

THE HIGH COURT

COMMERCIAL

[2012 No. 4283 P.]

BETWEEN

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

BLAKE O'DONNELL, BRUCE O'DONNELL, BLAISE O'DONNELL, ALEXANDRA O'DONNELL, BRIAN O'DONNELL, MARY-PATRICIA O'DONNELL, VICO LIMITED, CHANCERY TRUSTEES LIMITED AND VICO BARTON LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 2nd day of November, 2012

The Application

1. This is the application of the first four defendants (the adult children defendants) seeking to exclude *"such parts of the witness statement of Des Hanrahan dated 9th October, 2012, as are inadmissible in evidence by reason that they constitute hearsay or are otherwise deemed to be inadmissible"*.

2. This application is made prior to the trial of the proceedings which is due to commence on 4th December, 2012 and in circumstances where the adult children defendants have not as yet delivered their witness statements.

The Proceedings

3. This action began on 27th April, 2012. The adult children defendants are the adult children of the fifth and sixth defendants (the O'Donnells). The seventh defendant (Vico) is a company registered in the Isle of Man. The eighth defendant (Chancery) is likewise registered in the Isle of Man. The ninth defendant (Vico Barton) is a company registered in Jersey.

4. In the action, the plaintiff seeks a declaration that the contents of a house called Gorse Hill, Vico Road, Killiney, Co. Dublin and/or 8 Barton Street, London, England, consisting of any artwork, paintings, pictures, furniture, crystal glassware, rugs, antiques, sculptures, jewellery, ornaments, electronic appliances and equipment (the chattels) are the property of the O'Donnells are not the property of the other defendants nor subject to any trust in favour of the other defendants.

5. The O'Donnells have contended that they executed letters of wishes in October 2000. It is alleged that these letters of wishes are valid and effected a transfer of ownership the chattels to a trust in favour of the adult children defendants.

6. Vico delivered a defence on 19th July, 2012. The accuracy of the contents of that defence were confirmed on oath by the fifth defendant. In Vico's defence it asserts that the shares in it are owned by the adult children defendants and not by Chancery. Vico confirms in the defence that it will abide the outcome of these proceedings. This defence contradicts the fifth defendant's admission in his defence that Chancery is the registered owner of the shares in the Vico. Chancery has not delivered a defence and judgment has been given against it in default of so doing. The adult children defendants and the O'Donnells have asserted the Chancery is the legal owner of the chattels at Gorse Hill.

7. Vico Barton, the ninth defendant in its defence states that it has not at any stage asserted and does not now assert an entitlement to or interest in the chattels at Gorse Hill but contends that it is the owner of the chattels at 8 Barton Street. Rather curiously, the defence of Vico Barton is also supported by an affidavit sworn by the fifth defendant and was delivered on the same day as that of Vico. This defence admits that the shares in the Vico are held by Chancery.

8. The O'Donnells have delivered a defence and counterclaim in which they admit that they acquired the chattels but deny that they have held the legal and/or beneficial title to them on the premises at Gorse Hill or Barton Street. They assert that by letters of 20th October, 2000, they wrote to a trustee (Chancery's predecessor in title) and undertook to care for and support the adult children defendants and to give to those defendants the chattels, then or thereafter contained in the Gorse Hill premises in consideration of the grant by the trustee and/or the adult children defendants to the O'Donnells of a right to reside in the premises. The O'Donnells contend that the chattels at Gorse Hill was settled on the trustee in trust for the adult children defendants. In the alternative, they claim that the chattels are beneficially owned and retained by the adult children defendants. It is alleged that the chattels became vested in the trustee for the benefit of the adult children defendants pursuant to the letters of 20th October, 2000.

9. Insofar as the property at Barton Street is concerned, the O'Donnells contend that that is owned by Vico Barton. The shares in Vico Barton are, they say, beneficially owned by the adult children defendants. They also allege that the Chancery is constituted as the trustee of a deed of settlement of 16th December, 1997, whereby all trust property in Gorse Hill and its curtilage became and was vested in Chancery.

10. It is noteworthy that the O'Donnells do not admit that the plaintiff was unaware of this trust settlement and/or the letters of October 2000 and the other transactions alluded to in their defence. They specifically deny that the trust and/or letters and transactions constituted a pretence or a sham or do not reflect the true intentions of the O'Donnells. They also deny that the settlement of the chattels in Gorse Hill on the trustee is void and/or unenforceable.

