[2018] IEHC702

THE HIGH COURT

[2006 No. 4849P]

BETWEEN

MICHAEL AND THOMAS BUTLER LTD.,

MICHAEL BUTLER AND WILLIAM BUTLER

PLAINTIFFS

AND

BOSOD LTD., CROHAN O'SHEA AND THOMAS O'DRISCOLL

DEFENDANTS

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 11th day of December, 2018

1. The task which I have to undertake in this judgment is one which was directed by order of the Supreme Court dated 18th October, 2017. On that occasion it dealt with two appeals which had been brought by Michael Butler and William Butler (the Butlers) against orders made by McGovern J. and Dunne J. respectively. The appeals were dismissed save that a new trial was directed in respect of two particular issues.

2. The curial part of the Supreme Court order reads:-

> *"… that appeal no. 228 of 2009 and appeal no. 60 of 2011 be dismissed save that a new trial be had confined to the question of whether or not a settlement, purportedly entered into by the parties on 11th February, 2008, contained a default clause 6, and if so, whether the appellants were, and are, liable thereon and for further determination by the High Court of all or any further questions or issues that appear material to the High Court arising from, or ancillary to, its determination relating to the existence or otherwise of the said clause 6 in the settlement."*

3. The function to be undertaken is a confined one. I have to decide whether or not a settlement purportedly entered into by the parties on 11th February, 2008 contained a default clause 6. The Butlers contend that it did not, a view not shared by the other litigants. If I answer that question in a manner adverse to the Butlers I then have to proceed to decide whether they have a liability on foot of that settlement.

4. In order to make sense of how these questions come to be posed it is necessary that I set out briefly the background to this tortuous litigation which has been going on for the last twelve years. The judgment of MacMenamin J. of 18th October, 2017 [2017] IESC 65 contains a comprehensive and detailed history of the relationship between the parties and the litigation. This judgment should be read in conjunction with it. Because the area of inquiry that I am concerned with is narrow, I need not rehearse the whole history of the parties' dealings with each other.

Background

5. On 30th July, 2003 the Butlers entered into an agreement with Crohan O'Shea (Mr. O'Shea) and Thomas O'Driscoll (Mr. O'Driscoll). At that time the Butlers were carrying out a residential housing development in Clonmel, Co. Tipperary. They encountered cash flow problems. Under the terms of this agreement of 30th July, 2003 the Butlers and Messrs. O'Shea and O'Driscoll agreed to become partners for the purpose of completing the building project. A limited company was formed which is the first defendant, Bosod Ltd. (Bosod).

6. On 18th October, 2006 these proceedings were commenced. The Butlers sought damages of in excess of €4,500,000 together with a variety of other reliefs including injunctive relief. The statement of claim was delivered on 14th December, 2006 and defences and counterclaims were delivered by Messrs. O'Shea and O'Driscoll. In due course the case was set down for hearing. It was set down for trial in Dublin but did not get on for hearing on the trial date of 21st January, 2008. The case was then ordered to be heard in Dundalk and was listed for trial on 11th February, 2008. This was a perfectly routine order and was so described by MacMenamin J. in his judgment of 18th October, 2017.

7. The case came before McGovern J. in Dundalk on 11th February, 2008.

8. At that trial the Butlers were represented by two Senior Counsel (Mr. Alex Owens S.C. and Mr. John O'Donnell S.C.) and one junior counsel (Mr. Gary McCarthy) who were instructed by solicitors.

9. It is clear from the judgment of MacMenamin J. that the Butlers complained in the Supreme Court about the transfer of the case to Dundalk. It was a complaint repeated on numerous occasions during the evidence which I heard. It is a complaint of no substance. There was nothing unusual at that time about a case being transferred to a country venue with a view to ensuring a timely trial. Although such complaints continue to be made by the Butlers it is clear that no complaint was made in relation to that issue in their actual notice of appeal to the Supreme Court. (See para. 13 of the judgment of MacMenamin J.) There is no basis for this complaint and the Butlers attended at court in Dundalk and were fully represented on the day in question.

10. Unfortunately, the Butlers are no longer professionally represented. That was so both before the Supreme Court and in the trial which has resulted in this judgment. Throughout this hearing they had the "assistance" of Ms. Angela Farrell as a McKenzie friend. Ms. Farrell is a former solicitor who was struck off the Roll of Solicitors by the then President of this Court for professional misconduct. I regret to say that far from being of any assistance to the court or the Butlers she was the exact opposite. I do not believe that she furthered the interests of justice and she did no service to the Butlers who in many instances during the hearing, through the mouth of Mr. Michael Butler, simply repeated largely irrelevant material dictated to him by Ms. Farrell. Much inadmissible evidence both documentary and oral was sought to be introduced.

