THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 224

Record Number: 2018/371

Baker J.
Whelan J.
Collins J.

BETWEEN/

THOMAS KEARNEY

APPELLANT

- AND -

BANK OF SCOTLAND PLC AND PATRICK HORKAN

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 5th day of August 2020

Introduction

1. On 8 April 2020 the court's unapproved judgment in the above appeal was delivered electronically.

2. A number of consequential issues fall now to be addressed including:

   (1) Mr. Kearney's notice of motion seeking a review of the unapproved judgment;

   (2) two amendments sought by the receiver under O. 28, r. 11 ("the slip rule");

   (3) the terms of the Isaac Wunder order to be made by the court;

   (4) the terms of the issue remitted to be tried by the High Court;

   (5) costs; and,

   (6) a stay in respect of any costs order made pending final determination of the proceedings.

Issue One - Application for review

3. In his affidavit of 12 June 2020 seeking a review of the unapproved judgment Mr. Kearney deposed at para. 2: -

> "…From the outset I make this application in full knowledge of my dependence on the forbearance of this Honourable Court. I say, I am mindful of the Court's remit as regards matters of general public importance and constitutional matters."

4. A written submission was filed by Mr. Kearney in support of his application for review "on the grounds of constitutional justice in what are exceptional circumstances involving property rights and equality rights" (para. 27). Mr. Kearney in his submission acknowledges at para. 8: "Obtaining the relief sought requires this appellant to discharge a very heavy onus." In his submissions he placed reliance on the jurisprudence including the recent decision in *Launceston Property Finance DAC v. Wright* [2020] IECA 146 which reviewed the earlier case law.

5. The complaints made by the appellant include, in relation to para. 33 of the judgment, that the words used:-

> "…did not represent this applicant's presentation in written submissions which were provided to all parties including the Court. The Court has applied the words 'can only be interpreted to mean'. The written document provided to the Court expressly stated 'must be interpreted to mean'. The submission presented by this applicant referenced a preliminary decision of the Court of Justice (Third Chamber) and the written opinion of the Advocate General which was provided to the Court of Justice for its ruling in; *K.A. Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group* Case – 483/14."

Mr. Kearney contends that para. 33 of the judgment "does not reflect what was presented". He complains that the judgment does not refer to the opinion of the Advocate General in *K.A. Finanz* (Case C-483/14), EU:C:2015:757, or the CJEU decision, EU:C:2016:205. He states that he relied upon *K.A. Finanz* at the hearing to make the argument that the Central Bank Act 1971, rather than the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157/2008), was the law chosen by the parties at the time when the contract was first concluded. It should be noted, however, neither in his notice of appeal nor the written submissions filed on 26 March 2019 did the appellant expressly refer to the opinion of the Advocate General or the decision of the CJEU in *K.A. Finanz* or the Central Bank Act 1971. These new points were first raised by Mr Kearney at the hearing of the appeal. Mr Kearney did not elaborate on the significance of the Advocate General's opinion, or the 1971 Act, to the issues on appeal.

6. The appellant takes issue with paras. 87 and 88 of the unapproved judgment contending *inter alia* that they do not reflect verbatim the submissions he made to the court.

7. The appellant takes issue with paras. 134 to 136, inclusive, of the judgment. With regard to para. 134 he states:-

> "…this appellant submits that I did not deny the availability of Directive 2005/56 EC to facilitate the cross-border merger. At no point was a submission of that nature put to the Court."

8. Regarding para. 135 of the judgment the appellant states:-

> "This applicant did contend that the Irish regulations in particular 19(1)(g) and (h) were an example of interference in private contracts which were signed prior to their enactment".

It was also argued *inter alia*, "Such actions as carried out by BOS plc are an attack on past decisions of the Supreme Court which shall be referred to in due course."

9. It was further argued that para. 136 of the judgment "completely misunderstands the position of this applicant". The applicant asserts he "never suggested… that the mortgages vanished or ceased to exist following the 31st December 2010." With regard to the Supreme Court decision in *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555 the appellant asserts that the decision:-

> "…binds this Court in relation to certain aspects of this merger. However, the decision centred on the contractual right of BOS plc to appoint a receiver when not registered as owner of the charge. The court found albeit in the *obiter* comments of Laffoy J. that as a matter of contract BOS plc was entitled to appoint a receiver, however the receiver, absent registration, had no power of sale."

