THE COURT OF APPEAL

2015 No. 164CA

Peart J.
Hogan J.
Costello J.

IN THE MATTER OF PART II OF THE EXTRADITION ACT 1965

(AS AMENDED)

BETWEEN/

ATTORNEY GENERAL

APPLICANT/RESPONDENT

- AND -

PATRICK LEE

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of April 2016

1. As the relevant facts and issues have been helpfully stated in the judgment which Peart J. has just delivered, I propose to proceed immediately to the difficult legal issues which arise in this appeal.

2. As Peart J. has pointed out, it is plain that the offences with which the appellant has been charged all in fact occurred entirely within the territory of the United States. These offences are substantive offences relating to an alleged mortgage fraud scheme which, it is contended, was carried out by Mr. Lee, an Irish citizen, entirely within the territory of the United States.

3. The difficulty which arises in this appeal stems from the fact that s. 15 of the Extradition Act 1965 ("the 1965 Act") provides that:-

> Extradition shall not be granted where the offence for which it is requested is regarded under the law of the State as having been committed in the State."

4. For completeness, it should be observed that this deeming provision is not contained in the new version of s. 15 of the 1965 Act which was substituted by s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. Since the present case pre-dates the coming into force of this new version of s. 15, it is agreed for present purposes that it is original version of s. 15 of the 1965 Act which is the applicable provision.

5. The appellant's case, essentially, is that there exists under Irish law an offence which regards the conduct alleged, if done by an Irish citizen, as an offence which was committed in this State, even if the *actus reus* of the offence in question was entirely committed abroad. This is because the sweep of the conspiracy offences provided by s. 71 of the Criminal Justice Act 2006 ("the 2006 Act") is such that it would criminalise the conduct alleged in the present case if done abroad by an Irish citizen.

6. The particular difficulty which then arises is that s. 74(1) of the 2006 Act provides:

> Proceedings for an offence under s. 71 or s. 72 in relation to an act committed outside the State may be taken in any place in the State and the offence may for all incidental purposes be treated as having been committed in that place."

7. Here, then, is the core of Mr. Lee's argument. First, the conduct alleged here would, if committed by an Irish citizen, be regarded as an offence under s. 71 of the 2006 Act, even if it was actually committed entirely within the United States. Second, by virtue of the deeming provisions contained in s. 74(1) of the 2006 Act, the offence is one which is regarded as having been committed in Ireland. Third, it follows – or, at least, so the argument runs – that extradition cannot be granted in view of the prohibition contained in s. 15 of the 2006 Act.

8. As Edwards J. recognised in his judgment of the High Court, there is a difference between the assertion of extra territorial jurisdiction on the one hand and the deeming of offences actually committed outside the State to have been committed within the State on the other. The extra-territorial jurisdiction of this State is governed by Article 29.8 of the Constitution which provides that:

> The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."

9. It follows, therefore, that the State can exercise this extra-territorial jurisdiction in accordance with the generally recognised principles of international law. As the Supreme Court explained in *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977] I.R. 129, 149 the Permanent Court of International Justice had previously clarified in the *Lotus Case* (1927) P.C.I.J. Ser. A, No.10 that every State had the power to legislate with extra-territorial effect in the sense that:

> …it may enact that acts or omissions done outside its borders are criminal offences which may be successfully prosecuted within its borders….provided that the events, acts or persons to which its enactment applies bear upon the peace, order and good government of the legislating State…."

10. Acting on these principles of international law is clear, therefore, that the Oireachtas was entitled to legislate with extra-territorial effect so that a conspiracy offence committed abroad by an Irish citizen is constituted as an offence under our law. This is precisely what has occurred in the case of s. 71 of the 2006 Act. The particular difficulty which arises in the present case results from the fact that, for some purposes at least, an offence under s. 71 committed abroad by an Irish citizen is now deemed to have been committed in Ireland by virtue of s. 74(1) of the 2006 Act, even though, shorn of the artificiality inherent in this deeming provision, the offence remains in substance an extra-territorial offence.

11. A similar deeming provision is to be found in s. 15 of the 1965 Act, since extradition is to be refused if the offence in question is "regarded" under Irish law as having been committed in this State, irrespective of whether it was in fact so committed or not. It is both the existence and the interaction of these twin legislative deeming provisions which presents the difficult question of statutory interpretation which arise on this appeal. It is, accordingly, necessary at this juncture to say something about the nature of statutory deeming offences.

The nature of deeming clauses

12. The use of deeming clauses by the Oireachtas in legislation is, of course, an established technique of statutory drafting, since it is often useful in the context of such drafting to treat for statutory purposes state of affairs A as if it were indeed state of affairs B, even if it is not so in fact. The Supreme Court has, however, made it clear that where such clauses are utilised, then the question becomes whether the deeming clause operates for all purposes, or just for some specific purpose or purposes: see generally *Erin Executor and Trustee Co. Ltd. v. Revenue Commissioners* [1998] 2 I.R. 287. As Barron J. pointed out in his judgment in *Erin Executors* ([1998] 2 I.R. 287, 302-303), the question of the extent of the deeming provision is ultimately a matter of statutory construction. I applied the *Erin Executors* principle as a judge of the High Court in my judgment *in Ó hAonghusa v. DCC plc* [2011] IEHC 300, [2011] 3 I.R. 348.