11. Mr. O'Shea contends that at the proceedings in Dundalk on 11th February, 2008, a settlement was entered into between him and the Butlers. It is the only settlement which is relevant for the purposes of this hearing. A separate settlement was agreed to by the Butlers with Mr. O'Driscoll. Mr. O'Shea contends that under the terms of settlement the Butlers agreed to pay him the sum of €1,100,000 on or before 11th September, 2008. He alleges that the terms of settlement included a default clause (clause 6) whereby the Butlers accepted that in the event of non-payment of the €1.1 million by 11th September, 2008 they would consent to a joint and several judgment against each of them in the remaining sum then outstanding pursuant to the agreement. On foot of this agreement Mr. O'Shea accepts that he was paid €446,168. However, he contended that a balance of €653,832 remained due and owing to him. On 12th May, 2009 McGovern J. accepted that was so and granted judgment to Mr. O'Shea in that amount. That judgment was converted into a judgment mortgage which was registered against the lands contained in three folios. On 20th December, 2010 Dunne J. granted a well charging order in respect of these lands in enforcement proceedings brought by Mr. O'Shea. Subsequently, an order for sale of the lands was made on foot of the well charging order. The appeals to the Supreme Court related to the orders of McGovern J. of 12th May, 2009 and Dunne J. of 20th December, 2010. As I have already pointed out the appeals were dismissed save for the new trial that was directed.

12. As was pointed out by MacMenamin J. the entire edifice of the appeals brought by the Butlers is based on the proposition that there was no binding agreement entered into by them or, if there was, it did not contain the relevant default clause. They allege that the default clause is as a result of a "conspiracy" involving a forged court order or documents improperly placed on court files. As part of this argument they contend that a court order purportedly recording what took place in Dundalk is a dishonest forgery made at the behest of Mr. O'Shea.

13. The five day hearing which has led to this judgment was an extremely difficult one to preside over. That was due to a failure on the part of Messrs. Butler and Ms. Farrell either wittingly or unwittingly to address their minds to the two issues which were directed to be tried by the Supreme Court. It was very hard to confine them to those issues. The trial took much longer than was necessary and the Butlers aided by Ms. Farrell made the trial difficult to control. In seeking to range over many issues they attempted to place irrelevant and inadmissible evidence before the court and made allegations of wrongdoing, forgeries and Masonic conspiracies without the slightest evidence in support of them.

First issue

14. The first issue which falls for determination is one of fact. Was a settlement entered into between the Butlers and Mr. O'Shea on 11th February, 2008? If there was such an agreement did it contain a default clause 6?

15. The case was listed for hearing before McGovern J. in Dundalk on 11th February, 2008. Despite Mr. Michael Butler having asserted at a pre-trial hearing that he was not in Dundalk on that occasion there is now no doubt from his sworn testimony at trial that he was. He was present in Dundalk courthouse for most of the day. There is also no doubt from his own evidence that the Butlers were represented by Mr. Alex Owens S.C. and Mr. John O'Donnell S.C.

16. Mr. Michael Butler alleged that he did not meet Mr. John O'Donnell S.C. at any stage (Day 1, p. 106, line 19). He also alleged that he did not sign any agreement on that date (Day 1, p. 109, lines 6-25). He then had put to him by his brother a settlement agreement of the case purportedly signed by him annexed to a High Court order of 11th February, 2008. This document contained 8 paragraphs and did not include default clause 6. He said that he most certainly did not sign that document. He described it as a fraud document. He was then asked if he signed a similar document with 9 paragraphs annexed to a High Court order of 11th February, 2008 and he denied that he signed that document also. On the second day of the trial he asserted that no agreement had been reached by way of settlement of the proceedings with Mr. O'Shea (Day 2, p.5, lines 7-14). This is completely at variance with the position as asserted to the Supreme Court and recorded in the judgment of O'Donnell J. where he wrote at para. 4 as follows:-

> *"The appellants do not deny that the case was listed for hearing in Dundalk on the 11th February, 2008, or indeed that a settlement was arrived at and a court order made pursuant to that settlement."*

17. This allegation of no agreement having been reached was also in complete contrast to what I was told in evidence by his trial counsel, Mr. O'Donnell S.C. It was also in complete conflict with the transcript of what was said to McGovern J. on that occasion.

18. There could hardly be a greater conflict between the evidence of Mr. Michael Butler and Mr. O'Donnell S.C. Insofar as that conflict of evidence between Mr. Butler and Mr. O'Donnell S.C. is concerned I prefer the evidence of Mr. O'Donnell in every respect. His evidence was measured, careful and fully supported by the contemporaneous material put before me. Mr. Butler's, on the other hand, was confused and contradictory in places, meandering and replete with unsubstantiated allegations of conspiracy, Masonic influence and forgery.