11. In their counterclaim, the O'Donnells seeks a declaration that the chattels in Gorse Hill are vested in the Chancery on trust for the adult children defendants. They also seek a declaration that the chattels at Barton Street are vested in Vico Barton on trust for the adult children defendants.

12. In the defence delivered by the adult children defendants, they deny that the O'Donnells were the legal and beneficial owners of the chattels held at Gorse Hill. They deny that the plaintiff was not a party to or was previously unaware of any transaction or trust and furthermore deny that the trusts alleged are a sham. They deny that the documents executed by the O'Donnells in October 2000 were a sham. They deny that the trusts are void, unenforceable and of no effect. They also deny that the chattels are the property of the O'Donnells.

13. The adult children defendants assert that the letters in question transferred both legal and beneficial ownership of the chattels at Gorse Hill to them in consideration of the grant by the trustee and these defendants of a right of residence in the premises to the O'Donnells.

14. In the alternative, these defendants also allege that whether by way of settlement on the trust or otherwise, the transfer of the chattels was executed as part of an associated transaction of the transfer of the beneficial ownership of Gorse Hill to the adult children defendants. They allege that the plaintiff was at all times aware of and involved in the transfer of the property and was therefore on notice of the transfer of the contents of the property to these defendants.

15. The adult children defendants also allege that the plaintiff's case is misconceived and that the reliefs claim should be refused. That assertion is made, inter alia, on the basis that at a time when the O'Donnells made representations to their ownership of the chattels and their worth, such representations were false. They contend that the plaintiff knew at all times that the O'Donnells had neither legal or beneficial interest in the property at Gorse Hill but, despite that, it continued to rely on the statements of net worth and continues to do so in these proceedings.

16. These rather convoluted and, by times, contradictory pleadings have had to be mentioned in some detail with a view to attempting to identify the issues which the court will have to deal with at trial.

17. Despite the confusion which the pleadings may create, in essence the case boils down to the O'Donnells assertion that the chattels which they admit they acquired are impressed with a trust in favour of the adult children defendants. That trust is alleged to have been constituted on foot of a letter of wishes of 20th October, 2000, to Chancery's predecessor as trustee. The adult children defendants rely on the letter of wishes as having transferred legal and beneficial ownership of the Gorse Hill chattels to them. Chancery has submitted a declaration that the chattels are owned by the O'Donnells. Vico, the company which owns Gorse Hill is prepared to abide the outcome of the proceedings. Insofar as the chattels at Barton Street are concerned the O'Donnells allege that they are vested in Vico Barton on trust for the adult children defendants. Vico Barton asserts that it is the owner of the chattels at Barton Street but does not suggest that it holds them in trust for the adult children defendants.

Burden of Proof

18. The plaintiff asserts that, despite the various contentions contained in the respective defendant's defences, the chattels at Gorse Hill and Barton Street are the property of the O'Donnells. The plaintiff, in other proceedings, has secured a judgment for in excess of €70m against the O'Donnells and believes that the chattels ought to be available to it to satisfy in part that judgment.

19. In their counterclaim, the O'Donnells seek a declaration that the chattels were transferred by them to Chancery's predecessor in title to be held in trust for the benefit of the adult children defendants.

20. There is no dispute but that he who asserts must prove. That is the well established principle applicable to the conduct of all civil litigation in this jurisdiction.

21. On foot of pre-trial directions which were given by the court, the plaintiff delivered a witness statement by Mr. Des Hanrahan, who is a director of the Specialist Property Group of the plaintiff. He joined that bank in October 1974 and has been responsible for matters relating to the indebtedness of the O'Donnells since April 2010. It is this statement which is objected to by the adult children defendants. At this juncture, they ask the court to exclude such parts of it which they contend are inadmissible by reason of the fact that they constitute hearsay or are otherwise deemed to be inadmissible by the court.

Pre-trial Exclusion of Evidence

22. The Commercial List has been in existence since 12th January, 2004. For the first seven years of its existence, applications of the type with which I am now dealing were unknown. They began to manifest themselves about a year ago and are now occupying an inordinate amount of court time. This is the second such application that I have had to deal with in a week. None, that I am aware of, have been successful.

