APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Neutral Citation Number; [2025] IECA 32

Appeal Number: 2024/225

Allen J.

Meenan J.

Hyland J.

BETWEEN/

OSSORY ROAD ENTERPRISE PARK LIMITED

PLAINTIFF

- AND –

DECLAN ROGERS, TOM HARTY

AND

ROGERS RECYCLING LIMITED

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 7th day of February, 2025

1. This is an appeal by Mr. Declan Rogers and Rogers Recycling Limited *("the appellants")* against a judgment and order of the High Court (Oisín Quinn J.) setting aside a number of *subpoenas duces tecum*.

2. In the 1990s, Mr. Rogers purchased a number of units in an industrial park at Ossory Road, Dublin 3. By deed of mortgage dated 13th January, 2005 he mortgaged those properties to Allied Irish Banks plc *("AIB")*. Mr. Rogers defaulted on his loans and on 20th February, 2016 AIB appointed a receiver. On 17th January, 2020 AIB assigned the loans and security to Everyday Finance DAC *("Everyday")*. By agreement made on 24th September, 2021 Everyday agreed to sell the properties to a consortium of investors. Ossory Road Enterprise Park Limited *("OREP")* was incorporated as a special purpose vehicle to take the assurance and the sale and purchase was completed on 6th December, 2021. However, Mr. Rogers continued to collect the rents.

3. By plenary summons issued on 17th December, 2021 OREP issued proceedings claiming a variety of injunctions restraining Mr. Rogers from interfering with or collecting the rents in respect of the properties and damages for trespass. In the course of the exchange of affidavits on OREP's motion for interlocutory relief, it was said by Mr. Rogers that a company controlled by him, Rogers Recycling Limited, had a lease of one of the units and it was joined as a defendant.

4. As is often the case, the initial focus of the parties' attention was on the interlocutory motion but the exchange of pleadings was completed by November, 2022.

5. Mr. Rogers' case was set out in his defence and counterclaim, which was delivered on 22nd September, 2022. It is not necessary or useful for present purposes to go into the detail, but the bones of Mr. Rogers' case was that Everyday had contrived and effected what was described as the *"purported"* sale of the property at a price which was less than the best price reasonably obtainable, contrary – it was said – to s. 103 of the Land and Conveyancing Law Reform Act, 2009. OREP was said to have been part of *"an artificially contrived monopsony"* which was said to have been the result of a conspiracy between Everyday, the consortium, and the receiver.

6. Separately, Rogers Recycling claimed that it was in possession of Unit No. 1 on foot of a lease granted by Mr. Rogers for 21 years from 1st July, 2012 at a rent of €300 per week from January, 2014, with the consent of AIB as set out in a letter dated 10th March, 2014. However, for present purposes it is Mr. Rogers' defence and counterclaim that is relevant.

7. Before the properties were sold to OREP, they had been the subject of an online auction on 9th April, 2021 on the BidX1 platform in which the consortium behind OREP – lead by Mr. Emmet Stokes – had participated. On that occasion, the highest bid was €1.424 million, and the next highest bid was €1.413 million. The highest bidder at that auction was a company called Tigway Limited and the underbidder was a Mr. Robert Healy. The Stokes consortium was down the field.

8. The case pleaded by Mr. Rogers in defence to OREP's claim and in support of his counterclaim for a declaration that the sale to OREP was contrary to s. 103 of the Act of 2009 and null and void and of no effect, was that there had been a conspiracy between Everyday, the receiver, the consortium and OREP to exclude Mr. Healy from the negotiations or later auctions which resulted in the sale to OREP. The price paid by OREP - €1.251 million – was less than the price previously bid by Mr. Healy – €1.413 million. Mr. Rogers' core case was that Mr. Healy had been deliberately excluded in circumstances in which, had he been informed that the property was back on the market, he would have paid the same price as he had bid in April, 2021.

