

THE HIGH COURT

[2022] IEHC 343

[2018/2537 P]

BETWEEN

JAMES OSBORNE

PLAINTIFF

AND

KEN TYRELL

DEFENDANT

[2015/1856 S]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

JAMES OSBORNE

DEFENDANT

DECISION of Mr. Justice Brian O'Moore delivered on the day of 30th of May, 2022

1. By Notice of Motion dated the 30th of October 2020 Mr. James Osborne sought the following reliefs;

“An Order removing the obligations of an undertaking as was provided by the Plaintiff in lieu of a Notice of Motion seeking an Issac Wunder Order.

An Order granting liberty to the plaintiff to issue the proceedings as exhibited before this Honourable Court and as referred to in the Grounding Affidavit of the said Plaintiff in the within Application.

An Order granting liberty to reinstate a lis pendens attached to the within proceedings upon Folio No. 14039F

An Order for the setting up of an escrow account for the collection of rents.

Liberty to issue the within Notice of Motion

Liberty to Issue the Plenary Summons

Further or any order of the Court

Costs”

2. While the first paragraph of the Motion suggests that Mr. Osborne actually provided an undertaking in lieu of an Isaac Wunder Order, it transpired that the essence of Mr. Osborne's case on this issue was that the relevant undertaking (given to McGovern J on the 17th of April 2018) was given without Mr. Osborne's authority. Following an exchange of affidavits, some of them extremely detailed, the motion was heard on the 15th of December 2020.
3. After hearing the motion, I was concerned that Mr. Osborne (in his affidavit evidence) might have been focusing solely on instructions to counsel given through his solicitor, rather than possible instructions which may have been given by Mr. Osborne directly to

his counsel. I therefore issued an Interim Decision on the 5th of May 2021, which included following;

“The existence of an Isaac Wunder order is of huge significance to the person bound by it. The observations of Whelan J. in *Carney v. Bank of Scotland* [2020] IECA 281 unequivocally drive home the ways such an order can intrude on the individual’s rights under the Constitution and under the Convention on Human Rights. An application such as the present one should not be decided on the basis of equivocal evidence, particularly if reliance on such evidence can be avoided. One possible interpretation of Mr. Osborne’s affidavits is that he is swearing that Mr. Reynolds was not authorised to give the undertakings to this court because he was not instructed by Mr. Jacobs to do so, even if Mr. Osborne had in fact told Mr. Reynolds that the undertakings should be given. This construction of Mr. Osborne’s testimony would explain the fact that Mr. Osborne watched on while Mr. Reynolds provided undertakings to this court which Mr. Osborne now says he was not instructed to give. It is also consistent with the language used by Mr. Osborne in his affidavits, the relevant portions of which I have set out earlier in this Interim Decision.

I will therefore give Mr. Osborne an opportunity to provide evidence which persuades me that he never, either formally or informally, directly or indirectly, agreed that these undertakings, or any of them, or any version of any of them, be given to the High Court. I am conscious of the irony that I refused Mr. Osborne to

deliver a further affidavit on the morning that the motion was heard, but that affidavit may well not have dealt with this relevant issue as plainly as I want it to be addressed; certainly, that had not happened in the five affidavits already sworn by Mr. Osborne in this application.”

4. Mr. Osborne then swore an affidavit on the 25th of May 2021, in which he said that;

'I did not instruct anyone to deliver these undertakings on my behalf which I later discovered had much more serious implications than the Isaac Wunder application request on the notice of motion.' [paragraph 18].

5. In a subsequent affidavit, sworn on the 18th of June 2021, Mr. Osborne said [at paragraph 7];

'I say, for the avoidance of doubt , I did not directly or indirectly, formally or informally, give instructions or directions to Gabriel Reynolds B.L. to give the undertakings on my behalf in relation to the Issac Wunder Order proceedings.'

6. Around this time, there was a dramatic development. Counsel who gave the undertaking came forward, and swore a detailed affidavit. In it, Mr. Reynolds stated;

“I say that on the 17th of April 2018 I met with Mr. Osborne and that I gave him certain advices which, save in respect of matters he had at that time in the Court of Appeal in respect of the Bank, he was prepared to accept.

I also say that on foot of my advice he instructed me, inter alia, that he would undertake not to begin any fresh proceedings against the Bank. I further say that

on foot of those instructions, I spoke to Counsel for the Bank and the Receiver and conveyed my instructions. I say that the totality of the discussions between Counsel were with a view to seeking to advance all outstanding matters between Mr. Osborne, the Bank, and the Receiver, save for matters then before Court of Appeal.”

7. Mr. Reynolds also revealed that, in January 2021, Mr. Osborne and the solicitor acting for him in this motion had asked him to change (in a significant way) a note which Mr. Reynolds had prepared concerning the undertakings given to McGovern J.
8. Given this clash of evidence, a further hearing took place on the 22nd and 23rd of July 2021. At this hearing, both Mr. Osborne and Mr. Reynolds were cross-examined.
9. I am firmly of the view that, on the relevant issues, the evidence of Mr. Reynolds is to be preferred. I am satisfied that Mr. Osborne gave instructions to Mr. Reynolds to offer the disputed undertaking to McGovern J. In light of this finding and having considered the entirety of the submissions made in respect of the first relief sought in the Notice of Motion, I have decided to refuse that relief.
10. With regard to the second relief sought, namely liberty to issue fresh proceedings in the event that Mr. Osborne is not relieved of his undertaking, no cogent case has been made as to why such relief should be granted. I therefore also refuse the second relief sought. The other reliefs claimed, which did not feature prominently in the argument, are also refused.
11. This Decision is not in substitution for a full judgment, which it is expected will be circulated before the end of July. After the parties have had an opportunity to consider the

contents of the judgment, the motion will be listed for mention in order to deal with the costs of this application.