23. The position in relation to applications of this sort is dealt with comprehensively in the judgment of Charleton J. in *Condron v. ACC Bank* [2012] IEHC 395. That judgment was delivered on 11th October, 2012. Charleton J. said the following on this topic:-

*"Lastly, it is argued that a court apart from the court of trial has jurisdiction to hear an argument as to admissibility in advance of the trial and to exclude evidence. It must firstly be noted that the trial judge is in the best position to judge the real issues in the case. When the case is opened, when the papers are read and as the case develops, what is crucial to the disposal of the case becomes increasingly obvious. It would very rarely occur that a judge, in advance of the trial, with access to only affidavit evidence and limited papers would even be in a position to make an informed decision. Such an approach of pre-trial motion on the admissibility of evidence would interfere with the discretion of the trial judge to run the trial in the way that best enables admissible evidence to be called and justice to be done. It is also contrary to the approach of the High Court in *Byrne v. Grey* [1988] I.R. 31 and *Berkeley v. Edwards* [1988] 1 I.R. 217, which were cases on excluding evidence through judicial review whereby a search warrant was sought to be declared invalid. I notice that my approach in this regard is similar to, but more restrictive than, that of Mann J. in *Wilkinson v. West Coast Capital and Others* [2005] EWHC 1606 [2005] All E.R. 321. There, the application at issue in the Chancery list was to strike out paragraphs in witness statements on the grounds that they were irrelevant and disproportionate to the issues in the case."*

24. Charleton J. then went on to consider the observations of Mann J. in the *Wilkinson* case which in turn considered comments in a number of other English cases. Some of the observations from the judgment of Mann J. are apposite. He said:-

"5. Those cases, and indeed others in a similar vein, illustrate the very important powers of the court to control proceedings before it to make sure they remain manageable, proportionate and fair to the parties. If one were constructing a list of cases to which that power might be thought to be particularly appropriate, unfair prejudice petitions would be fairly high on the list. However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial. It is noteworthy that the two

cases which I have referred to above were both cases in which the issues as to evidence arose during the course of trials. By the time that the issue arises in that context, the judge is likely to have a much fuller overall picture of the issues in the case and of the evidence which is going to be adduced in support of them. In a large number of cases, he or she is likely to be in a better position to make judgments which turn on the real value of the line of evidence in question and its proportionality, and in very many cases its admissibility. A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time- and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden." (My emphasis)

25. Returning to the judgment of Charleton J. he said:-

"It is clear that a judge may, whether during a trial or in advance of a trial, strike out a pleading which is scandalous and that a judge may, where an extreme situation warrants it, strike out either an entire witness statement or a portion of a witness statement because it is either deliberately prejudicial to the case or is demonstrably of no possible assistance to the issues at trial. The burden in that regard will rarely be met."

26. In an ex tempore ruling of my own of Friday last, 26th October, 2012, in *Weaving Macro Fixed Income Fund Limited (In Liquidation) v. PNC Global Investments Servicing Europe Limited*, on a similar application I expressly followed the approach of Charleton J. It is, in my view, the correct approach to be taken on applications of this sort.

27. Thus, the question which falls to be decided is has the heavy burden which rests upon the adult children defendants in seeking this order been met?

Mr. Hanrahan's Statement

28. Mr. Hanrahan's statement runs to some 39 paragraphs. In the course of the hearing I was taken through the entire of the statement by counsel for the adult children defendants. During the course of that exercise, he identified elements of the statement to which he had no objection and those to which he had. It is not necessary for me to deal with each paragraph of Mr. Hanrahan's statement and then to deal with the objections *seriatim*.

29. The adult children defendants contend that parts of Mr. Hanrahan's statement deal with evidence which is inadmissible against them and/or contains hearsay.

30. During the course of his witness statement, Mr. Hanrahan refers to both affidavit evidence previously given in this court and to the transcript of evidence given by Brian O'Donnell in a post judgment examination of him pursuant to the provisions of O. 42, r. 36 of the Rules of the Superior Courts. Parts of the statement which refer to this material is alleged to be hearsay and inadmissible against the adult children defendants.

31. Objection is also raised to a conversation mentioned in Mr. Hanrahan's statement which took place between Eve Mulconry of the plaintiff's solicitors and Mr. Keith Jones, a director of Chancery on the basis that such is hearsay. There is also objection to Mr. Hanrahan exhibiting correspondence received by the bank's solicitor from Chancery.