19. Mr. O'Donnell's evidence on whether or not an agreement had been entered into was crystal clear. He said:

> *"I can't agree with Mr. Butler's evidence. There was an agreement entered into, in fact there were two agreements entered into, one in respect of the case against Mr. O'Shea, and another one in respect of the case against Mr. O'Driscoll. Mr. Sanfey represented Mr. O'Shea and Mr. Sanfey and I negotiated the settlement that related to Mr. O'Shea."*

20. He gave a description of what occurred during the course of the day, how he applied for adjournments from the trial judge which were granted, how an agreement in writing was entered into (the terms of which I will deal with presently), how the terms of that agreement were announced in part to McGovern J. when the settlement was being ruled and how the settlement expressly contained the default clause No. 6. Indeed, that default clause was actually read out to McGovern J. as is clear from the transcript of the hearing. Mr. O'Donnell had a specific recollection of speaking with Mr. Butler during the course of the day. He recalled that Mr. Michael Butler was unhappy with the advice that he got from both Mr. Owens and Mr. O'Donnell on the actual merits of his case. It appears clear that it was because of the weakness of the Butler's case that settlement was made with Mr. O'Shea.

21. When asked if he would come to a settlement without the agreement of his clients, Mr. O'Donnell prefaced his answer by telling me that the Butlers had sued him, his junior counsel and instructing solicitor in respect of the matter but that those proceedings had been struck out. Having apprised me of that, he said that the transcript of what went on before McGovern J. reflected the agreement which had been entered into between the parties. This agreement was negotiated throughout the day. I am quite satisfied on the evidence that Mr. O'Donnell did not purportedly settle the case without the Butlers' agreement. Neither did he mislead McGovern J. into believing that the case had been settled when it had not.

22. I turn now to the contemporaneous record of what was said to the trial judge.

23. Not merely did I have the transcript of the hearing of 11th February, 2008 placed in evidence before me but the stenographer who attended in Dundalk and who transcribed the audio tape also gave evidence. I listened to the audio tape of the hearing and her transcript is entirely accurate in all respects.

24. The earlier part of the transcript involves the legal representatives announcing themselves to the judge. Mr. O'Driscoll was not legally represented. Bosod was represented by a solicitor and indicated that it would abide the decision of the court. Adjournments were granted throughout the morning.

25. Further time was granted by McGovern J. in the afternoon. By mid-afternoon Mr. Owens S.C. announced that the case had been settled. Mr. Owens then dealt with the settlement of the action insofar as Mr. O'Driscoll was concerned.

26. Entirely consistent with the evidence which he gave to me concerning the division of labour between the two Senior Counsel, it was Mr. O'Donnell S.C. who announced the settlement of the proceedings as between the Butlers and Mr. O'Shea. At p.12 of the transcript Mr. O'Donnell is recorded as handing in the relevant terms of settlement. He pointed out that there were two undertakings being given to the court. The first was in para. 1 which related to the transfer of a shareholding by Mr. O'Shea to the Butlers. There was an undertaking given to the court to transfer that shareholding and to execute all necessary documents and liberty to apply to enforce that term.

27. Mr. O'Donnell then referred to other requirements in respect of payment. He then referred to para. 4 of the agreement whereby the Butlers agreed to pay Mr. O'Shea a specified sum of money out of the proceeds of sale of properties identified in an appendix to the agreement. Mr. O'Donnell pointed out that the Butlers were giving an undertaking to the court to that effect. He then went on to refer to what he described as "*various other terms of the agreement*". He said to the judge:

> *"You will note then at paragraph 6 that in the event that we have not discharged the relevant sums by 11 September, 2008 we consent to a joint and several judgment against them in the sum then outstanding, and if we do so consent to such a judgment, the undertakings that we give should be released. So a schedule of payments has been agreed and we are undertaking to the court to pay those."*

The judge then said:

> *"Yes, and in default"?*

To which Mr. O'Donnell replied:

> *"If by 11 September there are still monies outstanding then the judgment shall be entered against us for those sums and we will be released from our undertaking."*

The discussion then moved on to para. no. 7 to the effect that the settlement was in full and final settlement of all claims arising out of the proceedings.

28. Counsel also pointed out that para. 8 of the agreement provided that any amendment to the pleadings required to implement the terms were deemed effective. The reason for that was given by Mr. O'Donnell saying:

> *"I think that maybe because there was not a counterclaim brought by Mr. O'Shea against us, but not withstanding that, we are paying money as part of the terms of the settlement."*

29. I am quite satisfied on the evidence and find as a fact that on 11th February, 2008 a settlement of the proceedings between the Butlers and Mr. O'Shea was arrived at. Negotiations to lead to the agreement went on for the greater part of the day. The terms of settlement were reduced to writing and were signed by the Butlers. The settlement was received by McGovern J. and an order was made by him on foot of the settlement. The settlement included the default clause 6 as is clear not merely from the terms of the written document but also the recollection of Mr. O'Donnell and most particularly the fact that that specific term of the agreement was read out to McGovern J. and is contained in the transcript of evidence.