10. Mr. Kearney states: -

> "This applicant does not or did not suggest the Irish Regulations cannot be imposed on contracts signed following the date of their enactment on the 26th May, 2008. This submission is confined to this contract which was signed prior to this referenced date of the 26th May, 2008. Reference is made to past decisions of the Supreme Court in relation to retrospective legislation."

He placed reliance on the decisions in *Dublin City Council v. Fennell* [2005] IESC 33, [2005] 1 I.R. 604 and *Hamilton v. Hamilton* [1982] I.R. 466 and asked the court to permit the review on the grounds of constitutional justice in what he characterised as "exceptional circumstances involving property rights and equality rights."

11. The respondents oppose the application for review of the judgment.

Determination on Mr. Kearney's application for review

12. I am satisfied that the application ought to be refused. In substance, each of the points raised by Mr. Kearney amounts to an impermissible application to re-litigate the appeal on the merits.

13. The approach of the court to an application to review has been the subject of recent decisions of this court including *Friends First Managed Pension Funds Ltd. v. Smithwick* [2019] IECA 197 and *Launceston Property Finance DAC v. Wright*. As the appellant acknowledges, the jurisdiction to review or set aside a judgment is an exceptional one. The Supreme Court noted in *DPP v. McKevitt* [2009] IESC 29, p. 4: -

> "…Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the

grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant."

14. As was observed by this court in *Friends First Managed Pension Funds Ltd. v. Smithwick* and cited subsequently with approval at para. 5 of *Launceston Property Finance DAC v. Wright*:-

> "16. Implicit in the jurisprudence is the importance of proportionality and finality. The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect."

15. In summarising the ambit of the review jurisdiction, the decision in *Launceston Property Finance DAC v. Wright* noted that:-

(i) it is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

(iii) it requires the applicant to discharge a very heavy onus;

(iv) it is not for the purpose of revisiting the merits of the decision;

(v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) it cannot be invoked on the basis of the discovery of new evidence;

(vii) it requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) it cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment; and,

(ix) it is to be distinguished from the application of the slip rule in respect of errors of fact which have no bearing on the outcome.

16. I am satisfied that no point raised is meritorious or meets the "wholly exceptional" threshold. It is clear that the appellant disagrees with the views expressed and conclusions reached in those parts of the judgment where his grounds of appeal did not succeed. There is a substantial rehearsal of arguments advanced orally and in writing at the hearing, which have been substantively dealt with by the court's earlier judgment. Nowhere does the appellant meet the threshold or discharge the very heavy onus to succeed in the application. He has not demonstrated that there is any fundamental issue concerning a denial of justice, nor is any error identified of such a fundamental nature as to engage an issue of constitutional justice or have an effect on the result. Beyond

repeated bare assertions the appellant fails to satisfy the very high threshold for such an application to be viable.

17. This court is not obliged to address each and every point advanced in an appeal or to characterise same in its judgment by means only of a verbatim transcription of the words or language used by a party to the appeal at the hearing. As was observed by Clarke J. (as he then was) in *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505, the imperative is that a judgment engages with the key elements of the case advanced by both sides and identifies why one side's view is preferred and the reasoning why they have succeeded on that issue in the appeal. Even if the judgment had transcribed verbatim the contentions of the appellant the outcome would be no different. The judgment did engage comprehensively with the appellant's arguments without having to exhaustively rehearse and regurgitate each authority (however inapposite, incoherent or specious) purported to be relied upon. In any case, the opinion of the Advocate General is non-binding.

18. The application in substance seeks to revisit the merits of the decision of this court in the substantive judgment with regard to each of the points identified. On these issues it is clear the appellant seeks to reopen and reargue the grounds of appeal in respect of which he was not successful with a view to having the court reach a different conclusion. Such an approach is impermissible. If the appellant disagrees with this view or any conclusion reached it is open to him to seek leave to appeal to the Supreme Court.

Issue Two – Matters in the unapproved judgment requiring clarification – application of the receiver

19. The receiver identified two points requiring clarification at paras. 7 and 106 of the unapproved judgment which are minor factual inaccuracies requiring to be amended under O. 28, r. 11 RSC ("the slip rule"). The said application is granted.

