

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

GREGORY HUGHES

Plaintiff;

-and-

ST PATRICK'S ARCHDIOCESAN TRUST LIMITED

Defendant.

GILLEN LJ

Introduction

[1] In this matter the plaintiff claims for specific performance and damages arising from the alleged breach of an agreement in writing by the defendant to sell to the plaintiff premises at 19, 21, 23 and 25 Shamble Lane, Dungannon, County Tyrone (the premises).

[2] On 30 January 2013 of the Right Reverend Monsignor Colum Currie (Monsignor Currie) signed a Law Society General Conditions of Sale Contract for the sale of those premises. Mr Sean McGrath solicitor of P A Duffy and Company, Dungannon acted as a solicitor to the defendant and Monsignor Currie in the sale.

[3] The issue in this case is essentially whether Monsignor Currie had actual, ostensible or apparent authority to enter into a contract for the sale of property on behalf of the defendant. It is the defendant's case, as set out in the Defence of 7 November 2013 that the contract was signed by a priest who did not have actual ostensible or apparent authority to enter into the transaction and that he was not a trustee as specified in the formal trust deed which strictly governs the parties who have the authority to sell the property.

The issue before the court

[4] The issue now before the court is whether the plaintiff ought to be granted leave to issue two Khanna subpoenas to each of Monsignor Currie and Sean McGrath, solicitor.

[5] The material sought to be produced under these subpoenae is any document, howsoever described, containing any information relating to:

- (i) The sale, purchase or lease of property by Monsignor Currie acting on behalf of the defendant, as agent of the defendant or acting with the knowledge of the defendant.
- (ii) Communications made by or on behalf of Monsignor Currie with the defendant or any officer, member, shareholder, director or employer of the defendant company in relation to the sale, purchase or lease of any property.

[6] The plaintiff has already brought an application for specific discovery pursuant to Order 24 Rule 7 of the Rules of the Court of Judicature (NI) 1980 on 9 September 2014. That application was adjourned by the Master to afford the plaintiff an opportunity to amend his application and, after amendment, the application for specific discovery against the defendant amounted to a request for “property purchases, property sales and leases entered into by Monsignor Currie on behalf of the parish”.

[7] In response to the amendment the defendant’s solicitors sent open correspondence to the plaintiff’s solicitor stating:

“We are instructed that the Monsignor did not enter into any property transactions of the nature you have described.”

[8] At the hearing of the application on 28 April 2015 the Master dismissed the plaintiff’s summons for specific discovery. The plaintiff did not appeal the Master’s decision. It seems that instead the plaintiff has brought the ex parte applications for leave to issue Khanna subpoenas before the court. At the hearing of the applications on 7 September 2015 by consent this court ordered the matter to proceed on notice.

The plaintiff’s case

[9] Mr Orr QC, who appeared on behalf of the plaintiff with Mr O’Keefe, in the course of a concise and comprehensive skeleton argument augmented by oral submission made the following points:

- The issue of specific discovery determined by the Master is not res judicata on this issue since the relief now sought is not against the defendant but against different parties.
- Notwithstanding that the defendant's solicitor has said that the parties who are the subject to the current application have no documents, the plaintiff still has the right to explore every avenue in the interests of justice. In England an application can be made to the court for disclosure by a person who is not a party to the proceedings. The court may make such an order where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or save costs. This is pursuant to the Supreme Court Act 1981 Section 34(2) (amended by SI 1998/2940).
- In Northern Ireland a party in the position of the plaintiff must rely on the mechanism devised by the court in Khanna v Lovell White Durant [1994] 4 All ER 269.
- Although this action has not been set down, the pleadings have closed and, following the overriding principles of Order 1 Rule 1A, this step should be taken now to open up appropriate enquiries.
- The decision was taken not to appeal the Master's order because it was considered more appropriate to make this application in light of the denial that Monsignor Currie had any right to act for the parish and the current relief is not sought against that defendant but the two persons named in the subpoena.
- The action, albeit not yet set down, is at an advanced stage with a date for trial in the new year.