30. I am further satisfied that the terms of the agreement were as follows:

> *"1. Crohan O'Shea will transfer to Michael Butler and William Butler (Butlers) his shareholding in Bosod Ltd for the total consideration of €1.1 million, together with all interest that he may have in the partnership, within 10 days. Crohan O'Shea shall give an undertaking to this effect to the court with liberty to apply to enforce the term.*
>
> *2. Crohan O'Shea shall resign as a director of Bosod Ltd. with immediate effect.*
>
> *3. Michael Butler and William Butler shall pay Crohan O'Shea the sum of €100,000 within 28 days hereof.*
>
> *4. Michael Butler and William Butler shall pay Crohan O'Shea the sum of €1 million out of the proceeds of sale of the properties identified in the appendix hereto in the sums identified in the appendix. Michael Butler and William Butler hereby give an undertaking to this effect to the court with liberty to apply to enforce this term.*
>
> *5. Michael Butler and William Butler agree to supply information on the progress of the sale of the properties identified in the appendix hereto at four weekly intervals.*
>
> *6. In the event of the sum of €1,100,000 not being discharged on or before 11th September, 2008, Michael and William Butler shall consent to a joint and several judgment against each of them in the sum then outstanding pursuant to this agreement. In the event that judgment is entered the undertakings at (4) above are released.*
>
> *7. This settlement is in full and final settlement of all claims arising out of the within proceedings.*
>
> *8. Any amendment to the pleadings required to implement these terms is hereby deemed effected.*
>
> *9. Michael Butler and William Butler agree to indemnify Crohan O'Shea in respect of all liabilities or claims, howsoever arising, in respect of Bosod Ltd., or the partnership, following the transfer set out in (1)."*

31. I reject the contention made by the Butlers to the effect that they did not enter into any such agreement. That assertion is completely undermined by the evidence given by their own counsel and the transcript of what took place in court in Dundalk on that day as well as the other matters which I have identified.

32. The Butlers contention of no agreement having been entered into is also undermined by evidence given by Mr. Michael Butler himself. Throughout his testimony there are many inconsistencies but an insight into his actual mind-set when he left Dundalk courthouse is to be found in the answer which he gave in cross examination (Day 1, p.141, line 24) where he was asked "*When you left Dundalk Courthouse on 11 February, 2008 what was your belief as to what had happened and occurred*?" Answer "*I believed that was it and O'Shea was gone, because O'Shea had taken, he had taken a back to back figure of 6.318 million…*" In the very next question when asked if he left Dundalk that evening with an understanding that Mr. O'Shea was to be no longer involved he said he did not have a clue as to what happened in court that day. In the question immediately after when asked what he believed happened in court on 11th February, 2008 he said "*A fraud was perpetrated. We were dragged up to Dundalk on a fallacious errand by senior counsel and by counsel standing in and dropping the counsel which was available prior to that. That's what I think went on. …*"

33. I pointed out that these answers were inconsistent. In one he gave me to understand that Mr. O'Shea was "gone" and then went on to tell me that he did not have a clue as to what happened. When pressed on which was the correct answer he said he was not sure. He then alleged there was a "fix" on in Dundalk. When asked who was involved in the fix he alleged that Mr. O'Shea and his son John, Mr. John O'Donnell S.C. and a Mr. Donal Dunne were involved. He told me he did not know if the court was involved in the "fix". He then alleged the presence of Freemasons in court when asked of his belief of Masonic involvement in the "fix".

34. I believe the correct position is as stated by Mr. Butler where he said he believed O'Shea "was gone". That is consistent with the agreement which brought Mr. O'Shea's involvement in Bosod Ltd. to an end. I reject the remainder of his evidence which is mere assertion with nothing to support it.

35. The contention of no agreement having been reached is also undermined by the fact that on foot of the terms of the agreement Mr. O'Shea did in fact realise the sum of €446,168. The payment of that sum is consistent with the terms of the agreement entered into.

36. To hold in favour of the Butlers' assertions would, in the light of the evidence, be perverse. Not merely would it mean that I would give preference to the rambling and unconvincing evidence of Mr. Michael Butler over the precise and focused evidence given by Mr. O'Donnell which was backed up by all of the contemporaneous material but would also lead to the inference that when counsel announced the terms of settlement to McGovern J. they were participating in an elaborate and dishonest hoax. That charade would involve them not merely breaching the most basic of their ethical obligations to the court and their clients but also in confecting a false document containing detailed terms and forging the Butlers' names to it. I am quite satisfied that counsel did no such thing. Instead, the Butlers were advised by competent counsel that the case which they had brought was a very poor one. On advice they decided to settle it. The settlement negotiations went on through most of the day and resulted in the agreement which I have already reproduced. Having so settled the case the Butlers subsequently thought better of it. For many years now they have engaged in a war of litigation in an effort to evade their responsibilities to Mr. O'Shea. In the course of that campaign they have been prodigal with allegations of fraud, conspiracy and deceit and have not merely litigated with Mr. O'Shea but also unsuccessfully with the legal representatives who appeared for them.

