[2016] IEHC 7

THE HIGH COURT

Record No. 2015/105 JR

Between:

GLEN DONOGHUE

Plaintiff

– and –
HIS HONOUR JUDGE JAMES O'DONOGHUE AND IRELAND AND THE ATTORNEY GENERAL

Respondents

– and –
GARDA ENDA WATERS

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 13thJanuary, 2016.

Part 1: Overview

1. One thing is certain: the State did not buy the Range Rover. So who has title to it? Bluestone has laid claim to it but cannot prove its title. Mr Donoghue did a trade-in for it but cannot prove his title. So what is to be done? Is the Range Rover to sit in the possession of the State, the one party that certainly did not buy it, until such time as it sees fit to sell it off? The State points to long-ago English precedent which suggests that ownership had to be proven if the Range Rover was to be returned to Mr Donoghue. But what is 'ownership'? Is it something unchangeable as stone? Or is it something more fluid? When there are but two parties who claim ownership, does it suffice that one can prove better title than the other? And would this not be especially the case when statute provides a limited period within which an offended party maystill step forward at some future stage and prove that the Range Rover in truth belongs to it?

Part 2: Background Facts

2. These proceedings arise out of a District Court appeal brought by Mr Donoghue in the context of an application by Garda Waters pursuant to s.1(1) of the Police Property Act of 1897, an Act of the Westminster Parliament. Section 1(1), so far as relevant, provides as follows:

> *"Where any property has come into the possession of the police in connexion with any criminal charge…a court of summary jurisdiction may, on application, either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet."*

3. On 19th November, 2014, the Circuit Court ordered that aRange Rover Sport motor-car which was the subject of that application should be forfeited to the State. The evidence in salient part was as follows.

4. Garda Waters gave evidence that he seized the Range Rover from the possession of Mr Donoghue on 16th December, 2013, pursuant to s.41 of the Road Traffic Act. No objection has been made to the power of Garda Waters so to do.

5. Having seized the Range Rover, Garda Waters raised certain inquiries with his United Kingdom counterparts and was informed that the vehicle had been reported stolen and was believed to be the subject of a hire-purchase agreement involving Santander. In fact, it later transpired that the loans had been sold to Bluestone Portfolio Management (UK) Limited.

6. There is no suggestion now, nor has there ever been, that Mr Donoghue was in any way involved in the alleged theft of the Range Rover. So how had he come to be in possession of the Range Rover when he was stopped by Garda Waters on 16th December, 2013? In the Circuit Court, Mr Donoghue – a semi-retired car-dealer who still dabbles in the trade – gave evidence that he purchased the Range Rover in Lancashire, England from a Mr Benson on 17th May, 2013, trading in a trio of cars that and handing over a few thousand pounds sterlingby way of consideration. He also produced a UK DVLA certificate issued in February 2014, in which he was registered by the relevant United Kingdom authority as the 'keeper' of the Range Rover. (The court understands from the evidence before it that the United Kingdom does not register ownership of a vehicle as such; instead it registers who the 'keeper' of the vehicle is, with that person then being responsible for taxing and insuring the vehicle).

7. After Mr Donoghue's evidence-in-chief, the learned Circuit Court judge asked some questions of him. Counsel for Mr Donoghue then submitted that there was uncontroverted evidence of Mr Donoghue's possessory title to the Range Rover which had not been 'bested' by anyone else asserting a superior title, and that the DVLA certificate was consistent with, albeit not dispositive of, ownership. At this point, the Circuit Court judge indicated, over the objections of counsel from Mr Donoghue, that he was adjourning the matter until a future date when (a) he wanted to hear someone from Santander, and (b) he wanted some clarity as to the nature and effect of the DVLA certificate.

8. On 11th February, 2014, again over the objections of counsel for Mr Donoghue, the Circuit Court heard from a representative of Bluestone, the fact of the loan-sale between Santander and Bluestone having been discovered in the meantime. After hearing from Bluestone, having heard that the DVLA certificate was not dispositive of ownership, and having heard still further submissions from Mr Donoghue's counsel, the learned Circuit Court judge concluded that Mr Donoghue had made out a possessory title to the Range Rover but had not proved his ownership of same. However, he also considered that Bluestone (and indeed Santander) had failed to establish title to the Range Rover. So he orderedthat the Range Rover be forfeited to the State.

