[2019] IEHC 853

THE HIGH COURT

[2016 No. 9998 P]

BETWEEN

WILLIAM H GAGGOS

PLAINTIFF

AND

CATHERINE CULLEN NEE O'BRIEN

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 13th day of December, 2019

Introduction

1. The notice of motion before the Court seeks a number of orders, two of which can be made by consent relating to the admission into evidence of depositions taken from two individuals in Michigan, USA in 2018. The only contest relates to the order sought by the defendant giving her liberty to admit into evidence an affidavit by John Doyle sworn on 15th April, 2016, ("the John Doyle affidavit") at the trial of these proceedings, pursuant to Order 39, rule 1 of the Rules of the Superior Courts ("RSC"). It was not known to the defendant that the said John Doyle had died in March 2019 when the notice of motion was issued. The defendant, however, in her grounding affidavit sworn on 15th May, 2019, disclosed that the late John Doyle was at that time 94 years old and suffering from advanced dementia.

Background

2. The plaintiff is an attorney and the legal personal representative of Edward O'Brien (also known as Edward Brien) ("Edward O'Brien Jnr") who died on 3rd November, 2006, in respect of which an Irish grant of probate was issued to the plaintiff in October 2012. The defendant is the niece of Edward O'Brien Jnr. Her father, the late James O'Brien, and the late Edward O'Brien Jnr were the sons of Edward O'Brien ("Edward O'Brien Snr"). Edward O'Brien Snr died intestate on 28th April, 1960, survived by his widow (who also died intestate on 18th August, 1961) and 15 children. James O'Brien died on 1st June, 2013. The defendant is the sole executrix under the last will of her father, made in August 2007. The defendant is sued in her personal capacity and in her capacity as the personal representative of James O'Brien.

3. The house at the centre of this dispute at Kilkea, Castledermot, Co. Kildare ("the property") was registered in the name of Edward O'Brien on 1st October, 1955, according to the relevant folio, being folio 15125 Co. Kildare.

Pleadings

4. The plaintiff, in the statement of claim delivered in November 2016, claims possession of the property. It alleges that the property was transferred to and registered in the name of Edward O'Brien Jnr on 1st October, 1955. Further, it alleges that the parents of Edward O'Brien Jnr and his brother (James) lived in the property by agreement or licence.

5. The defence and counterclaim delivered in December 2016 alleges that the property was in fact registered in the name of the Edward O'Brien Snr. It is also pleaded at para. 8(d)

of the defence that "[t]*he said James O'Brien, and laterally with his spouse and children, remained in sole, exclusive, uninterrupted possession of the property, adverse to the title of the President of the High Court (in whom it vested on the death of the said Edward O'Brien otherwise Brien) thereby extinguishing the said title in or around 1972."*

Transfer in October 1955

6. The parties agree that the Edward O'Brien (be it Edward O'Brien Snr or Edward O'Brien Jnr) who was the transferee of the property did not execute or sign any such deed of transfer. Thus, one cannot identify the Edward O'Brien from a comparison of signatures on the deed of transfer.

Application to register in 2007

7. A copy of the application by way of "*Form 5*" seeking registration of ownership sworn by James O'Brien on 30th October, 2007, is exhibited by the solicitor for the plaintiff in his replying affidavit sworn on 19th October, 2019. Paragraph 10 of this Form 5 avers:-

> *"I say that my Brother Edward O'Brien moved into the property in Kilkea for approximately 2 to 3 months in 1953 and then left for America in 1953 where upon he never returned except on holidays and has since deceased. I further say that the property was put into the name of my Brother Edward O'Brien at the instruction of my Mother and Father however he only resided there for 2 to 3 months in 1953 and never again after leaving for America in 1953."*

8. This averment tends to corroborate the plaintiff's claim about registration of the property in the name of Edward O'Brien Jnr.

Primary issue for trial

9. The first principal issue for the plenary hearing of these proceedings is whether the property was registered in the name of Edward O'Brien Snr or Edward O'Brien Jnr.

The John Doyle affidavit

10. The John Doyle affidavit was sworn in proceedings (between the same parties to these proceedings) in Kildare Circuit Court having record number EJ158/15. At that time, according to counsel, there was a perception that the Circuit Court did not have jurisdiction to determine the claim. Nothing turns on whether that perception about jurisdiction was correct or not for the purposes of determining this application now before the Court other than the potential effect of the delay in 2015 and 2016 on having *viva voce* evidence taken from John Doyle.