37. It is, I think, time that this lengthy and expensive litigation should come to an end with the Butlers accepting what is the truth of the position namely that they did settle the litigation with Mr. O'Shea in February of 2008 in accordance with the terms of the agreement which I have already set forth.

The second question

38. The second question arising from the order of the Supreme Court is whether the Butlers are liable on foot of the agreement. It contained the default clause and it provided that in the event of the sum of €1.1 million not being discharged on time before 11th September, 2008 the Butlers "*shall consent to a joint and several judgment against each of them in a sum then outstanding pursuant to this agreement. In the event that judgment is so entered the undertakings at (4) above are released*."

39. It is common case and not in dispute as recorded at para.20 of the judgment of MacMenamin J. that subsequent to the hearing in Dundalk payments were made to Mr. O'Shea in a total sum of €446,168.

40. In May 2009 application was made on foot of the settlement for judgment for the outstanding sum of €653,832. That order was granted by McGovern J. Given the failure of the Butlers to pay the agreed sum in full and on time that order was correct.

41. No further payments were made by the Butlers notwithstanding the judgment. A judgment mortgage was registered against the Butlers' lands. Subsequently, proceedings in respect of that mortgage were instituted by way of special summons on 20th June, 2010. Orders on foot of the mortgage were duly made by Dunne J. An attempt has been made to suggest that there was no liability whatsoever on the part of the Butlers because of either the absence of an agreement or of a default clause in whatever agreement might have been entered into by them. That is an allegation which I have rejected for the stated reasons. The Butlers are and have been since 12th September 2008 liable to Mr. O'Shea in the sum of €653,832. The orders of McGovern and Dunne JJ. were properly made against the Butlers.

A further matter

42. Having answered the two questions identified in the order of the Supreme Court in a manner adverse to the Butlers that concludes the case. However, the Supreme Court order went on to permit me to determine any further questions or issues that might appear material arising from or ancillary to this determination. I have decided therefore to address an issue which loomed large in the case made by the Butlers. This relates to the court order that was made on foot of the hearing in Dundalk on 11th February, 2008.

43. Before I come to consider the evidence in that regard it is important that I point out, as I endeavoured to do on multiple occasions throughout the trial both to the Butlers and Ms. Farrell, that the issues for trial were the ones identified in the Supreme Court order. They are issues of fact. The answers to those questions are not to be found in court orders. They are to be found by an examination of the evidence of what took place on the day in question. That examination has led me to the conclusions which I have already expressed. Thus, a contract was entered into to settle the litigation in the terms outlined to McGovern J. Those terms were as specified in the agreement executed by the Butlers and the contract contained default clause 6. The liability of the Butlers to Mr. O'Shea derives from the contract of settlement which they made and not from any court order which purported to schedule or annex the agreement to it. Had the Butlers taken competent legal advice this would have been made clear to them. It is, however, doubtful that they would have heeded such advice.

44. The Butlers' stated belief of conspiracy, fraud and Masonic influence has been fuelled by an unsatisfactory situation which has arisen in relation to the court order which purported to record what went on in Dundalk. In fact, two versions of the order were placed before me. Clearly there should only be one order in any one case and thus the Principal Registrar of the High Court, Mr. Kevin O'Neill gave evidence to me on the third day of the hearing on the matter.

45. His evidence was that the court file (which was produced to me) contained two orders in respect of the hearing which took place on 11th February, 2008. There are other copies on the file but just two on cream High Court paper as distinct from white photocopy paper.

46. Neither of the orders contain the signature of the registrar Ms. Marie O'Carroll. Each of them contains her name in typescript. Neither of them is the original order. There can only be one original order and it should have the actual signature of the registrar on it. It should be on the High Court Central Office file. It is not there.

47. The second thing to notice about the two orders is that they contain different dates of perfection. One order shows a perfection date of 14th March, 2008 and the second shows a perfection date of 28th March, 2008.

48. Each order purports to record the settlement of the action against both Messrs. O'Shea and O'Driscoll. Although the settlement with Mr. O'Driscoll is not a matter that I am concerned with here, it is to be noted that in respect of one version of the order it is recorded that there is an agreement to pay Mr. O'Driscoll €1.5 million whereas in the other version that is recorded as €1.15 million. The order with the perfection date of 14th March, 2008 contains the €1.5 million figure and the order purportedly perfected on 28th March, 2008 contains the €1.15 million. €1.15 million is the correct sum.

49. There is a further difference between the two in that the order purportedly perfected on 14th March, 2008 does not identify the solicitor for the plaintiff by name whereas that perfected on 28th March shows "Lennon and Heather" as solicitor for the plaintiff.