The submissions of the defendant

[10] Mr Lockhart QC, who appeared on behalf of the defendant with Ms McConnell, in equally succinct and well-marshalled arguments, made the following points:

- The plaintiff has provided no justification for the use of this process prior to the setting down of the action.
- The plaintiff's application does not identify with any precision the documents or class of documents required to be disclosed.

- These are the same documents as those sought in the plaintiff's unsuccessful specific discovery summons before the Master.
- There is no evidence that these documents actually exist. This is a fishing exercise.
- This application is oppressive and an abuse of process. They are an attempt to obtain discovery by the back door.

Conclusion

[11] I have come to the conclusion that this application must be dismissed. The leading authority in Northern Ireland on such applications is found in Reid v Newtownabbey Borough Council [2007] NIQR 106. In that matter Morgan J set out, and adopted, the suggestions in the 13th report of the Law Reform Advisory Committee for Northern Ireland that the grounding affidavit for Khanna subpoenas should contain eight matters set out in paragraph [11] of the judgment. These included, at paragraph [11](g), whether the documents have been sought from the third party on an informal basis and if not why it is considered necessary to apply for a subpoena to require the production of the documents before such an informal request is made. I am not of the opinion that this application sets out clearly or sufficiently precisely the documents which are required in terms of timeframe or transactions involved. There is no evidence that either of these witnesses have any such documents and indeed it has been expressly denied, albeit by the solicitor on behalf of the Trust, that such documents exist.

[12] Although this is not an instance of *res judicata*, the fact of the matter is that the Master explored in some detail the criteria necessary to make an order for disclosure against the defendant to the proceedings. He looked at precisely these arguments that are now being put before this court and, having afforded the plaintiff an opportunity to amend their application, still concluded that an insufficient case had been made out to grant disclosure of such specific documents. This matter was not appealed. I see no reason to depart from the thinking of the Master in this matter. This application is far too speculative and there is a complete absence of evidence placed before this court to the effect that such documentation exists or has ever been or is now in the possession of these witnesses. It is an attempt to get around the decision of the Master to refuse specific disclosure without invoking the appeal procedure.

[13] I therefore endorse the approach adopted by Mr Justice O Caoimh in McConnell v Commissioner of the Garda Siochana and Others [1977] No. 2849P in the High Court in the Republic of Ireland where he said:

“I am satisfied that the court in granting an order for a subpoena duces takem should have material before it showing that the documents sought to be produced

are relevant to the claim made. In Fitzpatrick v Wymes [1976] IR 301 Walsh stated, inter alia, at p. 311 ...'No person can be a witness unless his evidence is relevant and admissible. As a summons to attend the hearing involves a liability of imprisonment if the person does not attend, it is not unreasonable and does not create any injustice that a prospective witness should not be compelled to attend the hearing unless his evidence is material to the proceedings. The fact that in most, if not all, court proceedings witnesses may be summoned without that precondition does not give a litigant a fundamental right to do so'."

[14] Matthews and Malik "Disclosure (2nd Edition)" at chapter 8 dealing with production by non-parties at paragraph 8.11 summarises the position as follows:

"The courts are astute to ensure that witness summons are kept within sensible bounds. Thus a summons which is in effect a request for discovery from third party and lacks precision will be set aside as being an improper use of the procedure. The summons must not be a fishing or speculative exercise. The request must be based on some reason to believe that the recipient actually has the document sought, i.e. it is not simply fishing."

[15] At paragraph 8.13 the authors go on to say:

"If specific disclosure of documents as between the parties has been refused by the court, that is a cogent factor against treating such documents as the proper subject of a witness summons." (See Steele v Savour [1891] 8 TLR 94).

[16] This plaintiff has already attempted to obtain such documentation by one route, namely through the Master in his application for specific discovery, and that having failed he is now attempting to obtain a successful outcome by the back door.

[17] In all the circumstances therefore I refuse the application. I shall invite counsel to address me on the issue of costs.