9. Section 103 of the Act of 2009 imposes a duty on the mortgagee, in the exercise of a power of sale, to ensure as far as is reasonably practicable that the mortgaged property is sold at the best price reasonably obtainable. It is not necessary for present purposes to contemplate how Mr. Rogers might have hoped to set aside a sale by an action to which the vendor was not party.

10. Incidentally, all of the bids for the properties were a fraction of the secured debt so that the immediate effect of a sale at a lower price than might have been achieved was a loss to Everyday, but that is not material for present purposes.

11. Following the close of pleadings, the action took its course. There was an exchange of discovery between OREP and Mr. Rogers. The action was set down and certified on behalf of OREP and on 8th March, 2024 the trial date was fixed for 16th July, 2024. There appear to have been a number of listings before the Chancery list judge with a view to ensuring that it would be ready for trial on 16th July, 2024.

12. On 28th June, 2024 counsel on behalf of Mr. Rogers and Rogers Recycling applied *ex parte* to the Deputy Master of the High Court for an order permitting them to issue a *subpoena duces tecum* directing the attendance at the trial of the action of Brendan Keogh, Jonathan Fenn, Ken Tyrrell and Kieran Dowling; and requiring that they should each bring with them and produce at the trial *"all documents within their possession power or procurement concerning the marketing, offering for sale in an online auction, sale by online auction, and sale by private treaty of [the properties] between 1st January, 2021 and 6th December, 2021 to include all instructions given in relation to particular aspects of the auction or sale by private [treaty?] which BidX1 was to have particular regard, concerning reserves, or variation of reserves, instructions as to receipt or retainer of deposits and the release of same."*

13. The order was refused by the Deputy Master but granted by Quinn (Oisín) J. on 1st July, 2024. Quinn J. directed personal service on each of the persons named within 48 hours and gave liberty to Mr. Rogers and Rogers Recycling in the meantime to notify the persons named by email and post of the making of the order; and he gave liberty to the persons named to apply on 48 hours' notice to vary or set aside the order.

14. Mr. Keogh was the managing director of Everyday, Mr. Fenn was the chief commercial officer of BidX1, Mr. Tyrrell was the receiver and Mr. Dowling was the head of insolvency at BCM Global ASI Limited, a company that provides administrative services to Everyday.

15. By notice of motion issued on 11th July, 2024 and originally returnable for 15th July, 2024 the proposed witnesses applied for an order pursuant to the inherent jurisdiction of the High Court setting aside the order of 1st July, 2024.

16. The motion was grounded on an affidavit of the proposed witnesses' solicitor, Mr. Richard O'Sullivan, sworn on 11th July, 2024. He deposed that he had procured a copy of the pleadings and suggested that what was sought by the *subpoenas* was irrelevant, unduly oppressive and an abuse of process. He said that the proposed witnesses had or would – which they had or later did – swear affidavits that none of them were involved in the marketing of the properties for sale, or the giving of instructions with respect to the auction sale process, or the fixing of or variation of reserves, or the receipt, retaining or release of deposits and that they had no direct knowledge of the property sales in issue. He suggested that any evidence any of them might give would be irrelevant.

17. Mr. O'Sullivan went on to make the point that the proposed witnesses and the entities which they represented had not been joined as parties to the action, despite the fact that grievous allegations of conspiracy had been made against them. He suggested that the true motive behind the *subpoenas* was to allow Mr. Rogers and Rogers Recycling to ventilate a grievance against the parties whom they represented – which was already the subject of other proceedings – without being constrained by the pleadings and procedures that would otherwise apply. The other proceedings were a plenary summons issued by Mr. Rogers on 13th April 2021 against AIB, Everyday and Mr. Tyrrell in which a statement of claim had been delivered but had not been further progressed.

18. Mr. O'Sullivan suggested that an alternative motive behind the *subpoenas* might have been to address Mr. Rogers' and Rogers Recycling's failure to deal with their perceived discovery requirements before certifying the case as ready for trial. I pause here to say that it was OREP who had certified the action ready but it nevertheless was the fact – as Mr. O'Sullivan deposed – that Mr. Rogers and Rogers Recycling were seeking the production of documents of which discovery had not been sought; which, he suggested, was unduly oppressive and an abuse of process.