11. For the sake of clarity, the Court sets out paras. 4 to 7 of the John Doyle affidavit which followed an explanation that John Doyle had lived in one of the six cottages including the property in Kilkea since May 1952 for which "*an agent from Kildare County Council*" had attended for "*the occupants … to sign*":-

> *"4. There were six cottages in total at Dairylands and an agent from Kildare County Council attended at our property, namely, 1112 Dairyland, Kilkea, Castledermot,*

Co. Kildare, whereby all of the occupants to be of the six houses at Dairylands, Kilkea, Castledermot, Co. Kildare met with the said agent to sign for their property.

5. *I say that Edward O'Brien, the Grandfather of Catherine Cullen nee O'Brien, who was to occupy 1111 Dairylands, Kilkea, Castledermot, Co. Kildare met with the agent, as did I and the other four occupants and in fact, signed for the house in our front room as one signing ceremony en masse. It is beyond doubt in my mind that Edward J. O'Brien Deceased the Plaintiff in the above mentioned proceedings did not attend this ceremony but his father, Edward O'Brien did and it was he Edward O'Brien (Senior) that signed for the house.*

6. *It is beyond doubt in my mind that the Edward O'Brien that signed is the father of the late Edward J. O'Brien late of the United States of America.*

7. *Edward J. O'Brien of the USA did not attend at the signing ceremony and while we have lived at 1112 Dairylands, Kilkea, Castledermot, Co. Kildare since 1952 to date Mr. Edward J. O'Brien has not resided at the property as a householder or otherwise."*

12. These averments contradict the claim that the property was registered in the name of Edward O'Brien Jnr.

Applicable rule of court

13. Order 39, rule 1 RSC provides:-

> *"In the absence of any agreement in writing between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action, or at any assessment of damages, shall be examined viva voce and in open court, but the Court may, at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the Court that the other party, bona fide, desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."*

Submissions for the applicant defendant

14. Counsel for the applicant defendant submitted that the plaintiff has never explained on affidavit the necessity for the cross-examination of the now late John Doyle. Counsel urged the Court to exercise its discretion to allow into evidence the affidavit of John Doyle in the interests of justice. In this regard it was suggested that this Court should leave it to the trial judge to assess the weight of the evidence contained in the John Doyle affidavit. The delay on the part of the plaintiff in commencing and prosecuting these proceedings was also a factor which the Court could take into account in assessing the

interests of justice and the prejudice caused to the defendant by the delay on the part of the plaintiff.

15. In relation to the principles from the Supreme Court judgment *in Phonographic Performance (Ireland) Ltd v. Cody & Princes' Investments Limited* [1998] IESC 64, [1998] 4 I.R. 504, [1998] 2 I.L.R.M. 21 ("*Phonographic Performance (Ireland) Ltd"),* counsel contended that that case concerned the difficulty and impracticality in calling witnesses from outside the jurisdiction whose evidence it was sought to be adduced on affidavit. Counsel for the defendant orally submitted that this was in contrast with the status of John Doyle. When drafting the notice of motion herein, the defendant was aware that John Doyle had advanced dementia. In fact, he was dead at that time. It is simply not possible to call him as a witness and allow cross-examination. Thus, while the plaintiffs in *Phonographic Performance (Ireland) Ltd* sought an order under O. 39 r. 1 for convenience and practicality, the order sought in this case is necessary, according to counsel for the defendant.

Submissions for the plaintiff respondent

16. Counsel for the plaintiff in oral submissions stressed that the identity of the actual transferee in 1955 is a "*core issue*". Not only did the plaintiff wish to cross-examine the late John Doyle but the plaintiff can adduce evidence that Edward O'Brien Jnr was the transferee in 1955 by way *inter alia* of the Form 5 sworn by the defendant's father (James O'Brien). That Form 5 asserts a possessory title which contradicts the defence plea that the plaintiff's father (Edward O'Brien Snr) was the transferee.

17. Moreover, the circumstances in "*procuring*" the John Doyle affidavit when he was so advanced in years and compromised gives rise to doubts about the reliability of the evidence sought to be adduced. Counsel for the plaintiff in reply also submitted that the issue of delay in commencing or prosecuting these proceedings was not particularly relevant to this application under O. 39 r. 1 given the acknowledged procedural history. In other words, the delay in 2015 and 2016 does not materially affect the consideration of this Court when applying the law relating to Order 39 rule 1. The Court understands this to mean that the defendant, on learning of the objection to the affidavit, should have sought evidence on commission.

