contract.

46. Mr. Aird's clients then, similar to the approach of the defendants in pursuing this appeal, applied to have the order of the Chief Clerk approving the sale set aside. By the time that application was heard Mr. Aird was actually in a position to demonstrate the existence of an increased offer which he had since obtained for the sum of £20,000 from a Mr. Mainprice. He also produced an affidavit from a valuer stating that the value of the property was anything between £26,000 and £36,000. In response, the auctioneer who had been appointed to sell made an affidavit stating that in his opinion £18,000 was fair value and more than would probably be obtained if the property were again put up for auction.

47. The Court upheld the decision of the Chief Clerk, and concluded that he had acted entirely correctly when he confirmed the contract. In the course of his judgment Malins V.C. said as follows:–

> "The real point I have to decide is what ought the Chief Clerk to have done on 29th September. It was not certain at that time that *Mainprice* would have come forward, and in that case Mr. Walker's offer might have been lost. What should I have done in such circumstances? Finding there was one man who had paid a deposit and bound himself to complete the contract, unquestionably, I should not have let him go, on a speculation that some one else might come forward, because Mr. Aird, who had had all this time, from 5th August up to 29th September, had not then brought forward another purchaser who would pay a higher price, and there never was found any one till 11th of October who would give more than £18,000.
>
> I think, therefore, that the Chief Clerk was perfectly right in doing what I should have done myself if I had been asked to confirm the contract. He did quite right not to refrain from confirming the contract upon a mere speculation as to a

> possible purchaser, when no one knew who the purchaser was, for it appears that the name of *Mainprice* was never even mentioned until to-day. It would have been most dangerous to have acted upon such a principle."

48. What also emerges from the judgment is that at the time the Chief Clerk confirmed the contract Mr. Aird had placed no expert evidence before the Court to support his own assertion that he thought he could get a better offer of £20,000.

49. This decision would appear to be authority for two propositions, the first being that when a court makes an order for the sale of property by way of public auction, and the auction proves unsuccessful for whatever reason, such as the fact that the reserve was not reached, the auctioneer appointed by the court is implicitly authorised to negotiate privately with a view to securing a contract for the sale of those lands, subject to court approval. The second is that an interested party, who wishes to object to the approval of a contract for sale agreed in such circumstances, must do more than speculate that a purchaser at a higher price might be found. Material to the court's consideration in such circumstances will be whether the objector is in a position to put expert evidence before the court to support their contention that the proposed purchase price is at an undervalue. Of like import is whether the objector has been able to identify the existence of any purchaser willing to offer a greater sum than that in respect of which court approval is sought and the period of time that was available to them for such purpose. In *Re Bartlett*, Mr. Aird, the objector, was noted by the Court to have had all of the period from 5th August, that being the date of the auction, to 29th September, that being the date upon which the proposed contract was put before the Chief Clerk for his approval, but had not proved the existence of a purchaser willing to pay more than £18,000.

50. In the present case the defendants had urged the High Court judge to refuse to approve the proposed sale of the lands based entirely on speculation that there might have been other parties who were interested in purchasing but who decided not to communicate their interest to anybody after the auction or in the days and weeks that followed and who would have been willing to pay more than that agreed following a competitive bidding process between four parties. In my view the decision in *Re Bartlett* lends full support to the approach adopted by the trial judge.

51. The defendants' second submission on this issue was that the trial judge had erred in law as Mr. Ganly accepted that the contracts, as signed, reflected a sale of the lands at an undervalue. I reject that submission. There was no evidence before the High Court Judge to establish that the sums offered by the potential purchasers represented an undervalue.

52. Mr. Counihan, S.C., in support of this submission relied upon a statement in Mr. Ganly's affidavit which he asserted amounted to a concession that the sums on offer for the lands constituted an undervalue. It is correct that at para.17 of his affidavit of the 7th October, 2015, Mr. Ganly advised that had the land been offered for sale on the open market <u>without any interference</u>, the property would likely have realised between €10,000 and €10,500 per acre. However, what Mr. Counihan ignores is that the lands were not being sold on "an open market without any interference". The background to the sales was fraught with interference and the sales were conducted, as was outlined by Mr. Ganly at para. 16 of his affidavit, under a general air of intimidation. The defendants had, as was stated by Mr. Ganly, planted crops and retained possession in defiance of court orders with the result that vacant possession was not immediately available. It was well known locally that the proposed sales were bitterly opposed by the defendants and that their opposition had led to a reduction in the number of purchasers who might be interested and the prices that might be achieved. This was further evidenced by what occurred at the auction itself when a man rose to his feet to intimidate purchasers by stating that the lands were the subject matter of a family dispute and that anybody who bid for them would be subjected to bad luck.

53. Of perhaps equal significance are paras. 22 and 24 of Mr. Ganly's affidavit where he referred to his discussion with the third named defendant in the immediate run up to the auction when he was told that any purchaser who bought the lands in question would "have to deal with him for the next ten years". The best that Mr. Stephen Rickard offered in response to this quite shocking revelation was that he just wanted Mr. Ganly to let any potential purchaser know that if they purchased the lands they would have to live alongside a disgruntled neighbour. This, Mr Rickard maintained, did not amount to the making of a threat. He just wanted any purchaser to know his feelings as a matter of fact. For my part I am quite satisfied that any potential purchaser advised by the auctioneer that their proposed next door neighbour had requested that they be advised that they would remain disgruntled following any purchase might advisedly wish to reconsider their interest in the lands.

