



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 414

[2014 No. 1413]

[2015 No. 352]

**The President
Hogan J.
O'Regan J.**

BETWEEN

KIERNAN MILLING

PLAINTIFF

AND

FINBAR TOLAN

DEFENDANT

EX TEMPORE JUDGMENT of the Court delivered by the President delivered on 14th November 2016

1. In the first place, I have sympathy for Mr. Tolan who clearly has a settled, undisturbable belief that things should be done in a regular, procedural and proper fashion. I will accept any delivery and pay for any products that I receive when I have (a) ordered them and (b) been there to receive them and (c) signed the document of receipt. I have some sympathy with someone who takes that view, especially when there is a substantial quantity of goods involved. It is fair to say that Mr. Tolan does not come to court and was not described in the High Court as being somebody who was of a dishonest disposition – far from it. Kiernan Milling, the plaintiff in this case, had significant regard for Mr. Tolan whom they regarded as a good customer. It is clear that Mr. Tolan had formed this view that he could not be liable for anything unless the three conditions mentioned had been fulfilled.

2. The matter came before the court and the court had to decide two things. The court had previously decided that Mr. Tolan's contention that the whole, if any, liability that he had to Kiernan Milling was extinguished by his payment of €19,000 and that wiped out any further debt. Hanna J. in the High Court held that this did not apply.

3. In subsequent proceedings, the whole issue as to the liability was gone into. There is a somewhat tangled history by the time that actually got to court in June 2015, but it cannot be said that Mr. Tolan was shut out from any remedy or from having the matter litigated fully and debated fully. Hanna J. heard the case of a couple of days and gave his judgment. In his judgment, he reviewed the evidence. The judge had to decide were the goods delivered; was Mr. Tolan liable for it? He accepted the evidence of Mr. McGowan, the driver; he accepted the evidence of Mr. Feeney to the extent that that evidence established regularity i.e. that the driver had signed delivery dockets confirming the receipt; he accepted the evidence of Mr. McHale of the plaintiff company and he accepted the evidence of Ms. Kiernan. If there was any doubt about any of the deliveries, the acceptance by the trial judge of the evidence of Ms. Kiernan as to the telephone conversation that she had in June 2013, with Mr. Tolan when he accepted liability for outstanding bills – I do not know that he accepted liability for the full amount – but he, according to Ms. Kiernan, accepted the evidence.

4. This is a classic case of Hay v. O'Grady which says if the judge has decided the case for reasons that the trial judge has thought are sufficient and if the judge has stated that and if there is evidence on which the judge could have reached that conclusion then this Court cannot interfere with it. It seems to me that this case meets that test, but it goes beyond that test because, in my view, the judge was amply justified in taking the view he did. It does not mean that I have to say if I were hearing it or one of my colleagues were hearing the case we would necessarily come to the same conclusion.

5. I am quite satisfied that Hanna J. did not err in his approach. I am satisfied on the clear authorities that applied to the situation of this appeal that there was evidence in which the judge could and did base his decision and it seems to me that Mr. Tolan accordingly cannot succeed in this appeal against the judgment.

Hogan J.

6. I have had the opportunity of listening to the ruling just given by the President and I agree with it. This is a case where the trial judge was entitled to draw certain inferences, if not make express findings of fact, to the effect that there had been an order and that the [?] question had been delivered. He said, expressly, he was doing so on the basis of the balance of probabilities and there were very clear findings of fact in that regard by the trial judge.

7. As the President has stated, this is a classic Hay v. O'Grady-type test. Despite the admirable way in which the case has been presented by Mr. McNally on behalf of Mr. Tolan, there is no suggestion at all that there was critical evidence, with which, to use the modern parlance, the trial judge had not engaged. This is, I regret to say, as clear-cut a case coming within the scope of Hay v. O'Grady as one is likely to find.

8. In these circumstances, I feel that this Court is coerced to uphold, by reason of the inherent limitations in the appellate process outlined by Hay v. O'Grady to hold in favour of the plaintiff and to dismiss the appeal.

O'Regan J.

9. I agree with the judgments of the President and of Hogan J.