Part 3: Reliefs now sought

9. Mr Donoghue has instituted the within judicial review proceedings in which he seeks the following reliefs:

> (1) an order of *certiorari* in respect of the order of the learned Circuit Court judge forfeiting the Range Rover to the State;
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> (2) an order of *mandamus* directing the State to deliver the Range Rover into the possession of Mr Donoghue;
>
> (3) a declaration that the learned Circuit judge, having found that Mr Donoghue had established possessory title, was obliged to make an order for the delivery up of the Range Rover to Mr Donoghue, in the absence of any other party establishing a superior title;
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> (4) a declaration that the learned Circuit Court judge, having determined that Mr Donoghue had established possessory

title to the Range Rover, erred in law and acted in excess of jurisdiction in directing that the Range Rover be forfeited to the State;

(5) a declaration that the learned Circuit Court judge erred in law and acted in excess of jurisdiction and in breach of fair procedures, in directing of its own motion on 19th November, 2014, that a further witness be called, and thereafter permitting a witness from Bluestone to be heard on 13th February, 2015; and

(6) certain ancillary reliefs.

Part 4: Relief No. (5)

i. Overview
10. Mr Donoghue contends that the learned Circuit Court judge erred in law and acted in excess of jurisdiction and in breach of fair procedures, in directing of his own motion on 19th November, 2014, that a further witness be called, and thereafter permitting a witness from Bluestone to be heard on 13th February, 2015. This ground of relief can be dealt with shortly, and, for the reasons stated hereafter,is rejected.

ii. Hearing of further evidence
11. Rule 10, Order 33 of the Circuit Court Rules provides that *"The Judge may, if he thinks it expedient in the interests of justice, postpone or adjourn a trial for such time, and upon such terms, if any, as he shall think fit."* Moreover, it was held by the Irish King's Bench Division in Quinn v. Pratt [1909] 2 I.R. 69 that a court has no jurisdiction to make an order under s.1(1) of the Act of 1897 without the parties interested being present or summoned to court. According toPalles C.B., perhaps the most eminent of Ireland's pre-Independence judges, at 77:

> *"As…the second ground on which it was contended that this was a matter in which the Justices had no jurisdiction has been very emphatically argued before us, I do not think that we ought to pass over it in silence. It was that the defendant ought to have been present, or at least summoned. The procedure which I conceive ought to be adopted under [the Act of 1897]…is the procedure prescribed by the Summary Jurisdiction Act, and the Petty Sessions Act, i.e. a procedure by summons. In this particular case not only was the adjudication made in the absence of the party, but he was not even summoned to the proceedings. It has been argued, and as I think rightly, that by reason of the plaintiff not having been present or summoned, the matter was one in which quoad [with respect to] him, the magistrates had no jurisdiction to proceed at all."*

12. Given the powers afforded the learned Circuit Court judge under R.10. o.33, given the observations of Palles C.B. in *Quinn*, can it successfully be contended that the learned Circuit judge erred in law or acted ultra vires when he directed that a further witness called and heard that witness? This Court's answer is 'no'. Moreover, the cases to which the court was referred by counsel for Mr Donoghue in this regard – *Attorney-General (Corbett) v. Halford* [1976] I.R. 318, *Bates v. Brady* [2003] 4 I.R. 111 and *O'Keeffe v. Judge Mangan and DPP* [2012] IEHC 195 – do not affectthe court's just-stated answer. This is because those cases, without exception, concern criminal prosecutions and thus are not comparable to the within proceedings. Indeed, Mr Donoghue's counsel acknowledges in his written submissions that *"slightly greater latitude may apply in the context of an application in the context of an application under the Police Property Act as compared with a criminal prosecution".* [Emphasis added] For the reasons stated, the court considers that, in truth, considerably greater latitude applies, and was rightly availed of by the learned Circuit Court judge.

ii. Questioning of Mr Donoghue
13. As to the questioning of Mr Donoghue by the Circuit Court judge, it is contended in effect that the learned Circuit Court judge engaged in an improper inquisitorial exercise. Of this episode, Mr Donoghue's statement grounding the within application puts matters as follows:

> *"Following a preliminary few questions of his evidence-in-chief, the [learned Circuit Court judge] assumed a role of leading the questioning of [Mr Donoghue]. [The judge] asked [Mr Donoghue] what he worked at. When he replied that he had been in the car trade business, but was currently on a career break, [the judge] asked what he was doing day-to-day. [Mr Donoghue] gave evidence that he was acting as a carer for his fiancée. [An exchange then followed as to why this was so, and where Mr Donoghue's fiancée was]….[The judge] inquired whether [Mr Donoghue] was in fact disqualified from driving. Objection was made to this question by Counsel for the Applicant."*

14. This Court must admit to some surprise that objection has been taken to the foregoing questions. They seem rather tame. It may have been a little embarrassing for Mr Donoghue that the judge enquired after his fiancée's health in open court; if so this is to be regretted – though, in fairness to the learned judge, he appears to have evinced nothing more than some solicitude in this regard. But as to the suggestion that, in posing the foregoing questions, the learned Circuit Court judge, to borrowfrom the colourful imagery of Lord Greene M.R. in *Yuill v. Yuill* [1945] 1 All E.R 183, 'descended into the arena and so was liable to have his vision clouded by the dust of conflict', such suggestion is both far-fetched and wrong. When it comes to the use of metaphor in judgments, this Court is ever mindful of Cardozo J.'s observation in the 'veil-piercing' case of *Berkey v. Third Avenue Railway Co* 244 N.Y. 84 (1926), 94, that *"[M]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."* However, if this Court were to deploy the imagery of Lord Greene, it would be to observe that in pursuing the above-quoted line of questions the learned Circuit Court judge seems not even to have'suited up' for combat, never mind stepped into the 'arena'.To put matters more plainly, the court sees nothing improperly inquisitorial in what was done by the learned Circuit Court judge.

