Neutral Citation Number: [2007] IEHC 308

THE HIGH COURT

[2006 No. 4266P}

BETWEEN

GERARD CHARLTON AND MAEVE CHARLTON

PLAINTIFFS

AND

PAT KENNY AND KATHRYN KENNY

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 7th day of September, 2007

1. Introduction

1.1 The plaintiffs ("the Charltons") and the defendants ("the Kennys") own neighbouring properties in Dalkey, County Dublin. A significant dispute has arisen between them as to the ownership of a portion of land that is close to both houses. The Charltons claim to be the legal and beneficial owners of the property. The Kennys contest the Charltons title and, in particular, suggest that any title which the Charltons may have had to the property concerned has been extinguished by adverse possession. It would be fair to say that the proceedings appear to be marked with a considerable degree of acrimony on all sides. Unfortunately, for reasons which will be apparent, it would appear that that level of acrimony has spilled over to an unusual degree into the positions which has been adopted by the solicitors on both sides.

1.2 Two procedural motions involving three separate issues were heard by me in late July. One issue concerned inspection on behalf of the Kennys of documents which had been discovered by the Charltons by their inclusion in an affidavit of discovery. The second issue concerned a request for further and better particulars of the defence served by the Charltons on the Kennys. The third, and most substantive issue, concerned an application by the Charltons to be enabled to inspect the disputed property.

1.3 At the hearing before me the only issues of substance relating to the inspection of documents and the replies to particulars were questions of timing. Were it not for the acrimonious atmosphere in which these proceedings seem to be conducted, it seems unlikely that any such applications would have been necessitated at all. It was, in any event, clear that inspection of the relevant documents would be facilitated in early course and that replies to the outstanding particulars would also be furnished within a short time frame. In those circumstances I did not consider it either necessary or appropriate to make any substantive orders and the only issues which remain for consideration in relation to those motions are the costs. The question of inspection of the property is, however, a matter on which I have to rule and I will deal with that issue later in the course of this judgment.

1.4 However so far as the costs of the two outstanding motions are concerned it is necessary to say something about the circumstances in which the procedural aspects of this case have been conducted in order to properly address those costs issues. I now turn to the underlying facts relevant to those applications.

2. The Facts - Particulars

2.1 On the 31st May, 2007 solicitors on behalf of the Charltons served a notice seeking further and better particulars of the Defence on solicitors acting on behalf of the Kennys. On the 27th June, no response having been received, a letter was written voluntarily extending time for the furnishing of the relevant replies by a further seven days. No response was received to that letter either. The relevant motion then issued.

2.2 In a replying affidavit the solicitors acting on behalf of the Kennys indicated that their clients were on holidays for much of the intervening period but that they were unwilling to reveal that fact to the solicitors acting on behalf of the Charltons because of concerns arising out of an alleged incident at the property which is said to have occurred on a previous occasion when the Kennys were not present in their home.

2.3 It has been a universal practice on my part when dealing with the costs of procedural motions to ascertain whether any reason that might be put forward as a cause for not having complied with a procedural request in a timely fashion, had been communicated in correspondence at the time when the request was made. If no such reason is put forward in correspondence at the relevant time, then I have, almost invariably, disregarded any such reason in considering the costs of the matter. In other words if there was a good reason why a procedural request ought not be complied with within the time frame specified in the request (or provided for by the rules) it seems to me to be incumbent on the person receiving that request to inform the other side of that reason. If the other side is not informed, then they cannot reasonably be expected to guess what the reasons, if any, might be and are entitled to bring an application before the court seeking to enforce the procedural request if not complied with in time. On the other hand if a reason is proffered as to why the request should not be complied with, at least within the requested time frame, then it is up to the requesting party to decide whether that reason is reasonable. If, notwithstanding the reason proffered, a motion is brought to court to enforce the request, then that motion is brought on risk that if the reason proffered is considered to be a valid one, the costs may be awarded against the party bringing the motion on the basis of having unnecessarily invoked, in a premature fashion, the courts jurisdiction and added to the costs of the proceedings by so doing.

2.4 Clearly, in the ordinary way, and applying that principle, the Charltons would appear to be entitled to their costs of that motion in that at the time they issued the motion there was a request (and indeed a reminder) outstanding and no reason for not complying had been proffered. Whatever may be the answer to the question of whether the special circumstances raised on behalf of the Kennys ought to lead to a change in that situation in this case, it also seems to me to be necessary to view the costs of this issue in the light of the views which I have taken as to the procedural course of these proceedings as a whole. That is an issue to which I will shortly turn.

3. The Facts – Inspection of Documents

3.1 So far as the request for inspection is concerned the facts are these. The Kennys delivered their affidavit of discovery on 13th June, 2007. The Charltons' solicitors sought inspection of the discovered documents by letter dated the 15th June, 2007. In the absence of a response a further letter was written on the 20th June. A response was received on that date which suggested that there had been, what I can only describe as a very technical failure to comply with the rules of court in relation to specifying in a notice the documents in relation to which inspection was sought and also suggesting that it would be more appropriate to arrange for a reciprocal inspection of discovery documents. This latter point arose by virtue of the fact that the Kennys had not, despite being asked earlier if they wished so to do, sought discovery until the 23rd May, 2007 and the Charltons' discovery affidavit had not, therefore, by the timeframe I am dealing with, been sworn.