19. The proposed witnesses' motion was adjourned by consent from 15th July to 16th July, to be heard before the trial of the action. No replying affidavit was filed contesting the evidence on which the application was based.

20. Having heard counsel, Quinn J. gave an *ex tempore* ruling. He noted that it was agreed that the High Court has jurisdiction to set aside a *subpoena duces tecum* in circumstances in which witnesses could not give relevant evidence, where it would be oppressive, and where it is an abuse of process. All of the proposed witnesses had sworn affidavits to say that they had no knowledge of the issues between the parties. Mr. Tyrrell, in particular, although he had been the receiver, had deposed that he had no involvement in the sale of the properties the subject of the proceedings. The judge noted Mr. Rogers' expressed concern about the auction process but said that the High Court was not a tribunal of inquiry to try to get to the bottom of things. He noted that Everyday and BCM Global and BidX1 might have been joined as parties to the action but were not. Even without joining them, Mr. Rogers and Rogers Recycling had the option of seeking non-party discovery, but had not done so.

21. *"And it is not an answer",* said the judge, *"to say we want the people in charge of these organisations to bring down under their arm the entire file so that it can be then handed over and trawled over either when the court rises or during the lunch break or*

overnight while someone is waiting around to see what, if anything, they are going to be asked."

22. The judge noted that Mr. Rogers and Rogers Recycling had been unable to say what evidence they wished to elicit from the proposed witnesses. He concluded that he was not satisfied that any of the proposed witnesses could give relevant evidence; that to allow the *subpoenas* to stand would be to facilitate an abuse of process; and that it would be oppressive of the witnesses.

23. By notice of appeal filed on 28th August, 2024 Mr. Rogers and Rogers Recycling appealed on eleven numbered grounds. In the appellants' written submissions which followed, the appeal was described as an *"adjectival appeal."* Strikingly absent from the notice of appeal is any challenge to the judge's conclusions or the reasoning on which his judgment was based. Moreover, although an appeal was filed at the same time (2024 223) against the judgment and order of Quinn J. on the action and counterclaim, the setting aside of the *subpoenas* was not a ground relied upon as a basis on which the substantive judgment should be set aside. The grounds of appeal in the substantive appeal did refer to the order setting aside the *subpoenas* but embraced it as supporting the appellants' thesis that there was irregularity in the conduct of the sale. The proposition was that it was to be inferred from the fact that the proposed witnesses had objected to the *subpoenas* that there was something amiss.

24. Not only that, but the written submissions filed on behalf of the appellants proposed that this appeal was dependant on the outcome of the substantive appeal and should be left over until the determination of the substantive appeal. But on the appellants' case, the order setting aside the *subpoenas* did not impact on the outcome of the action.

25. In Grounds Nos. 1 – 3 it is said that the judge erred, variously, in setting aside the *subpoenas* well before the opening of the defence and counterclaim; in failing to postpone his

ruling until the close of the plaintiff's case; and in setting aside the subpoenas *"upon a basis summarily precipitate"*: all of which, it seems to me, amount to the same thing.

26. The respondents object that the appellants should not be heard to complain that the judge gave his ruling when he gave it, in circumstances in which he was not asked to postpone it – until the opening of the defence and counterclaim, or the close of the plaintiff's case, or whenever. However, it sems to me that the appellants' problem is more fundamental. The judge found (1) that the proposed witnesses could not give relevant evidence, (2) that the *subpoenas* were oppressive, and (3) that they were an abuse of process. It is not contended that he was wrong in any of these conclusions, or that the outcome might have been different if the judge had deferred his ruling. These grounds go nowhere.

27. In Ground No. 4 it is said that a major issue at trial was that there had been a 13% capital security loss to Mr. Rogers and a corresponding 13% capital gain to OREP which arose because *"the decision to deal with [OREP] was made by PwC. (Affidavit Robert Healy sworn 31 January 2022.)"* The 13% is the difference between Mr. Healy's bid in April, 2021 of €1.413 million and the price paid by OREP of €1.251 million.