Part 5: Possessory Title and Ownership

i. The decision in Lyons.
15. The principal contention of Mr Donoghue is that the learned Circuit Court judge erred when he distinguished between possessory title and ownership, in a context in which no superior title had been established. Considerable reliance has been placed by the State in this regard on the long-ago judgment of Lord Widgery C.J. in *Lyons & Co. Ltd. v. Metropolitan Police Commissioner* [1975] 1 Q.B. 321.

16. *Lyons* was a case in which a 'youth' visited a jewellery-shop, produced a ring and asked for a valuation. The ring was worth about £3,500, a substantial sum both then and now; and the shop staff suspected that their visitor had come by the ring other than by honest means. So they sent him off and told him to come back after the ring was valued. Then, once he was gone, they called the police. As it happened, the youth never returned. The ring was taken into the possession of the Metropolitan Police and unsuccessful

efforts made to find its true owner. Eventually, the jewellers, acting pursuant to s.1(1) of the Act of 1897, sought that the ring be returned to them, claiming that when the ring came into their possession, they had a good title to it as against the whole world, save for the true owner, and that possession of that kind, valid against the world except the true owner is ownership for the purposes of s.1(1).

17. Immediately, one can see that there are significant differences between *Lyons* and the case now before this Court:

> - in *Lyons*, the jewellers clearly suspected from the outset that the ring was 'hot' property. That is not the case here. There is no suggestion that Mr Donoghue knew that another party was claiming or would claim title to the Range Rover.
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> - in *Lyons*, the jewellers acknowledged that there was someone 'out there' with a better title but that in his or her absence, their alleged title could not be 'bested'. That is not the case here. Mr Donoghue claims the Range Rover is his and that his title has not been 'bested'.
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> - in *Lyons*, the jewellers took in the ring, in effect as bailees, and handed it to the police. That is not the case here. Mr Donoghue, did a part-trade in/part-cash deal to secure ownership of the Range Rover. There is no suggestion that he did not give good value for the Range Rover.
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> - in *Lyons,* the jewellers 'got lucky' and appear to have brought what might, not uncharitably, be described as an opportunistic claim of property that was never properly theirs. That is not the case here. Mr Donoghue paid in money and by way of trade-in for the Range Rover, there is no suggestion that he did not believe that it was truly his; indeed, he has been consistent in maintaining from the outset that the Range Rover is his.

18. In truth, there are so many distinctions of fact between *Lyons* and this case that it can, not unreasonably,be contended – indeed it was contended by counsel for Mr Donoghue –that the two cases are not on a par at all. Be that as it may, it seems to the court that the central observations made by Lord Widgery C.J. as to the effect of s.1(1) of the Act of 1897 are nonetheless of interest, not least as *Lyons* was described by counsel for the State as being the leading authority (albeit but a persuasive one) on the meaning and effect of s.1(1). Per Lord Widgery, at 325:

> *"I…would readily accept that in certain circumstances the word 'owner' can have a meaning different from the ordinary popular meaning. The popular meaning of 'owner' is a person who is entitled to the goods in question, a person whose goods they are, not simply the person who happens to have them in his hands at any given moment. I have little doubt that in section 1 'owner' is to be given that ordinary popular meaning, which lay justices would naturally give to it, using the word in the ordinary layman's sense. I think that that conclusion is underlined by the fact that the draftsman is distinguishing between 'possession' and ownership' because section 1(1), it will be remembered, begins with the phrase 'Where any property has come into the possession of the police.'*
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> *The justices in this case asked themselves whether the jewellers, who had received custody of the ring in the manner in which I have described, were to be regarded as the owner for the purpose of the section. They thought not. I think that they were right. I do not think that the claimants were the owner in the ordinary popular sense at all."*

