

THE HIGH COURT

[Record No. 2017/4357 P.]

BETWEEN

RICHARD BOND AND JUDITH BOND TRUSTEES OF ECLIPSE MARINE RETIREMENT BENEFIT SCHEME AND ANDREW PAUL ROWLAND AND PAMELA MARY ROWLAND TRUSTEES OF E.J. GODWIN (PEAT INDUSTRIES) LIMITED DIRECTORS PENSION SCHEME

AND

RICHARD BOND AND ANDREW ROWLAND

AND

BULRUSH HORTICULTURE LIMITED

PLAINTIFFS

AND

WILLIAM (OTHERWISE LIAM) DUNNE AND MARK DUNNE

DEFENDANTS

JUDGMENT of Mr. Justice Paul Gilligan on the 4th day of July, 2017

1. The defendants William (otherwise Liam) and Mark Dunne application before the court is for direct access counsel, Ms. Eugenie Houston barrister-at-law [the applicant] to come on record for them in these proceedings, without being instructed by a solicitor.
2. The plaintiff's claim is for a permanent injunction restraining the defendants from entering onto, trespassing upon or otherwise interfering with the lands known as Ballycommon Bog, Ballycommon in the County of Offaly together with a declaration as to the plaintiff's ownership of the lands. The plaintiff instituted proceedings by plenary summons dated the 16th of May, 2017 and the defendants entered an appearance on the 18th of May, 2017. By order of this Court (O'Connor J.) on the 1st of June, 2017 the defendants were restrained from trespassing on the lands the subject matter of the proceedings pending the determination of the substantive issues to be tried. The matter is due back before O'Connor J. on the 11th of July next.
3. The defendants have not retained a solicitor to represent them and on the 11th of June, 2017 counsel appointed directly by the defendants wrote to the plaintiff's solicitors indicating that she had been instructed as direct access counsel for the defendants. In accordance with the directions of O'Connor J. the defendants delivered their defence as drafted and signed by Ms. Houston on the 28th of June, 2017.
4. In this application Ms. Houston is seeking in effect formally to come on record for the defendants in the proceedings and she seeks leave to file in the Central Office a notice to the effect that she has been appointed to act as direct access counsel for the defendants in this action. To all intents and purpose the form as devised by counsel is in the nature of an appearance which in the normal course would be entered and filed in the Central Office to the summons as issued.
5. The applicant accepts that there is no procedure within the Rules of the Superior Courts to facilitate the filing of a notice to appoint direct access counsel, and she accepts this is a new development but if permitted by the courts is likely to be availed of by parties who had otherwise appeared before the court as lay-litigants.
6. The application is made on the basis that it is the appropriate mechanism in circumstances where a barrister seeks to appear in a contentious matter before the court directly instructed by the client and with no instructing solicitor.
7. The applicant is a practising barrister and President of the Association of Barristers in Ireland. She is not a member of the Law Library. Her qualifications and character are not in any way in dispute. It is noted that she maintains barrister's professional indemnity insurance which apparently covers direct professional access as a barrister including acting in contentious matters.
8. The applicant refers to the Legal Services Regulation Act 2015 and in particular s. 13 thereof in respect of legal practitioners acting with independence and integrity and in general terms maintaining proper standards of work.
9. The applicant relies on s. 101 of the Legal Services Regulation Act 2015 which is not yet commenced and which provides:-

"No professional code shall operate to prevent a barrister from providing legal services as a practising barrister in relating to a matter other than a contentious matter where his or her instructions on that matter were received directly from a person who is not a solicitor".
10. The applicant stresses that the Association of Barristers in Ireland expressly provide that its members can accept direct access instructions in all matters including in contentious matters strictly provided that appropriate professional indemnity insurance is in place. It is further contended by the applicant that members of the Association of Barristers in Ireland who accept direct access instructions do not handle client's funds as there is no statutory regulation in place in respect of such a situation. Should the applicant be permitted to come on record, then any issue relating to funds would require to be ruled upon by the court.
11. In these circumstances, the applicant respectfully asks that the court exercise its inherent jurisdiction and directs that the stamped notice of appointment of direct access counsel presented to the court be filed in the Central Office of the High Court and in so doing thereby permit the applicant barrister to come on record for the defendants in these contentious civil litigation proceedings.
12. Frank Crean, barrister-at-law on behalf of the plaintiffs, by way of assistance to the court contends that there are three insuperable obstacles lying across the path of the defendants' application. Firstly, the Rules of the Superior Courts do not authorise counsel to have carriage of proceedings on her client's behalf. Secondly, there is no authority for the proposition that counsel may conduct proceedings on their client's behalf by coming on record for those clients and being responsible for compliance with the Rules

of the Superior Courts and with such orders and directions as may be made by the trial judge including at an interlocutory stage. Thirdly, as the Rules of the Superior Courts do not define the rights or obligations of counsel in the conduct of litigation these proceedings could not be prosecuted in an orderly fashion if this Court was to grant the application advanced on the defendants' behalf.