28. As to this, it must first be said that the ground of appeal does not suggest any error on the part of the trial judge. It is the case that Mr. Roger's case was that Mr. Healy had not been contacted after the first auction and – inferentially – that if he had been the property would have been sold for more than it was. However, if the higher price that might achieved was less than the outstanding debt, any shortfall would immediately have been a matter for Everyday rather than Mr. Rogers. More to the point, Mr. Tyrrell had sworn that he had nothing to do with the sale and this was not contested.

29. If Mr. Tyrrell had been called on behalf of Mr. Rogers and had repeated that, Mr. Rogers would have been stuck with his answer. Neither the notice of appeal nor the appellants' submissions show any basis on which Mr. Healy might have concluded that the

decision not to contact him was made by PwC but if – for the sake of argument – it was, and it was not made by or with the knowledge of Mr. Tyrrell, the purpose of having Mr. Tyrrell bring his file to court could only be the hope that he would allow Mr. Rogers or his lawyers to trawl through it in the hope of finding something. If Mr. Rogers or his lawyers thought or hoped that they might have been allowed to root around the PwC files or any other files – after court or in the lunch break, that is not something that any of the proposed witnesses was obliged to permit; and in the real world, was not something that any of them would ever have countenanced. In his oral submission, counsel for the appellants contemplated that if he had been permitted to call the witnesses, he could have impeached them. But it was clear that counsel did not even know what he wanted to ask the witnesses, still less that he could conceivably have been in a position to impeach the.

30. The fifth ground of appeal is that the judge failed to act on what is asserted to be the critical distinction between the conduct of the mortgagee by open auction on the one hand and the *"decidedly private sale ('not generally open to the public' Judgment para. 6) on the other."* This references a finding in the judgment given at the end of a trial which at the time of the ruling under appeal had not commenced. It does not go to whether any of the witnesses could have given relevant evidence; or whether the *subpoenas* were oppressive; or whether they were an abuse of process. If – as the uncontested evidence before the High Court was – none of the proposed witnesses had anything to do with the sale, they could not give relevant evidence and it would have been oppressive to have them hanging around for days when they could not assist either Mr. Rogers or the court.

31. Ground No. 6 is that the judge erred *"in precipitating a decision, before the trial proper had opened, to set aside critical subpoenas upon argument that such were no substitute for third-party discovery and in the premises an abuse of process."* This in large measure repeats the point made in Grounds Nos. 1 – 3 but adds a reference to *"an argument"*

that the *subpoenas* were no substitute for non-party discovery. That is not what the judge said. He took into account the fact that Everyday, BCM Global and BidX1 might have been asked to make non-party discovery in an orderly way of any records they had which Mr. Rogers might have been able to show were relevant to any issue in the action and otherwise unavailable to him. The judge found that it was oppressive and an abuse of process to use the procedure of issuing a *subpoena duces tecum* at the last minute directed to people who knew nothing about the case to bring their company files to court, in the hope of fishing for records which had not previously been sought. Specifically, the judge contemplated that a *subpoena* might, if necessary, be used to formally prove documents which had been discovered by a non-party.

32. If the argument now advanced is that a *subpoena duces tecum* at the last minute for a file is a substitute for non-party discovery of identified relevant documents in good time, it is wrong.

33. Ground No. 7 points to the *"frank absurdity"* that while the *subpoena* for one of the appellants' proposed witnesses, Mr. Dowling, was set aside, he was called as a witness by OREP. It is said that while Mr. Rogers was able to cross-examine Mr. Dowling, he was deprived of the records and documents part of the summons. There is a fundamental disconnect here between the evidence which Mr. Dowling was in a position to give – and did give – and the *subpoena*. Mr. Dowling was called after lunch on Day 3 of the trial to prove a power of attorney from Everyday and the execution by him, on foot of that power of attorney, of a number of title documents. That took five minutes. He was then cross-examined for two minutes on the execution of a deed of rectification which, he said, had nothing to do with BCM Global; and then for two minutes asked a few questions in relation to the abortive sale of the property in April, 2021, of which he said that he knew nothing. If Mr. Dowling and BCM Global had nothing to do with the sale – and Mr. Dowling's evidence that they did not

was not challenged – the setting aside of his *subpoena* cannot have deprived Mr. Rogers of anything.