Issue Three - The terms of the Isaac Wunder order

20. The appellant has succeeded in having the terms of the Isaac Wunder order made by the High Court varied. The terms of the order are set out in an appendix to this judgment.

Issue Four- Issue remitted to High Court for determination

21. With regard to the single issue remitted to the High Court for determination, the terms of the order are set out in an appendix to this judgment.

Issue Five - Costs

22. Turning then to the proper allocation of costs, the bank points out that the appellant made a series of allegations against it, including that the registration of the bank as owner of the charge on the folios which formed part of the secured property, comprising both registered and unregistered land, was invalid. Secondly, he alleged that the sums claimed as secured by the Deed of Mortgage and Charge of 14 January 2004 were not lawfully due and owing and thirdly, had alleged that the bank could not lawfully have appointed the receiver since it was not registered as owner of the charge on the folios which formed part of the secured property.

23. The bank observes that an order was made in the High Court as against the appellant in respect of his unsuccessful stay application and he did not appeal against that order.

24. The bank contends that, whereas the appellant did not persist with the contention pleaded in his statement of claim that there was a registration infirmity in respect of the security originally registered in favour of the bank on the relevant folios comprising part of the secured property and did not persist with the argument that there was no money due and owing in relation to the underlying loan facilities, the following matters were relevant in the context of a determination of the issue of costs:

    (a) that he made a "last minute application" on the morning of the hearing seeking to pursue a separate application to the Supreme Court, which application was refused (see: para. 148 of the unapproved judgment); and

    (b) that the appellant was unsuccessful in his allegation that there was a legal infirmity at the heart of the cross-border merger between BOSI and BOS. Reliance was placed on paras. 85 to 88, para. 103 and paras. 134 to 138 of the unapproved judgment.

25. Reliance was also placed on the fact that the appellant had failed to secure a discharge of the Isaac Wunder order made by the High Court although he did succeed in having the extent of it modified. Finally it was contended that the appellant had succeeded in one element only of his claim, namely that he be permitted to proceed to have the validity of the appointment of the receiver, and whether the Deed of Appointment of 5 July 2012 was effective for the purposes of Clause 8.1 of the Deed of Mortgage and Charge dated 14 January 2004, determined. The bank contends that its decision to bring an application to the High Court to have the proceedings dismissed and seeking a limited Isaac Wunder order has "largely been vindicated by the decision of the Court of Appeal". The appellant had been wholly unsuccessful in his application for an adjournment and wholly unsuccessful in his allegations regarding the legality and effect of the cross-border merger between BOSI and BOS. The bank submits that in light of the determination of the issues there is a strong argument to be made in its favour for an order for a significant portion of the costs as against the appellant in both the High Court and the Court of Appeal.

26. Should the court consider that the appellant's success in overturning the judgment and order of the High Court striking out his claim on the single issue identified by this court warrants an award of some measure of costs, the bank argues that this should be limited to 25% of the appellant's expenses in pursuing the appeal as against the bank and the receiver.

27. On a without prejudice basis and in light of the requirement to endeavour to agree a form of order where possible in light of the restrictions due to the Covid-19 pandemic, the bank proposed in the alternative that the court should make no order as to costs in respect of the appeal.

28. On behalf of the receiver, it was contended that, in regard to the motion wherein the appellant had sought to have the proceedings transferred to the Supreme Court and have the Attorney General joined as a notice party, if a costs order was not made on the day the receiver seeks his costs thereof.

29. In regard to the appellant's application on the morning of the hearing of the appeal seeking an adjournment pending determination of an application then recently made to the Supreme Court for a leapfrog appeal, the receiver did not seek costs in respect of dealing with that issue. The receiver contends that the appellant should receive 25% of his costs of (a) the appeal, and (b) the receiver's motion to dismiss in the High Court when taxed and ascertained.

Determination on costs

30. At the date of the initiation of the appeal the legal regime governing the award of costs was defined by the general discretion of the court as specified in O. 99, r. 1(1) RSC. In particular, O. 99, r. 1(3) RSC provided that the costs of every "action, question and issue tried" followed the event.