13. The Rules of the Superior Courts do not permit anyone other than a solicitor to have carriage of legal proceedings on a client's behalf. That privilege is not extended to counsel or to any other profession for good reason.

14. Solicitors are the nominated body of persons entitled to represent clients in the conduct of contentious litigation because they are officers of the court from whom the court demands a high standard of conduct and whom the court can call to account, and this is the foundation stone upon which the Rules governing the conduct of litigation in this State rests.

15. A barrister is not an officer of the court and this Court does not have a supervisory jurisdiction to compel counsel to act or to enjoin counsel not to act in any particular way.

16. The Rules of the Superior Courts specifically provide that a party to proceedings may prosecute or defend an action by himself or by his solicitor but not by counsel alone.

17. It is also the situation that the Rules of the Superior Courts are a form of secondary legislation. In particular, as stated by Clarke J. in *Shell E & P Ireland Ltd. v. McGrath* [2013] 1 I.R. 247, the Rules are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924 to 1936 and the Courts (Supplemental Provisions) Act 1961.

18. Mr. Magee solicitor on behalf of the Legal Services Regulatory Authority, confirms that the Association of Barristers in Ireland of which Ms. Houston is a member is not a prescribed professional body pursuant to the Legal Services Regulation Act 2015 and in essence there is no provision pursuant to the Act for a barrister to engage in contentious litigation on behalf of a client without being instructed by a solicitor.

19. Maurice Collins S.C. on behalf of the Honorable Society of Kings Inns made observations by way of assistance to the court as to the proper approach in principal to the issue that has arisen. It is pointed out to the court that Ms. Houston made a declaration to the Benchers of the Honorable Society of Kings Inns as part of her admittance to the degree of barrister at law in July, 2008 in which she undertook to comply with the rules and regulations of the General Council of the Bar of Ireland and that she would observe the Code of Conduct of the Bar of Ireland and further that she would comply with the Rules and Regulations of the Honorable Society of Kings Inns. It is a specific provision of the Code of Conduct of the Bar of Ireland that a barrister may not act in a professional capacity in contentious litigation except upon the instructions of a solicitor. Further where a barrister may be involved in giving advice free of charge to a friend or relative or on a charitable basis without the intervention of a solicitor they must not in such circumstances where the matter is or becomes contentious draft any formal document, engage in correspondence or make direct contact with a third party and they must direct that a solicitor be retained in order for them to continue to advise and provide other professional services as a barrister.

20. Mr. Collins contends that nothing in the 2015 Act has affected this position and that furthermore numerous provisions of the Act implicitly recognise the status of professional codes such as the Society's rules and the Bar Council Code of Conduct.

21. Insofar as Ms. Houston relies on s. 101 of the Act which has not yet commenced Mr. Collins contends that it is quite clear that specifically the section provides that no professional code shall operate to prevent a barrister from providing legal services as a practising barrister in relation to a matter other than a contentious matter and that quite clearly this case involves contentious litigation.

22. It is clear to this Court that the Oireachtas intended that the professional codes applicable to barristers should continue to apply unless and until replaced or revised by regulatory action by the Authority.

23. In essence, the Rules of the Superior Courts do not permit a party to defend an action by counsel alone and as the Rules are secondary legislation and have the force of law and the jurisdiction vested in this Court as regards practice and procedure must be exercised in accordance with the Rules.

24. Insofar as the applicant relies on the decision of the Supreme Court in *McMullen v. Clancy* [2005] 2 I.R. 445, I do not accept that the judgment of the Court has any applicability to the particular circumstances that arise in this application.

25. There is simply no authority for the proposition, that a barrister can act for and conduct contentious civil litigation on behalf of a party to such proceedings without being instructed by a solicitor.

26. The Rules of the Superior Courts in particular, do not provide for counsel to file documents, issue notices of motions, serve documents or accept service of documents on their client's behalf, yet the Rules prescribe in exhaustive detail the manner in which litigation is to be conducted by a solicitor.

27. It is quite clear that the Codes of Conduct to which Ms. Houston undertook to abide by expressly prohibits her in her capacity as a barrister be it individually or as a member of an association of barristers outside of the Law Library to act on behalf of a client in contentious civil litigation without being instructed by a solicitor.

28. There is no basis for this Court to consider in the exercise of its discretion the issuing of a practice direction that would enable the defendants in these proceedings to be represented by a barrister who is not instructed by a solicitor as retained by them.

29. For the reasons as set out herein I take the view that no basis is made out for the granting of the application. Such a decision does not affect the defendants right of access to the courts as they can either represent themselves directly or retain the services of a solicitor to act on their behalf.

30. Accordingly, the relief as sought on the defendants' behalf is denied.