50. Each version of the order contains annexures. There is a copy of the manuscript terms of settlement entered into between the Butlers and Mr. O'Driscoll. There is also a copy of the terms of settlement between the Butlers and Mr. O'Shea.

51. Each version of the copy of the settlement between the Butlers and Mr. O'Shea records agreement to pay €100,000 within 28 days at clause 3 thereof.

52. Each contains a clause (4) whereby they agree to pay the sum of €1 million out of the proceeds of sale of the properties identified in the appendix. However, in the version which is annexed to the order showing a perfection date of 28th March, 2008 there is no default clause (6). The clause (6) which is shown in that version of the agreement is in precisely the terms which are contained at clause (7) in the agreement annexed to the order perfected on 14th March, 2008. Thereafter clauses (7) and (8) of the agreement annexed to the order with the perfection date of 28th March, 2008 are the same as those contained in clauses (8) and (9) of the agreement annexed to the order with the perfection date of 14th March, 2008. The body of each of the orders insofar as they relate to the agreement with Mr. O'Shea are identical. It records:-

> *"And the parties by said counsel intimating to the court that this action has been settled as against the second named defendant on the terms of a consent now reduced to writing and on reading the said consent herein executed by the parties (and their solicitors) (a copy of which is annexed hereto as a schedule) and the second named defendant through counsel giving undertakings in the terms of paragraphs 1. and 4. of the said consent the proceedings as against the second named defendant be struck out subject to the terms of the said consent.*
>
> *Liberty to apply for the purpose of enforcing the terms of settlement.*
>
> *AND IT IS ORDERED that the actions against the first named defendant be struck out with no order as to costs.*
>
> *Liberty to apply."*

It is to be noted that both versions of the order recite that it was not the original but rather a copy of the relevant consent which was annexed to the order.

53. Finally, I should record that the appendix (described as appendix 1) to each version of the settlement agreement as annexed to both versions of the court order is in precisely the same terms.

54. Thus, it can be seen that a very unsatisfactory position obtains insofar as the Central Office record of this litigation is concerned. There should be one original order bearing the signature of the court registrar on the court file. There is none. There are two versions of an order with two different versions of the settlement agreement between the Butlers and Mr. O'Shea.

55. As I have made clear I am satisfied that the agreement actually made in Dundalk was the one which contained 9 paragraphs and included default clause (6). How does a second version of that agreement become annexed to a purported court order?

56. Mr. O'Neill is the person charged with the management of the business of the Central Office, Public Office and Registrars of the High Court attached to the Central Office. He first became involved in this matter when it was before the Supreme Court and it asked for his assistance to explain the discrepancies concerning the orders. As I said he also gave evidence before me.

57. Mr. O'Neill confirmed that the original order was not on the High Court file. He so concluded because such order would bear the actual signature of the High Court Registrar in question. He then described the procedure that is followed by registrars in respect of the perfection of orders and he expanded on this in the course of cross-examination. First, the registrar types the order. If there is a written settlement such as in this case that settlement is scanned and the entire document is saved to a shared folder as a word document. That shared folder is one to which all registrars have access. The order is then printed off and is signed by the registrar and placed on the court file. The cause book is maintained electronically on a separate system to the folder. The system records the date of the order, the name of the registrar, the date of perfection and a short description of the nature of the order. That is then visible on the Courts Service website and also on a public search which may be carried out in the Central Office. This enables anybody who is interested to see whether an order has been perfected or not. This system began in January 2008.

58. Mr. O'Neill conducted a search and checked the electronic version of the original order. Having done so he concluded that the correct order is the one which contained as a schedule the nine paragraph settlement agreement rather than the eight paragraph settlement agreement. Thus the electronic recording system confirms that the version of the order containing a nine paragraph

settlement is the correct one.

59. Mr. O'Neill also described how access is obtained to court files. Such access is available to either the solicitor on record or in the case of self-represented parties those parties themselves. Access to the file is obtained by a simple request which is recorded in a book located in the Central Office. When such request is made then at two designated times per day the relevant file is made available to the requestor. Mr. O'Neill told me "*Access to court files isn't supervised in any secure way. Files are handed out to people who are entitled to see them and they look at them on a shelf provided for that purpose effectively in the Central Office. It is not possible to monitor everybody looking at every file. I can only – so with that unrestricted or largely unrestricted access, anything could happen with regard to the integrity of a file, I am afraid*". He agreed that it is possible for people to interfere with a file or to tamper with a file. He agreed that it was possible for someone to place a document on the file that was not originally on it.

60. I now turn to the evidence of Mr. Stockton.

61. Mr. Stockton has a Bachelor of Science Honours Degree in Human Biology and a Master of Science Degree in Forensic Science from Kings College, London. He has specialised in the scientific examination of handwriting, signatures and disputed documents since 1989. He was trained at the laboratory of the Government Chemist in London and from 1992 until its closure in March 2012 he was employed by the United Kingdom Home Office Forensic Science Service. He was the National Scientific Lead for the subject and Chairman of the European Working Group for Handwriting Examiners within the European Network of Forensic Science Institutes. Since 2012 he has been an independent forensic practitioner specialising in the examination of disputed documents, handwriting and signatures. This is his sole occupation and his work has involved criminal prosecution, criminal defence and civil litigation.