31. The current legislative basis for the awarding of costs is now to be found in the provisions of ss. 168 and 169 of the Legal Services Regulation Act 2015, which came into operation on 7 October 2019, and the recast O. 99 RSC introduced by S.I. No. 584/2019 which took effect from 3 December 2019. At all events the vast bulk of costs would have been incurred prior to either date. Having considered both iterations of O. 99 RSC, I conclude that, on the particular facts and circumstances here, no material difference to the determination on costs would arise irrespective of which regime is to be applied. No arguments to the contrary were advanced by any of the parties.

32. The essential principle is that costs follow the "event". As was observed by Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81 at para. 12, the event in question involves the securing of a substantive or procedural entitlement which could not be obtained without the hearing concerned.

33. The appellant is a litigant in person. He does not appear to have retained legal representation, either before the High Court or before this court. Murray J. in this court in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 considered the scenario where an event is identified but where the party who prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case. He observed: -

> "In that circumstance the successful party may obtain his costs but may suffer two deductions – one in respect of his own costs in presenting that issue, and the other requiring him to set off against such costs as are ordered in his favour, the costs of his opponent in meeting it (see *Veolia* at para. 2.10 *and O'Mahony v. O'Connor* [2005] IEHC 248, [2005] 3 I.R. 167). Both *Veolia* and *M.D*. make it clear that an order splitting costs in this way is very much the exception where the winner of an event has been identified and, in particular, should only be made where (a) the proceedings involve multiple issues and therefore are (as variously suggested in the judgment) 'complex'… and/or not 'straightforward'…, (b) where the raising of the issues on which the otherwise successful party failed to prevail could have affected the overall costs of the litigation 'in a material extent' (*Veolia* para. 2.14) and (c) where the court can readily separate and identify the costs so arising."

Motion to transfer appeal

34. There was the motion before the court wherein the appellant sought to stay the hearing of the appeal so that he could in effect have the appeal transferred for determination by the Supreme Court or procedurally pursue an application to the Supreme Court to hear his appeal by way of leapfrog. He also sought leave to join the Attorney General as a notice party to the proceedings. The application therefore engaged s. 9 of the Court of Appeal Act 2014 which in turn inserted s. 7B of the Courts (Supplemental Provisions) Act 1961 providing that this court has power to grant a stay on an appeal and permit an application be made to the Supreme Court for leave to appeal pursuant to Article 34.5.4°.

35. In the circumstances the court is disposed to make no order in regard to those costs as the application did not detain the court unduly.

High Court order as to costs

36. The parties agree that the order as to costs made in the High Court requires to be vacated. With regard to the substantive hearing in the High Court, it encompassed far reaching assertions. The respondents succeeded in obtaining significant orders many of which have either not been appealed at all or unsuccessfully appealed against. In the circumstances the respondents are each entitled to 75% of their costs in the High Court as against the appellant.

Costs of the appeal

37. With regard to this appeal, in all the circumstances, the most equitable approach having particular regard to the clear terms of the written and oral submissions of all parties is that no order as to costs should be made.

Issue 6 – Stay and orders pending determination of proceedings

38. A stay will be granted on the execution of the aforesaid order as to costs in the usual terms pending conclusion of the above entitled proceedings. Otherwise, no valid basis has been made out by the appellant for this court making any orders as could interfere with the receivership pending determination of the proceedings.

39. Baker J. and Collins J. concur with this judgment.

APPENDIX I

"**IT IS ORDERED** that the within proceedings be remitted to the High Court for determination of the sole question whether the appointment of Patrick Horkan as "Receiver" by deed of appointment dated 5 July 2012 was valid pursuant to clause 8.1 of the Charge (as defined in the Part 1 of the Schedule hereto) conferring on the mortgagee the power to appoint a "receiver and manager" over the Secured Property (as defined in Part 2 of the Schedule hereto);

AND IT IS ORDERED that, in lieu of the Isaac Wunder order of the High Court, the Appellant, his servants, agents and/or proxies be, and hereby are, restrained from instituting any proceedings that seek to impugn any or all of:

(i) the validity of the cross-border merger of Bank of Scotland Limited with Bank of Scotland plc;

(ii) the title of Bank of Scotland plc or of any lawful assignee (including Pentire Property Finance DAC) to the Charge;

(iii) the validity of the assignment of the said Charge by Bank of Scotland plc to Pentire Property Finance DAC;