34. The eight ground of appeal is that *"Any application for third-party discovery is all too commonly met with the same colourably easy ad hominem objection of 'abuse of process'"*. If this reflects the experience of Mr. Rogers' legal team, it is not a valid ground of appeal.

35. The ninth ground of appeal is that *"Such precipitate set aside ruling starves parties and the court of critical evidence."* This flies in the face of the finding of the High Court judge – against which there is no appeal – that none of the witnesses were in a position to give relevant, never mind critical, evidence.

36. The written submissions filed on behalf of the appellants are not directed to the grounds of appeal but to the supposed merits of the action: which they comprehensively lost.

37. The appellants have abjectly failed to identify any alleged error in the judge's ruling, still less engage with the findings and reasoning on which his conclusion was based.

38. I would dismiss what for shorthand I would misdescribe as the substance of the appeal on all grounds.

39. Grounds Nos. 10 and 11 are addressed to the costs order made on the proposed witnesses' motion. Specifically, as I understand it, the complaint is that the judge made an order for the proposed witnesses' costs on a legal practitioner and own client basis.

40. The transcript shows that having given his ruling on the motion on 16th July, 2024, the judge proposed to deal with the question of costs but was asked by counsel for Mr. Rogers and Rogers Recycling to leave the costs of the motion over to the conclusion of the case. It was recognised that such a course would increase the notice parties' costs – and the appellants' exposure if there was an order for those costs – but the hope appears to have been that something would emerge in the course of the trial that would somehow go to the question of the costs of the motion.

41. Although the intended witnesses' motion was addressed to and served on OREP as well as Mr. Rogers and Rogers Recycling, the costs order was in respect of the intended witnesses' costs, only. This correctly reflects the fact that the protagonists on the motion were the intended witnesses and those on whose behalf the *subpoenas* had been issued.

42. The costs of the proposed witnesses' motion were dealt with on 31st July 2024, immediately after judgment was delivered in the action. The Court was not provided with a transcript of the hearing or ruling. The respondents' notice suggests that the judge took into account his conclusion that the *subpoenas* were an abuse of process and also the fact that in the course of the trial – after the motion was heard – the appellants had tendered false evidence and a fabricated AIB letter.

43. The appellants' written submissions address the costs order in a single short paragraph, the substance of which is that because the judge's decision to set aside the *subpoenas* was wrong, he was *a fortiori* wrong to award costs on a legal practitioner and own client basis. In his oral submission, counsel suggested that the award of costs on a legal practitioner and own client basis was *"off the wall"* and *"over the top"* – which was not terribly focussed or forensic.

44. It is trite that the onus is on an appellant to identify and establish that the High Court judge made an error which warrants the intervention of this Court. As far as the costs order is concerned, this would necessarily involve engagement with the reasons given by the judge for making the order which he did. The first step to that end would have been the production of a transcript of the costs hearing, and the judge's ruling. The appellants have signally failed to engage with the judge's reasons. It follows that they cannot hope to establish that the judge was wrong. It may very well be that the appellants had an argument to make that in allocating the costs on the proposed witnesses' motion, the judge ought not to have taken into account the conduct of the appellants in the course of the action to which the proposed

witnesses were not party: but this was not a ground of appeal. Without a transcript of the judge's ruling on costs, it is impossible to say what factors were taken into consideration, or what weight may have been attached to them.

45. The onus is on the appellants to articulate the grounds of appeal and to ensure that the Court is in a position to address them. The appellants having failed to do either, the appeal against the costs order must also be dismissed.

[Meenan and Hyland JJ. agreed]