62. He prepared a report which was referred to and put before me in evidence.

63. Mr. Stockton was provided with two copy documents which he labelled in his reports as Q1 and Q2. One was a three-page document which contained a 9 clause agreement which was Q1 and the other contained a copy 8 clause agreement. Q1 is the settlement agreement which contains the default clause as clause 6 and Q2 is the 8 clause agreement which does not contain the default clause.

64. In each case it was photostatic copies of the documents that were supplied to him by the solicitors acting for Mr. O'Shea.

65. Mr. Stockton found that the documents were identical one with the other save for one paragraph in Q2. They corresponded in all handwriting features of the main text so as to satisfy him that one was a copy of the other and that both documents could not have been independently written documents in ink. The correspondence between the handwritten entries on both agreements was such that in his opinion there was evidence to show that the 8 clause document Q2 had not been written out independently at a different time to the 9 clause document Q1. He was of opinion that both copy agreements had been copied from the same source document. He was of opinion that there was evidence to show that Q1 had been copied or scanned and clause 6 removed. The text associated with clause 7, 8 and 9 and the numeral 9 had been cut from Q1 and inserted further up the page along with the numerals 7 and 8 to create the agreement contained in document Q2. A paragraph from Q1 had been taken out to produce document Q2. He told me how this could be done. He said "*It is relatively straightforward in the crudest sense in that you can use scissors and glue to create a paste in the same way that children would do it at school and then you would just photocopy your paste up document, or if you have access to a computer, most computers have software upon them which enables you to manipulate images quite easily to create a document which can then be printed out*". He went on to tell me that it is not always possible to determine the exact method used. Often, when a photocopier is being used, marks are found around the images which have been made into a collage. There did not seem to be those marks on Q2 so it might well have been that a computer with software had been used but he could be by no means certain which actual method was used to produce Q2. However, he considered it more likely to have been accomplished with the aid of a scanner and computer software.

66. There was no forensic evidence called to controvert the opinion expressed by Mr. Stockton and I accept his evidence.

67. In the light of all of this testimony my conclusions concerning the High Court file are as follows.

> 1. The High Court file ought to contain the original order made by Mr. Justice McGovern in Dundalk duly signed by the registrar. No such order is on file.
>
> 2. The file contains what purport to be two orders of the High Court with the name of a registrar typed on each of them and showing two different perfection dates.
>
> 3. The two orders also differ insofar as the schedule purportedly containing a copy of the agreement made between the Butlers and Mr. O'Shea is concerned in that one has 9 paragraphs and in the other 8 paragraphs
>
> 4. The schedule containing 9 paragraphs which includes the default clause 6 is the correct one and accurately reproduces the agreement made in Dundalk courthouse. It is in perfect accord with the details which were read out to Mr. Justice McGovern on that occasion.
>
> 5. The purported agreement containing 8 paragraphs with no default clause was, as a matter of probability, created as described by Mr. Stockton.
>
> 6. The likelihood is that the file in question was interfered with to bring about the unsatisfactory situation which now obtains.
>
> 7. I am unable to say when or by whom this interference occurred.
>
> 8. The procedure by which High Court files may be inspected in an unsupervised fashion and where they are open to being interfered with is completely unsatisfactory.

68. Given this unsatisfactory situation I propose to discuss with the Chief Justice and the President of the Court of Appeal alterations in the system of inspection of High Court files so as to ensure that files are not interfered with and that they accurately record orders of the court. It is, in my view, essential that the integrity of High Court Central Office files be protected. This unsatisfactory situation concerning the file does not alter or affect the contractual obligations undertaken by the Butlers in settling the case.

Recusal application

69. At the conclusion of the closing submissions of counsel for Mr. O'Shea on the fourth day of the trial, Mr. Michael Butler indicated that he was not in a position to present his submissions because of an alleged illness. This was not the first occasion that alleged illness was relied upon to bring about a delay in proceedings. Notwithstanding my misgivings concerning the *bona fides* of the application I nonetheless granted a deferral to the Butlers to make closing submissions. In the course of so doing I said to him:

> *"It's been perfectly clear to me that you're very exercised about a whole lot of things and, during the course of last week, you endeavoured to raise a whole lot of matters which I had to rule out of order, sometimes with difficulty, because your McKenzie Friend was prompting you on. I'm not here to deal with a whole lot of things. I'm here to deal with what the Supreme Court directed me to deal with. That is set out in para.2 of the order of the Supreme Court. I'm to deal with whether or not a settlement was entered into by the parties on 11th February, 2008 and if it contained a default clause 6 and then, if so, certain questions flow from that. So that's the issue that you have to deal with. That is the crucial issue. … So any submissions that you have to make have to be focused on these matters, not extraneous matters such as you endeavoured to do last week. There shouldn't be great difficulty about this."*