19. If these just-quoted observations represent the height of the State's case in these proceedings, and they do, then the State's case appears not to rise too high. Lord Widgery says in effect: 'Look to the popular meaning of the word 'owner' when you seek to know what it means for the purposes of s.1(1)'. He draws a distinction, it is true, between 'ownership' and 'possession', but case-law can never be read separate from the facts, and the facts in *Lyons* were that the receiving jewellers were 'chancing their luck' and claiming ownership on the most tenuous of possession of what they clearly suspected from the outset was 'hot' property. No wonder, then, that Lord Widgery drew a distinction between possession and ownership in such a context. The man on the LUAS, the woman on the DART, they would undoubtedly be at one with him in this regard. But what would that man, that woman, say of Mr Donoghue, an individual who:

> (a) traded vehicles that he owned and handed over additional hard cash for a Range Rover,
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> (b) possesses a UK DVLA certificate issued in February 2014, in which he has been registered by the relevant United Kingdom authority as the 'keeper' of the Range Rover,
>
> (c) has never been accused of being in any way complicit in the alleged theft of the vehicle from Bluestone, and
>
> (d) has not had his so-called possessory title 'bested' by Bluestone despite the latter having been afforded opportunity by the Circuit Court so to do?

20. The man on the LUAS, the woman on the DART, they would surely recognise that when it comes to competing claims of ownership, title is a relative concept, and the question is 'who has the better and 'un-bested' claim?'Recognising that title is a relative concept, they would undoubtedly distinguish between:

> (i) a man who met all the characteristics recited at (a) to (d) above, and
>
> (ii) a jeweller who was staking a claim to almost certainly stolen goods that he suspected to be 'hot' property, almost if not precisely at the moment they were placed with him.

21. Entirely consistent with the observations of Lord Widgery in *Lyons,* indeed applying the very letter of his logic, that man on the DART, that woman on the LUAS, could, and this Court considers that they would, conclude that Mr Donoghue satisfies the criteria of 'ownership' for the purposes of s.1(1), insofar as the Range Rover is concerned. They would not distinguish between possession and ownership in his particular context, and to the extent that the learned Circuit Court judge recognised a distinction between ownership and possession in the context of Mr Donoghue, this Court respectfully considers that hemis-applied the logic of Lord Widgery in *Lyons,* the case that the State itself contends to be a defining case in this area of the law in the United Kingdom,and so erred in law.

22. As the State's case fails by reference to the case by which it urged the court to decide the meaning and application of s.1(1) of the Act of 1897, the court does not consider it necessary to consider such other cases to which it has been referred by counsel for Mr Donoghue.

Part 6: What to do?

23. Traditionally, not every error committed by a lower tribunal will affect the jurisdiction of that tribunal so as to invalidate the resulting decision. However, the decision of the Supreme Court in *State (Holland) v. Kennedy* [1977] I.R. 393 is now generally perceived as having ushered in a new approach, akin to that adopted by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, in which latter case Lord Reid confirmed that a court engaged in the process of judicial review is entitled to determine whether a decision of a lower tribunal is a nullity as a matter of law. That said, as Hogan and Morgan note in *Administrative Law in Ireland* (4th edition, 2010), 479:

> *"While this case law [Holland] appeared to presage the abolition of the time-honoured distinction between errors which go to jurisdiction and those which do not, nothing of the kind immediately happened. The old distinctions retained an exiguous vitality and the courts veered from one direction to another without ever once reproaching themselves for their lack of consistency in this matter."*

24. Even so, it does not appear that the availability of *certiorari* in the case of significant, clear, severe or extreme errors of law has ever been doubted in more recent Irish authorities. So, for example, in *Farrelly v. Devally* [1992] 4 I.R. 76, 82, Morris J., borrowing from the terminology of *Anisminic,* confirmed the jurisdiction to quash decisions where there has been "an extreme example of an error of law". Indeed, throughout the relevant case-law the decisive trend is away from the rigid structures and questionably sustainable distinctions associated with an older era of jurisprudence; it was not without reason that McKechnie J. was driven, in *Leonard v. Garavan* [2003] 4 I.R. 60, 76 to remark upon a *"judicial tendency to enlarge the occasions upon which the decision of an inferior court could be susceptible to High Court challenge"*.

25. It seems to this Court that the most intellectually coherent approach, consistent with *Holland* and the wider trend of later jurisprudence, is and has been to treat errors of law as going to jurisdiction, save where they are quite incidental to that determination, rather than engaging in a confusing and artificial distinction between severe and ordinary errors. In this case the court has found, for the reasons stated above, that the learned Circuit Court judge applied the wrong legal test to the facts before him and that his application of the test resulted in a forfeiture of property to the State. It was a significant error with significant consequence; it cannot be allowed simply to stand.

Part 7: Conclusions

26. For the reasons stated above, the court will grant (i) an order of *certiorari* in respect of the order of the learned Circuit Court judge forfeiting the Range Rover to the State; and (ii) an order of *mandamus* directing the State to deliver the Range Rover into the possession of Mr Donoghue. It appears to the court that these orders suffice to meet the case before it and that no further declaration is required.