32. I will deal with each of these contentions in turn.

The Objections

33. The first thing that must be remembered is that Mr. Hanrahan's statement is put in evidence not merely against the adult children defendants but against all the defendants in the proceedings.

34. A witness in a case such as this is not required to produce in advance of trial a series of witness statements containing only the material peculiar to each defendant. Such an exercise would be objectionable on grounds of cost, efficiency and time. In the present case it would be wholly disproportionate to the relatively simple issues in suit.

35. There can be little doubt but that the plaintiff is entitled to rely upon evidence contained in the transcript of evidence given by Brian O'Donnell or in his affidavits. Admissions contained in that testimony are admissible as against the O'Donnells. The transcripts are relied upon to demonstrate that the O'Donnells have asserted ownership over chattels in Gorse Hill. A party who makes a statement adverse to his case under oath on another occasion may be regarded as having made an admission and evidence of that statement is admissible.

36. It is not a matter for this court at this stage to rule upon either the admissibility of or the probative value to be given to such admission in the context of the case made against the adult children defendants. Such questions are matters peculiarly suited to the trial judge. They are wholly unsuitable to be dealt with at this juncture for the reasons which have been given by Charleton J. in *Condrón's* case.

37. As to the conversation between Eve Mulconry and Mr. Jones, it is to be noted that that conversation is introductory to subsequently received and, I would think, admissible correspondence between the plaintiff's solicitors and Mr. Jones. The plaintiff in any event has indicated that it is content to file a further short witness statement from Ms. Mulconry which will confirm her conversation with Mr. Jones if such is necessary.

38. As to the objection to the exhibiting by Mr. Hanrahan of correspondence received by the bank's solicitors from Chancery, I do not believe that there is any sound basis for asserting that correspondence received by the agent of the bank is inadmissible in the proceedings. But I do not intend to rule on that now since that is matter which will be dealt with by the trial judge.

39. Heavy reliance was placed by the adult children defendants' counsel on the decision of Hardiman J. in the case of *Bovale Developments Limited and the Companies Act* [2011] IESC 24. Particular reliance was placed upon the statements contained in that judgment under the heading "procedural issues" where he said:-

"Some of my colleagues have expressed understandable concerns about the procedures adopted in this case, and specifically about the bringing of an interlocutory motion to strike out certain evidence filed on behalf of the moving party.

I wish to say that, in the most unusual circumstances of this case, I do not share these concerns. It is notable that the evidence which is the subject of the present appeal was clearly and manifestly inadmissible evidence. Portions of it were rank hearsay, other portions consisted of an attempt to deploy in litigation, as a weapon of offence, portions of the findings of a Tribunal of Inquiry. This is legally impossible by reason of a decision of this court of the highest authority. In those circumstances, I would be extremely sorry to think that a person against whom this inadmissible evidence was sought to be deployed could do nothing about it until the trial of the action. If this were so, I believe it would confer a wholly unmerited tactical advantage on the party deploying evidence which he knows to be inadmissible. Firstly, the evidence would be on the record of the Court publicly available. Secondly, the person against whom it was deployed would have no certainty until the trial as to how the issue of its admissibility would be resolved. From this it follows that he would have to make his tactical and evidential preparations for the trial on the basis that the evidence to which he objected might nonetheless be admitted. This in turn might easily (and in the present case in my view would probably) involve him in answering material not properly deployed against him and perhaps in committing himself on matters which do not properly arise at all. It would add to the length and therefore to the expense of the hearing."

40. It is to be noted that Hardiman J. himself acknowledges that some of his colleagues expressed understandable concerns about the procedure of seeking to strike out evidence prior to trial. It is indeed true that other judges expressed reservations about such a procedure. These are particularly dealt with in the judgments of Fennelly J. and Denham J.

41. It is also to be noted that Hardiman J. indicated that the decision in *Bovale* arose in what he described as "*the most unusual circumstances of this case*". The *Bovale* case is on its facts and the procedures followed very different to the present case. I do not read the observations of Hardiman J., which were not supported by the other judges, for reasons which equally apply here, as an authority to justify an order of the type sought.

Conclusion

42. For the reasons which I have outlined, the adult children defendants have not discharged the onus identified by Charleton J. to justify the making of an order of the type which they seek.

43. Questions as to admissibility, relevance, prejudice and probative value are all matters which are peculiarly suited to the trial judge.

44. This application is dismissed.