3.2 The relevant sequence of events demonstrates the difficulties which have arisen between the solicitors in this case. It is, of

course, true to state that the rules of court do, strictly speaking, require a notice of the type referred to, to be served. It is, however, also true to state that it is, nowadays, rarely the case that any such notices are in fact required. Inspection is normally arranged by mutual agreement between the solicitors concerned. Indeed in many cases (perhaps a majority) inspection may, in the formal sense of the word, not actually be engaged in where the parties agree to make copies of all relevant documents available to the other side.

3.3 It is also technically correct to say that as soon as discovery by affidavit has been made, the party receiving the affidavit of discovery is, *prima facie*, entitled to inspection or copies of the relevant documentation in a timely fashion. There is nothing in the rules which requires that that party postpone its entitlement to inspect or receive copies until the other side has itself made discovery. On the other hand it is equally fair to say that it is common practice that solicitors co-operate by arranging either for a contemporaneous inspection of documents or more frequently, in practice, an exchange of copies of the relevant documentation, at the same time.

3.4 I emphasize these facts for the purposes of noting that both sides seem to be prepared to require strict compliance with the rules when it suits them but to place reliance on what might be called "normal practice" when strict compliance does not suit them. While insisting on the little used, but technically correct, obligation to serve a notice to produce a list of documents for inspection (which only had the effect of requiring the production of a wholly unnecessary schedule of documents), solicitors for the Charltons nonetheless sought to place reliance on "normal practice" as a means of avoiding their technical obligation to allow for inspection in a timely fashion after discovery had been made. Other examples of similar positions being adopted by both sides can be found in the procedural history of this case.

4. Conclusions
4.1 In *Cork Plastics and Others v. Ineos Compounds U.K. Limited*, (unreported, High Court Clarke J., 26th July, 2007), I noted that there had been a constructive engagement by the solicitors on both sides of those proceedings in a whole range of complex procedural issues which have arisen in the context of very difficult litigation. Arising out of that judgment I indicated that I proposed making the costs of all procedural matters in that case "costs in the cause" to reflect the fact that both sides had, at all times, acted co-operatively and reasonably and such issues as had fallen to me to decide were ones in relation to which there were real procedural issues to be considered.

4.2 Unfortunately I would have to say that the opposite appears to be the case in these proceedings. Far from there being a constructive engagement by the solicitors on both sides it has to be said that, as demonstrated by examples such as those which I have already given, both sides have been prepared to rely on mere technicalities on occasion but adopt the broad approach of "normal practice" on others so that there has been little or no constructive engagement on the procedural issues which necessarily have to be disposed of in order that this case might be ready for hearing.

4.3 I can fully appreciate that where the issues between the parties themselves are highly acrimonious (as they clearly are in this case) that situation will necessarily effect, to some extent, the way in which the litigation is conducted at the level of their advisors. However, it does not seem to me to be helpful to the proper management of litigation to find such a level of unmeritorious technical position taking as has undoubtedly occurred in this case. In those circumstances it seems to me that I should make no order as to costs in respect of either motion. A significant volume of affidavit evidence was put before me which amounted to complaints about "the other side" having failed to assist in getting the case ready for hearing. It would be neither appropriate nor possible for me to reach a conclusion as to where the balance of any such blame might lie. I am, however, satisfied that some significant blame lies on both sides. Suffice it to say that I have formed a view that such technical position taking should not be encouraged. In a case where both sides are at least to some significant degree at fault (as I am satisfied is the case here) I feel that I should not make any order as to costs.

4.4 There only remains, therefore, the substantive question of inspection. I now turn to that issue.

5. The Inspection Application
5.1 This issue has its genesis in a letter of 31st May, 2007 written on behalf of the Charltons to the Kennys solicitors, which indicated that there was a requirement to inspect the disputed property in conjunction "with our professional advisors". Three persons were named being a horticulturist, an architect and a Mr. Corry McMahon, who is, as I understand it, an in-law of the Charltons and was present on one of the occasions when, it is said, serious personal acrimony broke out at the property in question. By reply of the 7th June, the Kennys' solicitors sought reasons why the inspection was required at all and why, in particular, the three named individuals ought to be involved in the inspection. In addition a question was asked concerning whether the Charltons would, themselves, be present during the inspection and specific complaint was made about the proposed attendance of Mr. McMahon.

5.2 By reply of 14th June, it was suggested that the reason for the attendance of the horticulturist and the architect was self evident. In addition it was suggested that a professional photographer and auctioneer would be present and that the Charltons "as well as members of their family" would also be present. By letter of 20th June, a list of eight people who would be present at the inspection was given. Against that background the Kennys suggest either that no sufficient case has been made out for inspection at all or that, at a minimum, the inspection sought is excessive.

