### THE HIGH COURT

### **CIRCUIT APPEAL**

2017 No. 210 CA

**BETWEEN** 

#### THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

**PLAINTIFF** 

AND

### JACK McCARTHY

#### THERESE McCARTHY

**DEFENDANTS** 

## NOTE OF EX TEMPORE RULING of Mr. Justice Garrett Simons delivered on 2 July 2019

### INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The underlying proceedings seek an order of possession in respect of unregistered land. The order had been sought in circumstances where the plaintiff bank contends that it has a valid mortgage over the property, and that a power of sale and right to possession have arisen. The Circuit Court (Judge Linnane) made an order in favour of the plaintiff bank in 24 April 2017. The defendants have brought an appeal against that order to the High Court. The appeal came on for hearing on Tuesday 2 July 2019.

### **APPLICATION TO STRIKE OUT**

- 2. This ruling is confined to an application made by the defendants to strike out the proceedings in their entirety. This application was made by way of notice of motion filed in the Central Office of the High Court on 21 June 2019. The motion is grounded on an affidavit of Therese McCarthy, the second named defendant herein. The motion had initially been allocated a return date of 21 October 2019. However, by order of the High Court (Noonan J.), this motion was listed for hearing together with the substantive appeal on 2 July 2019
- 3. In circumstances where the motion raises a jurisdictional issue which, if well founded, would have implications for the continuation of the proceedings, the motion was heard first, i.e. ahead of any hearing on the appeal itself.
- 4. The application to strike out the proceedings is one which can only be described as preposterous. The application is predicated on an argument that *all* court summonses and *all* court orders are invalid. The basis for this argument involves an allegation that in proceedings taken in 2006 (described below), the Director of Public Prosecutions failed to deliver a defence within the time limited by an order of the High Court, and that the Director was, in effect, treated by the courts as being immune from having to comply with court orders. The argument then runs to the effect that—in accordance with the guarantee of equality under Article 40.1 of the Constitution of Ireland—the defendants must also be regarded as immune from having to comply with any court order.
- 5. In support of this argument, Ms McCarthy has exhibited a number of orders from proceedings entitled "Eugene Cafferkey, Plaintiff, and the Director of Public Prosecutions, Defendant". These proceedings bear the High Court Record Number 2006 No. 114 P. These are the proceedings in which, it is alleged, the Director of Public Prosecutions was treated as being immune from having to comply with court orders.
- 6. In truth, there is nothing in the exhibits which bears out this allegation. Rather, what emerges is that the proceedings taken by Mr. Cafferkey in 2006 were dismissed on the grounds that they disclosed no reasonable cause of action. The order of the High Court (Lavan J.) of 13 November 2007 dismissing the proceedings was subsequently upheld by the Supreme Court by order dated 28 October 2011 (Supreme Court Appeal No. 334/07). In circumstances where the proceedings were dismissed, there could no obligation on the Director to deliver a defence in the proceedings.
- 7. There is no suggestion that any complaint of an alleged contempt was ever made against the Director of Public Prosecutions in respect of the proceedings by Mr Cafferkey, still less that the Director was found to have been in contempt of court.
- 8. Notwithstanding that his proceedings were dismissed in 2007, it seems that Mr. Cafferkey attempted to reagitate his proceedings subsequently. This attempt was dismissed by an order of the Supreme Court dated 31 July 2018 (McKechnie, O'Malley and Finlay Geoghegan JJ.).

# **DECISION**

- 9. The fundamental allegation underlying the application on 2 July 2019 to have the within proceedings struck out is entirely unsustainable. There is no evidence that the Director of Public Prosecutions had been in breach of any court order. Moreover, even if it had been demonstrated that the Director had breached a procedural order in a single case some twelve years ago—and I repeat that this has not been demonstrated—this could not conceivably give rise to the collapse of the entire court system as contended for by Ms McCarthy, whereby all individuals would thereafter be immune from ever complying with court orders.
- 10. Given the fact that the application to strike out the proceedings was obviously without merit, I made an order on 2 July 2019 dismissing the application in its entirety. Ms McCarthy then immediately applied to have me recuse myself on the basis that I had allegedly denied her right to equality under Article 40.1. I refused this application in circumstances where it too had no merit. The fact that a judge has ruled against a party to litigation on a preliminary application cannot give rise to any reasonable apprehension of bias on the part of the judge against that party. My ruling was made on the basis of a straightforward application of legal principles.
- 11. Ms. McCarthy next indicated an intention to appeal my order. In the circumstances, I have arranged for this short note explaining my ex tempore ruling to be prepared. A copy of same will be circulated to Ms McCarthy and the solicitors acting for the plaintiff bank.

### **SECTION 39 OF COURTS OF JUSTICE ACT 1936**

12. It will be a matter for the appellate courts to determine the nature and extent of any right of appeal which arises in

circumstances where the motion seeking to strike out the proceedings was issued in the context of an existing appeal from the Circuit Court. In the ordinary course of events, the judgment of the High Court on an appeal from the Circuit Court shall be final and conclusive and not appealable. See section 39 of Courts of Justice Act 1936. (This is subject always to the right under Article 34.5 of the Constitution of Ireland to petition the Supreme Court for leave to appeal.)

13. Section 39 might not apply in circumstances where my order of 2 July 2019 is not dispositive of the appeal from the Circuit Court.