13. As it happened, the deeming provisions at issue in both *Erin Executors* and *Ó hAonghusa* were held to be limited in their effect and operation. In *Erin Executors*, a provision of the Value Added Tax Act 1972 deemed a reversionary interest to have been self-supplied by the taxpayer so that it became taxable for this purpose, even though, as Barron J. stated "it is not being supplied in fact" and this reversion " is not deemed to have been supplied for any other purpose."

14. The Supreme Court accordingly rejected the argument advanced by the Revenue Commissioners to the effect that once the VAT had been paid on the self-supply, the reversionary interest no longer remained part of the business assets of the taxpayer. Had the Oireachtas intended any other result, "it would have said so in clear terms": [1998] 2 I.R. 287, 303. Here it can be seen that the Supreme Court fully recognised the artificialities inherent in deeming clauses and the limits to such clauses.

15. As just indicated, I adopted this general approach in my judgment in *Ó hAonghusa*. In that case I held that a provision of the Liability for Defective Products Act 1991 was deemed to be relevant provision of the Statute of Limitation Acts *solely* for the purposes of the application of the date of knowledge and running of time rules, *but for no other purpose*. It followed that the general limitation period prescribed by the 1991 Act (three years) had not been reduced to two (as had been done with personal injuries claims by more recent amendments to the Statute of Limitations). As I put it ([2011] 3 I.R. 348, 354):

> The deeming provision goes no further than this. It does not deem s. 7(1) of the 1991 Act to be a provision of the Statute of Limitations for all purposes. It follows that the principal limitation period remains that of three years. Any other conclusion would mean that the limitation period contained in one statute (*i.e.*, the 1991 Act) might be taken to have been obliquely and indirectly amended by the amendments effected in respect of another statute (*i.e.*, the Statutes of Limitation Acts), in the absence of a general collective interpretation clause such that deemed the 1991 Act to be part of the Statute of Limitations for all purposes."

16. In passing I might observe that the limits of the deeming provisions at issue in *Erin Executors* and *Ó hAonghusa* were clear or, at least, could be fairly discerned by objective analysis. For all the reasons I will later set out, it is much more difficult to say the same about s. 74(1) of the 2006 Act.

17. The English courts have also struggled with deeming provisions, often in the context of complex revenue statutes where the use of deeming provisions is a common drafting technique, especially in aid of intricate anti-avoidance measures. While the specific facts of those tax cases are irrelevant to the detail of the issues in the present appeal, the statements of principle concerning the interpretation of such statutory provisions are nonetheless helpful. In *Inland Revenue Commissioners v Metrolands (Property Finance) Ltd* [1981] 1 W.L.R. 637, Nourse J. stated ([1981] 1 W.L.R. 637, 646):

> When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

18. This was developed by Peter Gibson J. in *Marshall v. Kerr* (1993) 67 T.C. 56, 79 where he stated:

> For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

19. These principles were also applied by Neuberger J. in *Jenks v Dickinson* [1997] S.T.C. 853, 878 where he stated:

It appears to me that the observations of Peter Gibson J….. in *Marshall* indicate that, when considering the extent to which one can 'do some violence to the words' and whether one can 'discard the ordinary meaning', one can, indeed one should, take into account

the fact that one is construing a deeming provision. This is not to say that normal principles of construction somehow cease to apply when one is concerned with interpreting a deeming provision; there is no basis in principle or authority for such a proposition. It is more that, by its very nature, a deeming provision involves artificial assumptions. It will frequently be difficult or unrealistic to expect the legislature to be able satisfactorily to [prescribe] the precise limit to the circumstances in which, or the extent to which, the artificial assumptions are to be made."

20. I will return later to the application of these provisions in the present case: it is sufficient to say that these English cases mirror the general approach found in *Erin Executors*, namely, that the courts should be wary of being compelled by the internal logic of such clauses to arrive at artificial results beyond the specific intendment of the deeming clause itself.

The effect of the deeming clause contained in s. 74(1) of the 2006 Act

21. Turning next to an analysis of s. 74(1) of the 2006 Act, it will be seen that it consists of two subjunctive clauses, each of which seeks to accomplish separate things. The first subjunctive clause provides that proceedings for an offence under s.71 of the 2006 Act "may be taken in any place in the State". This provision was necessary to give the appropriate venue for any prosecution in "any place in the State" in respect of any extra territorial offence arising under s. 71 of the 2006 Act. The second subjunctive clause deems the offence "as having been committed in that place", albeit that this deeming provision is only "for all incidental purposes".