5.3 An application for inspection of property is made under O. 50 r. 4 of the Rules of the Superior Courts when same may be "necessary or expedient for the purpose of obtaining full information or evidence". In making such an order in *Bula Limited v. Tara Mines Limited*, (No. 1) [1987] I.R. 85, Murphy J. indicated that he proposed to give what he described as an extremely limited right of access to named experts to inspect the property in dispute. The case was, of course, one which also included a high degree of acrimony. The principle issue considered by Murphy J. concerned a contention by Tara that the case against it had no merit and that that was a proper factor to take into account. Murphy J. declined, for the reasons given, to consider the merits of the substantive case. However, as an order for inspection will possibly, on that basis, allow some interference with a parties property in circumstances where there is no case against it, the obligation should only be imposed where there is a real need for it and, then, only to the minimum extent necessary.

5.4 I am prepared to make a similar order in this case, to the one made by Murphy J. in *Bula*. I am not satisfied that any adequate basis has been made out for allowing for the attendance of non expert witnesses at the property. It is clear that the only factual issues at trial will concern the extent to which it may be said that the Kennys, have, in fact, occupied the property in the manner which they contend for and the extent, if any, which it may be said that the Charltons or their friends or family continued to have any use of the property. These are the issues which will arise in a claim for adverse possession and its defence. It does not seem to me that individuals who may claim to have been present on the land (and thus to have maintained some degree of possession on the part of the Charltons), need to now to go on the land to be able to give their evidence. To the extent that an architect or horticulturist may be able to give evidence as to when certain physical or planting works are likely to have taken place then that is

evidence which the Charltons are entitled to lead if they should consider it to be advantageous to their case. In those circumstances it seems to me that they have made out a case for the attendance of those two persons.

5.5 In all the circumstances I propose to allow inspection but that it should be confined only to the Charleton's solicitor or his representative and the two expert witnesses referred to in the original letter of request of 31st May.

5.6 Counsel for the Kennys suggested that some limitations should be put in the way of those experts making their evidence available to individual members of the Charleton family or their friends whom it might be intended to give evidence at the trial. The stated basis for that objection seems to stem from a contention that witnesses of fact may be able to "manufacture" descriptions of the property consistent with their having used it by reference to information obtained on such an inspection by the experts. It is, of course, always possible that witnesses of fact can adjust their evidence to reflect the findings or opinions of experts. That is a potential hazard in any set of proceedings. Where it is suggested that such an exercise has occurred it is, of course, open to the opposite side to test the credibility of any such witnesses in whatever way may be considered appropriate within the bounds of the rules of evidence and procedure.

5.7 However I am not satisfied that any sufficiently exceptional circumstances arise in this case that would warrant placing any particular restriction on the circulation of whatever expert reports might derive from the inspection. Such restrictions have, in my experience, been exclusively or almost exclusively confined to cases where expert witnesses are necessarily given access to highly confidential information to enable them to prepare the reports concerned. In such circumstances the courts sometimes imposes a restriction on the expert evidence being made available directly to the client, who ought not, in the ordinary way, have access to such confidential information. In such a way the balance between the competing interests of maintaining the confidentiality of information but nonetheless ensuring a fair trial are sought to be met.

5.8 However it seems to me that it would require wholly unusual circumstances before evidence such as the type which will be gathered by inspection in this case could be restrained from been made available to the party procuring the attendance of the expert concerned. If there is any credible suggestion that witnesses have altered their evidence to marry in with the observations of the experts concerned than that is, doubtless, a matter that can be fully pursued by cross examination at the trial.

5.9 For like reasons I do not consider it appropriate to place what would, in effect, be a moratorium on the making available of such expert evidence to witnesses of fact until such time as those witnesses of fact have put in witness statements. The normal practice is that where witness statements are required to be filed, all same (including expert reports) are filed at the same time. I see no reason to depart from that practice in this case.

5.10 It seems to me, therefore, that the total opposition to any inspection or, at a minimum, to the making available of the results of a proper and necessary professional observation of the disputed lands, put forward on behalf of the Kennys, was excessive. I am also of the view that the type of inspection ultimately sought on behalf of the Charltons was significantly excessive, unnecessary, and not too far short of the description given to it on behalf of the Kennys as inflammatory. This issue, again, and unfortunately, reflects the degree of acrimony in which these proceedings are being conducted. In the circumstances, and for the reasons which I have already given in respect of the other two issues, I do not feel it appropriate to make an order for costs in respect of this matter either.

6. Conclusions

6.1 On the assumption that the document inspection and particulars issues have, in substance, been complied with, within the time frames contemplated at the hearing before me I would propose making no order in respect of either of those two matters.

6.2 For the reasons which I have indicated earlier I would propose making an order allowing three persons and three persons only (being the Charltons' solicitor, or a representative of that solicitors firm, together with one horticulturist and one architect) to attend, by reasonable appointment, at the property for the purposes of inspecting same with a view only to reporting on the likely timing of the carrying out by the Kennys of the various works referred to in the pleadings in these proceedings. No order as to costs will be made in respect of that application either.