Case law

18. The plaintiff in *Phonographic Performance (Ireland) Ltd,* a company which conducted the business of administering the copyright in sound recordings, brought proceedings against the defendants, the general manager and owner of a hotel that had a discotheque. The plaintiff alleged that the defendants had played certain recordings on their premises without remunerating the plaintiff. The defendants put in issue that copyright subsisted in the relevant recordings and that the plaintiff was the owner or exclusive licensee of such copyrights. The plaintiffs sought, pursuant to O. 39 r. 1, to adduce evidence in relation to these issues on affidavit having regard to the multiplicity of witnesses needed and the difficulty in obtaining the attendance in court of the witnesses considering that 11 out of 13 witnesses were resident outside of the jurisdiction.

High Court

19. The judgment of Keane J. (then of the High Court) noted the discretion in making an order like that sought by the defendant in the application before this Court now. Keane J. at p. 515 explained:-

> *"… However, it can only be made where 'sufficient reason' is shown for the making of the order and where justice requires that it should be made.*
>
> *The authorities on the rule and its predecessors are sparse. In Cronin v. Paul (1881) 15 I.L.T.R. 121, a decision on the corresponding rule under the Supreme Court of Judicature Act (Ireland) 1877, Palles C.B. held that an order should not be made permitting the proof of facts by affidavit, if they are facts directly in issue in the action and going to the gist thereof. A similar view was taken by Maguire P., as he then was, in* Northridge v. O'Grady and Thompson *[1940] Ir. Jur. Rep. 19. In* Shannon v. Ireland *[1984] I.R. 548, Finlay P. allowed evidence to be given on affidavit by a person who was in custody in Northern Ireland at the relevant time where the application was made during the course of the trial, but emphasized that in normal circumstances the application should be made, as here, as a preliminary application before the trial. In* McGlinchey v. Ireland (No. 2*) [1990] 2 I.R. 220, Costello J. allowed an affidavit as to Northern Irish law to be used by one of the parties. One of the grounds on which it was allowed was that counsel had not indicated that it was intended to adduce evidence to dispute what was deposed to in the affidavit.*" (emphasis added).

20. At least three points emerge from this excerpt:-

(i) An order should not be made permitting proof of the fact referred to in the affidavit if the fact is directly in issue;
(ii) An application like this should be made before the trial of the action;
(iii) The Court can take into account the absence of any evidence to the contrary concerning the issue sought to be proven.

21. Keane J. further noted:-

> *"While the rule that witnesses at the trial of the action must be examined viva voce and in open court is of central importance in our system of justice and is not to be lightly departed from, it seems to me that an order should be made at least where all the following requirements are met:-*
>
> *(1) the facts sought to be proved do not relate to issues significantly in dispute between the parties;*
>
> *(2) the court is not satisfied that the other party bona fide requires the production of the deponent for cross-examination;*

(3) *the difficulty or expense of producing the deponent in court is such that there is a serious risk of injustice to the party seeking to adduce the evidence on affidavit; and*

(4) *the application is made as a preliminary application before the trial of the action."* (pp. 515-516).

22. Keane J. held that the facts intended to be proved on affidavit did not go to the gist of the action and noted that the defendants had not indicated that there was a serious doubt as to the correctness of the averments or that they wished to cross-examine the witnesses. Finally, Keane J. noted that as the 11 witnesses lived outside of the jurisdiction, and could not therefore be compelled to attend, it would be very difficult to guarantee their attendance. Keane J. held that the plaintiff had clearly established a degree of difficulty and impracticality in the calling of witnesses leading to a serious risk of real injustice if the application was to be refused. He thus made an order enabling the evidence to be adduced on affidavit without the necessity of producing the deponents for cross-examination.

Supreme Court

23. Murphy J. for the Supreme Court allowed the appeal from the order granted by Keane J. Murphy J. held, contrary to the conclusion of Keane J., that the facts sought to be proved on affidavit did go to the gist of the action and that the dispute arising could not be described as "*formal*" or "*collateral*". Having so found, Murphy J. held that the question about whether the defendants *bona fide* required the production of the deponent for cross-examination did not arise. However, he also noted with regard to the discretion of the court described by Keane J.:-

> *"Keane J. described the rule as conferring a discretion on the court to permit particular facts to be proved by affidavit where 'sufficient reason is shown for the making of the order and where justice requires that it should be made'. This is clearly the general effect of the order but I would refine that analysis to the extent that where the proviso to the rule is applicable, that is to say, where the production of a witness is bona fide desired by the other party for cross-examination, the matter ceases to be one of discretion and the order must be refused. Again it would seem to me that in seeking to persuade the judge to exercise the discretion conferred on him by the rule that the onus lies on the party making the application and in the case of the application being resisted on foot of the proviso that the onus lies on the other party to establish a bona fide desire for the production of the witness."* (pp. 521-522, emphasis added).