54. It was against this backdrop that Mr. Ganly advised the Court that the offers received which reflected an average value of €7,701 per acre "given the entire background to the sale" was, in his opinion, "a very good price overall" and was one which should be accepted. He told the Court that he did not believe that there would be any higher offers if the lands were to be re-marketed and that they might realise substantially less.

55. Of some minor additional relevance in relation to this issue is the fact that on 21st January, 2015, Ganly Walters had guided a figure of €8,000 per acre but following negative feedback from interested parties due to the family dispute, recommended a reserve of €5,000 per acre, albeit to encourage interest. Nonetheless, the Examiner confirmed the entitlement of Mr. Ganly to sell the property at auction subject to a reserve of €5,000 minimum per acre. It is difficult against this backdrop to treat with any merit the submissions made by the defendants that the High Court judge erred in approving the sale of the lands as per the value proposed.

56. For my part I am quite satisfied that the High Court judge correctly concluded that he should reject the defendants assertions that the offers did not reflect the full value of the lands in the market in which they were being sold. Further, as was stated by the trial judge the defendants chose, for whatever reason, not to put forward any expert evidence to support their bald assertion that the lands were being sold at an undervalue. Their failure to do so was to my mind, particularly having regard to the decision in Re Bartlett, a fatal flaw in their opposition to the relief sought by the plaintiff.

57. I also reject the third named defendant's submission that as a matter of law this Court should overturn the order of the High Court judge having regard to the fact that he only afforded him four days to come up with funds sufficient to purchase the lands contained in folio 20219 of the County of Meath. As Haugh J. stated in *Provincial Bank of Ireland v. Farris* [944] I.R. 150 at 153:-

> "The place and time in which to make the offer is at the Court auction; to hold otherwise would turn the Court proceedings into the real auction and allow the auction itself to be a kind of preliminary canter before the real event – a form of procedure I would hesitate to justify. Special circumstances might justify a late bid after the auction, but no such special circumstances exist in this case."

58. The third named defendant has not advanced any special circumstances to explain why he did not bid at the auction. Neither did he explain why he elected not to participate in the negotiations which he knew to be taking place in the aftermath of the auction. Further, following the issue of the notice of motion on 8th October, 2015, he gave no indication of his wish to make an offer in excess of that which had been obtained by Mr. Ganly for the lands in which he was interested. It was not until 9th November, 2015, that he first expressed that wish. Further, he put no evidence before the Court to demonstrate that in the four days afforded to him he had

sought and been refused funds to meet the requirements of the Court order made on 9th November, 2015. Relevant also is his own affidavit which states that Mr. Martin had been put in funds by the defendants, at least to the extent of the offer that had been made by all three defendants, on 29th September, 2015. To assert that the opportunity afforded to him on 9th November, 2015, was in some way unfair to the point that this Court should interfere with the order of the High Court judge is simply untenable.

59. Finally, as to the refusal of the High Court judge to permit the service of notices to cross examine, I entirely accept that the law would favour granting such relief if the presiding judge is satisfied that there are conflicts of fact that need to be resolved before the Court might otherwise lawfully and justly determine the issues before it. However, in this case, particularly having regard to the contents of the affidavits before the Court and Mr. Ganly's concession as to the time at which Mr. Martin was first contacted after the auction, I am satisfied that the High Court judge was correct when he concluded that there were no factual matters that needed to be resolved by cross examination for the purposes of enabling him to fairly adjudicate on the application before him.

Conclusion.
62. This is indeed a difficult and troubling case. The forced sale of land against the wishes of its owners is bound to cause great upset to those involved. All the more so in a case where it is one family member that pursues that relief against his siblings.

63. The attachment of these defendants to their land in entirely understandable. However, is not acceptable that a person such as the plaintiff, who has wanted to sell his interest in lands which were owned by a partnership which terminated in 2006, should have his path blocked and obstructed by his former partners with the result that he has spent years engaging with the Court in order to achieve his lawful entitlement. In this case the plaintiff's entitlement to the partition and sale of the lands was established as far back as 16th December, 2010. After years of non co-operation on the part of his siblings, he eventually obtained an order for sale in June, 2013 and has still not achieved his objective.

64. Of course it has to be recognised that the defendants enjoy a constitutional right of access to the courts and that this includes not only a right to defend any proceedings brought against them but also their right to appeal any decision made by the High Court. Regrettably, however, their conduct has at times far exceeded their legal entitlements and they have wilfully obstructed the sale of these lands. The manner in which they achieved their objective is earlier referred to and will not be repeated here. In so doing they have acted not only to the detriment of the plaintiff but have acted to their own detriment in that significant costs have been incurred which would otherwise have been avoided. Hopefully, this judgment will close the final chapter to this difficult and tragic saga.

65. I would dismiss the appeal.