70. When the court resumed some weeks later to hear those submissions Mr. Butler simply handed me a document described as "Closing submission of Michael Butler". No oral submissions were offered. The first part of the submission concerns what is described as the "Supreme Court warrant". This reproduces, but not with complete accuracy, the order made by the Supreme Court the relevant part of which I have reproduced at para.2 of this judgment. The submission asserts that:-

> *"The warrant is an unlawful attempt to divorce the settlement agreement from the court order; and to prosecute the alleged settlement agreement giving advantage yet again to the second named defendant whilst evading the record.*
>
> *The scope of the warrant of the Supreme Court violates my right and that of my brother by unlawfully delimiting the benefit of the courts power of adjudication over all aspects of the impropriety brought to its attention."*

71. I have no doubt but that the Butlers received assistance in drawing up this submission since it quotes case law which I am satisfied would be quite unknown to them.

72. The assertion made concerning the order of the Supreme Court is quite outrageous in that it alleges that that court was itself guilty of an illegality in making the order which remitted the identified issues for trial before me. Far from focusing their submissions on the issues for trial and not on extraneous matters the Butlers have, not for the first time, simply ignored the courts directions. They have sought in their closing submission to introduce an entirely new element namely a criticism of the order of the Supreme Court on foot of which this trial took place. That is impermissible and whoever provided them with assistance in the preparation of this document ought to have known better.

73. Not content with the criticism made of the Supreme Court the submission then goes on to *inter alia* allege that both Messrs. O'Shea and O'Driscoll "*… had managed to lift a copy signature of my brother and I on one page of plain photocopy paper by whatever means, and I have objected to the authenticity of my signature within that context*". This is an assertion in respect of which there is no evidence whatsoever.

74. Later in the submission entirely unfounded allegations are made against one or more registrars of the High Court. As there was no factual material adduced in evidence to support any of those allegations I will not reproduce them in this judgment. The conclusion of the written submission reads: "*The falsification of the court record in this case cannot be divorced from the impropriety of the sham proceedings in Dundalk*."

75. There was nothing sham about the sitting of the High Court in Dundalk on 11th February, 2008. Neither were the Butlers "dragged up to Dundalk on a fallacious errand" in order to attend that court. They were fully represented, settled their case, thought better of it and have been seeking to evade their responsibilities ever since.

76. The closing submission in addition to criticising the Supreme Court and alleging unlawful behaviour on its part, alleging unlawful behaviour on the part of High Court Registrars and unlawful behaviour on the part of Mr. O'Shea also sought to have me recuse myself from hearing the case. This was the first time that that issue was raised namely on the fifth and final day of the hearing and it was raised only in the course of written closing submissions.

77. The basis for the recusal is apparently my *ex officio* membership of the Courts Service Board. The Butlers allege that they "*are confronted with blatant procedural irregularity committed by registrars and principal officers within the Courts Service of which you Mr. Justice Kelly are a current director*". There is not a scintilla of evidence to support the assertion of irregularities committed by registrars and principal officers within the Courts Service.

78. As far as I can ascertain from the written submission the basis of the application for my recusal is alleged objective bias arising by virtue of my *ex officio* membership of the Courts Service Board. My membership of that Board must have been known to the Butlers at all relevant times both prior to and during the course of the trial. Yet the application was not made until the closing written submission.

79. Even if the application had been made at the commencement of the hearing I would in any event have refused it. I do not believe that any reasonable person with a knowledge of the issues to be tried would have a reasonable apprehension that the Butlers would not have a fair hearing simply by virtue of the fact that I happen to be a member of the Courts Service Board.

80. The Courts Service is not a party to these proceedings. It made non party discovery and an official of the Courts Service gave evidence before me. But it is not a defendant in these proceedings. No relief is sought against it.

81. The two matters directed to be tried by the Supreme Court were issues of fact concerning an alleged contract to settle litigation made between the Butlers and Mr. O'Shea in Dundalk. That issue did not involve the Courts Service at all.

82. The only element of the case involving the Courts Service was the ancillary matter involving the court order. Even on that matter the Courts Service was only involved to the extent that it made non party discovery and one official gave evidence before me.

83. The recusal application is as devoid of merit as many of the other allegations made by the Butlers. It was a late in the day attempt to once again evade their liabilities to Mr. O'Shea by having the five day hearing aborted. I refuse the application.

Disposal

84. I answer the questions posed by the Supreme Court as follows:-

(a) There was a settlement agreement entered into between the Butlers and Mr. O'Shea on 11th February, 2008 and it contained default clause 6;

(b) The Butlers were and are liable to Mr. O'Shea on foot of it.