(iv) save on the sole ground hereby remitted to the High Court for determination in the within proceedings, the right of Bank of Scotland plc to appoint the receiver or the validity of the appointment of the Receiver and all acts done by him

without prior leave of the President of the High Court, or some other judge nominated by the said President, such leave to be sought by an application in writing addressed to the Chief Registrar for the time being of the High Court

Without prejudice to the Order of the High Court (McGovern J.) that each of the first and second Respondents should recover as against the Appellant the costs of the Appellant's Motion to Stay (being a motion dated the 12th day of April, 2018), **IT IS ORDERED** that the order for costs against the Appellant made by the High Court (McGovern J.) in respect of the Respondents' motions to dismiss, be and hereby is vacated and that, in lieu thereof, **IT IS ORDERED** that the first named and the second named Respondents do each recover as against the Appellant 75% of their respective costs of their respective High Court motions the subject of this appeal **AND** there be no Order as to costs of this appeal, including the appellant's motion to have the appeal stayed in order to pursue an application for leave to appeal to the Supreme Court and to have the Attorney General joined as a notice party to the proceedings, in the circumstances

AND IT IS ORDERED that execution of the said costs order be stayed pending final determination of the proceedings

AND IT IS ORDERED that save as herein provided the Appellant's appeal is dismissed

SCHEDULE – PART 1

THE CHARGE

The deed of mortgage or charge made the 14th day of January, 2004 pursuant to which Thomas Kearney as continuing security for the payment and discharge of the secured obligations (as defined therein) and as legal and beneficial and registered owner or the person entitled to be registered as owner charged the property (as therein described) in favour of Bank of Scotland (Ireland) Limited, the benefit of which was thereafter transferred to Bank of Scotland plc pursuant to a cross-border merger and, thereafter, assigned to Pentire Property Finance DAC.

SCHEDULE – PART 2

THE SECURED PROPERTY

ALL THAT AND THOSE the lands and premises known as the Sleepzone Hostel, St Brendan's Avenue & Bothar Na mBan, County Galway being part of the property formerly known as 27, 28, 29 and 30 St Brendan's Avenue, Galway and being parts of the building shown (for identification purposes only) outlined in red on Plan 1 annexed to the Notice of Motion filed in the Central Office of the High Court on 24 January 2018 on behalf of the Second Respondent herein (the "**Building**"), the said parts being the property on the ground floor, first floor, second floor and third floor as shown (for identification purposes only) outlined in blue and red on Plans 2 and 3 annexed thereto, all of which property is comprised in the following sub-lots:

FIRSTLY part of the property comprised in part of folios GY71601F and GY67197F of the register of freeholders Co. Galway;

SECONDLY part of the property formerly known as 27 St Brendan's Avenue, Woodquay, Galway being part of the property assured by the Deed of Conveyance dated 20 November 1996 between (1) William Glynn and Mary Glynn and (2) Thomas Francis Kearney;

THIRDLY part of the property formerly known as 28 St Brendan's Avenue, Woodquay, Galway being part of the property assured by the Deed of Conveyance dated 27 November 1995 between (1) Martin Tierney and Catherine Tierney and (2) Thomas Francis Kearney; and

FOURTHLY part of the property formerly known as 29 St Brendan's Avenue, Woodquay, Galway being part of the property assured by the Deed of Conveyance dated 16 June 2000 between (1) Anthony Lambert and (2) Thomas Francis Kearney.

FIFTHLY part of the property formerly known as 30 St Brendan's Avenue, Woodquay, Galway being part of the property assured by the Deed of Conveyance dated 23 November 2000 between Sean Lenihan and Thomas Francis Kearney.

HELD in fee simple

EXCLUDING the basement level of the Building and all other parts of the Building not outlined in blue and red on Plans 2 and 3 annexed to the Notice of Motion filed in the

Central Office of the High Court on 24 January 2018 on behalf of the Second Respondent herein.

SUBJECT TO AND WITH THE BENEFIT OF the Lease dated 21 October 2002 and made between (1) Thomas Francis Kearney and (2) Sleepzone Limited subject to the Memorandum of Rent Review dated 24 May 2017 between Thomas F Kearney (acting by receiver Patrick Horkan) and Sleepzone Limited

SUBJECT TO AND WITH THE BENEFIT OF the Grant of Easements dated 4 April 2006 between (1) Thomas Francis Kearney, (2) Etonway Management Limited and (3) Bank of Scotland (Ireland) Limited"