22. The effect of the second subjunctive clause is to convert for certain legislative purposes what is in truth an extra territorial offence into an offence which has now been legislatively deemed for "all incidental purposes" to have been committed in the State. I cannot help observing that this second subjunctive clause is at once both unnecessary and confusing. It is unnecessary, because once venue is established and provided for (as it has been done in the first subjunctive clause), there is in fact no need to deem an extra territorial offence as one which has been committed in the State. But more to the point, the language is confusing and, I think, not necessarily helpful.

23. Section 74(1) of the 2006 Act provides that the offence "may, for all incidental purposes, be treated as having been committed in" the State. I agree, of course, that the court must have regard to the fact that the word "incidental" is used in the adjectival sense, thus cutting down the scope of the deeming provision. The offence is, accordingly, not one which has been deemed *for all purposes* to have been committed in the State.

24. But, it might nonetheless be asked, incidental to what and for what purposes? The deeming provision presumably deems this to be incidental to the place of venue. It seems to follow that in the case of prosecution in this State of the s. 71 offence, the offence is deemed to have been committed within the State, precisely because the fact of prosecution is, in this context at least, incidental to the choice of venue for the purposes of prosecution. But beyond this it is extremely difficult to say for what other purposes the offence is deemed to have been committed within the State. It is, however, sufficient to state that the offence has been deemed for at least some purposes to have been committed within the State.

The inter-action of s. 15 of the 1965 Act with s. 74(1) of the 2006 Act

25. At this point the inter-action of s. 74(1) of the 2006 Act with the provisions of s. 15 of the 1996 Act assumes an importance. Section 15 of the 1965 Act prohibits extradition where the offence is "regarded" by the law of the State as "having been committed in the State." This is, of course, a deeming provision because for this purpose it is irrelevant whether the offence was *in fact* committed in the State: what matters is whether it is *regarded* by our law as having been so committed within the territory of the State.

26. If, therefore, one asks whether an offence committed under s. 71 of the 2006 Act is regarded by our law as having been committed in the State, the bare, literal words of s. 74(1) of the 2006 Act seem to command a positive (if admittedly qualified) answer: the offence is one "regarded" by our law as having been committed in Ireland, at least for certain purposes.

27. In the present case, however, I do not think that such a literal construction would be appropriate. It is perhaps one thing to treat statement of affairs A as if it were state of affairs B for one particular statutory purpose, even though this is not the case as a matter of fact. It is, however, quite another thing to pile one deeming provision from one legislative era upon another quite different deeming provision enacted some time later. The appellant's argument effectively says that because the first deeming provision in question (namely, s. 74(1) of the 2006 Act) provides that A must be treated as if it were B, while the second deeming provision in question (namely, s. 15 of the 1965 Act) provides that B must be treated as it were C, it follows that the joint operation and interaction of these deeming provisions is such that A must then be treated for this quite different statutory purpose as if it were C.

28. While the appellant's argument has something of a mathematical symmetry about it, the precepts of statutory interpretation are not branches of the laws of mathematics and, as

Holmes so famously observed, it would be a mistake to treat them as such. This is especially so given the artificiality which is inherent in a statutory deeming provision. The present case well illustrates how the inter-action of two different such deeming provisions in quite different statutory contexts is such that, if followed in some quasi-mathematical linear progression, it is liable to produce results which were never legislatively intended or envisaged: this, after all, is the very point which was made by both Barron J. in *Erin Executors* and by Neuberger J. in *Jenks.*

29. It is true that statutory provisions governing extradition arrangements should, in general, at least, be construed rigorously, if admittedly not quite with the same strictness which might apply in the case of criminal statutes. But I consider that this Court is nonetheless free to depart from a strictly literal construction when this is the product of separate and necessarily artificial assumptions made for drafting purposes in two quite different statutes which are not in pari material and where all of this leads to results which could not have been intended or foreseen by the Oireachtas. This was the very freedom claimed in the context of deeming provisions by Peter Gibson J. in his judgment in *Marshall* and I consider that a similar freedom might conveniently be claimed here.

Conclusions

30. It follows, therefore, that I consider that the prohibition on extradition contained in s. 15 of the 1965 Act should be interpreted as applying only to offences which are actually regarded by the law for all purposes as having been committed in this State. On this construction s. 15 does not apply to offences such as that created by s. 71 of the 2006 Act which are, in substance, extra-territorial offences committed on the territory of another state by Irish citizens, even if such offences are deemed for certain purposes by quite different statutory provisions to have been committed in this State, especially perhaps for the purposes of conferring jurisdiction as to venue.

31. While the matter does not at all arise in the present case, I would nonetheless observe that quite different considerations may

well apply in the special case of offences committed outside the territory of the State on Irish-registered vessels and aircraft.

32. In these circumstances I agree that the appeal should be dismissed and that the order made by Edwards J. in the High Court should be affirmed.