24. Murphy J. at p. 524 further explained:-

> *"I would respectfully disagree with the learned trial judge in his conclusion that*:-

'The gist of this action is obviously the reasonableness of the remuneration being sought by the plaintiff and the appropriate machinery by which any dispute as to the level of such remuneration is to be resolved.'

I accept that remuneration is part of the gist of the action but the gist is twofold: it includes the right or title of the plaintiff to receive such remuneration.

At the end of the day remuneration may be the more hotly contested issue but as the defendants deny the title of the plaintiff that issue must be resolved in favour of the plaintiff before any other issue can arise. In my view it is not possible to dismiss the dispute as to ownership as 'formal', as the Chief Baron said or 'collateral' as Maguire P. indicated simply because there are grounds for suspecting that the defendants have no witnesses or evidence on which to challenge the plaintiff's title."

Determination

25. The rules of court exist to facilitate the administration of justice and should not hinder justice. On the other hand, examination and cross-examination are fundamental characteristics of the adversarial process which is long established. Examination of witnesses "*… is a rule not to be departed from lightly*" (Murphy J. in *Phonographic Performance (Ireland) Ltd* at p. 521).

26. Although Mr. Doyle could not have been cross-examined in 2019, the defendant applicant has not explained when Mr. Doyle would have been capable of cross-examination, if at all, on his affidavit sworn in April 2016.

27. The solicitor for the plaintiff, in reply to a request dated 1st August, 2018, to admit the John Doyle affidavit, said that he had "*never heard of evidence being given in the manner suggested.*" No application was made to take evidence on commission.

28. The memory and cognition of John Doyle was always going to be a matter of concern and it is worth commenting that the burden of proving the competence of the person who adduces evidence is on the party leading the witness.

29. It may be tempting to allow the trial judge to determine the weight of evidence adduced by a deponent by way of affidavit who has not been cross-examined. However, that ignores the long-established characteristic of the adversarial process. Moreover, the Supreme Court in *Phonographic Performance (Ireland) Ltd* has made it quite clear that the order sought must be refused where the respondent has a *bona fide* desire for the production of the witness.

30. The solicitor or the plaintiff could not have averred in his affidavit sworn on the 14th October, 2019, that there is now a desire to cross-examine the late John Doyle. The defendant in her grounding affidavit for this motion sworn on 28th May, 2019, avoids or omits to explain if and when John Doyle was ever capable of being cross-examined despite being aware from at least August 2018, if not when arranging for the swearing of

the John Doyle affidavit in April 2016, that this form of evidence could not be admitted without the consent of the plaintiff.

31. Order 39, rule 4 of the RSC confers a broad discretion on the court to order that evidence be taken on commission. In this way the strictures of the principle requiring viva voce evidence in open court may be alleviated. It is not open to a party such as the defendant to wriggle out of having a witness cross-examined by making a unilateral decision to procure an affidavit for a plenary hearing. It was open to the defendant to have applied for the taking of evidence on commission from the late John Doyle in or before April 2016.

32. The Court realises that these proceedings were commenced in November 2016 but notes that Circuit Court proceedings about the same issue had been issued in 2015. The defendant has not described how and when she became aware of the substance which informed the averments in the John Doyle affidavit. The dispute about whether Edward O'Brien Snr or Edward O'Brien Jnr was the registered owner of the property has been known to the parties for many years now. Suffice to say that whatever about the obligation to follow the law established in *Phonographic Performance (Ireland) Ltd*, this Court has not been persuaded about injustice having been caused by applying Order 39, rule 1. In other words, I am not satisfied that the rules of court have hindered the administration of justice in the dispute between the parties. The defendant's submission that the John Doyle affidavit or the averments contained therein are necessary ought to have been acted upon by the defendant in accordance with the RSC before that affidavit was sworn.

33. The foregoing is secondary to the determination of the application which must follow the decision of the Supreme Court in *Phonographic Performance (Ireland) Ltd* that the court does not have discretion to permit affidavit evidence at a plenary trial about a fact directly in issue without consent. It was apparent to the parties from the outset that the identity of the Edward O'Brien registered as owner of the property is a primary issue which requires *viva voce* evidence to resolve.

34. In those circumstances, I refuse the order sought in the notice of motion at paragraph one.