



THE COURT OF APPEAL
Kelly J.
Peart J.
Hogan J.

2014/1339

[S.C. 371/14]

[Article 64 Transfer]

Declan McDonald

Plaintiff

and

McCaughey Developments Limited (In Receivership) and Martin McCaughey

Defendants

Ex tempore Judgment of Mr. Justice Kelly delivered on the 8th day of July 2015

1. The plaintiff in these proceedings Mr. Declan McDonald was allegedly appointed a receiver over the assets of the first named defendant McCaughey Developments Limited (the company) by a Deed of Appointment on the 20th December, 2013.
2. The Deed of Appointment demonstrates that he was appointed by Danske Bank in purported pursuance of powers contained in a floating charge dated the 18th December, 1998. That floating charge had been allegedly granted by the company in favour of National Irish Bank Limited over all of its property whatsoever and wheresoever both present and future, including its uncalled capital for the time being.
3. Danske Bank is the successor to National Irish Bank by virtue of a scheme approved of by the Minister for Finance. Pursuant to the lending facilities which were granted, it is alleged that a sum in excess of €8 million was advanced to the company and had not been repaid hence the appointment of the plaintiff as receiver.
4. The company has been in existence for over 50 years. It was founded by the father of the second named defendant. The second defendant is now the managing director of the company and is also one of the three shareholders. One of the other shareholders is his father.
5. Mr. McCaughey, the second defendant, contends amongst other things that the floating charge was altered, amended or changed in order to suit the bank, but only after the appointment of the plaintiff as receiver. He also alleges that the actual charge registered was not the original charge.
6. He also raises issues concerning the probity of the conduct of the bank and the whole basis upon which the demands were made and the receiver appointed.
7. It is his contention that the company is at risk if it has no representation so as to highlight relevant facts. If it is not represented it cannot contest the validity of the appointment of the receiver and so the company will lose by default. It is common case that neither the company nor Mr. McCaughey have sufficient funds to retain lawyers to represent the company in the situation that has arisen.
8. The matter came before Gilligan J. on an interlocutory application for injunctive relief and on that occasion he raised an issue as to the entitlement of the second defendant Mr. McCaughey, to represent the interests of the company.
9. Having raised that issue, there was then argument between the parties and the judge delivered a reserved judgment. In the course of that judgment he considered Irish, English, Scottish, Northern Irish, Hong Kong and South African authorities. He concluded his judgment as follows:-

"This Court has a degree of sympathy with the position in which both defendants find themselves and in the absence of available funding, it may not be possible to retain the services of a legal team and thus, in the absence of the second named defendant representing the first named defendant in his capacity as a director and majority shareholder, the first named defendant company's challenge to the appointment of the liquidator (sic) may never be considered by a court which may result in an injustice. The reality of the situation is that clarification is needed in respect of the particular circumstances that arise herein, because due to the collapse of the property market and of so many limited liability companies involved in all aspects of the construction and property industry, there are a large number of ongoing claims by the banking industry against defaulting companies and guarantors. It may be that the situation can be resolved whereby in certain exceptional circumstances a company director and significant shareholder on a valid bona fide arguable point at the discretion of the court could be allowed to represent the company's interests, provided the court was satisfied that the point was at least arguable on the known facts and the applicable law."

The judge went on:

"However, this Court is constrained to follow the decision in Battle v. Irish Art Promotion Centre Limited and also to follow the views as expressed by Fennelly J. in the Supreme Court in the Matter of the Application for Orders in relation to Costs in Intended Proceedings by Stella Coffey & Ors, wherein at paras. 32, 33 and 34 Fennelly J. refers the judgment in Battle and further, by reference to Ó Dálaigh J. to the statement of Viscount Simon L.C. in his speech in Tritonia Limited v. Equity and Law Life Assurance Society (1943) 1 A.C. 584, where he said:-

'In the case of a corporation in as much as the artificial entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf.'"

The judge further quotes from Fennelly J. where he said:-

"This ruling proceeds from the fact that the incorporated company is as a strict matter of law a legal person separate from its members and from its directors and management. Nonetheless in practice the courts have to deal on a daily basis with difficult cases involving unrepresented companies frequently because there are simply no funds to provide for legal representation. The company being a purely legal or notional person cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although that is far from ideal, it represents the present law."

Gilligan J. continued:-

"Fennelly J. refers to the slight modification of the strict rule regarding companies as adopted in the New Zealand case of Re J G Mannix Limited as considered by Budd J. in PMLB v. PHG. Cooke J. in the New Zealand Court of Appeal had thought that the court should retain a residual discretion to hear unqualified advocates, but considered that it would be a reserve of rare expedient.

Fennelly J. also considered the judgment of this Court (O'Neill J.) in Coffey v. Tara Mines Limited [2008] 1 I.R. where the trial judge permitted the plaintiff to be represented by his wife because he formed the view that the action would proceed no further and that as an outcome or consequence that would be destructive of the interests of justice."

Gilligan J. then concluded:-

"In the overall circumstances of this application, I take the view that I am obliged to refuse the application to enable Martin McCaughey, as a majority shareholder and director of the first named defendant company (in receivership), to represent the company in these proceedings."

10. On foot of that judgment a formal order was drawn up dated the 31st July, 2014, and perfected on the following day and the curial part of the order reads:-

"IT IS ORDERED that the application of the second defendant to allow him as a majority shareholder and director of the first defendant company (in receivership) to represent the company in these proceedings be refused."

There was no order made as to costs.

11. It is from this order that Mr. McCaughey brings this appeal.

12. I have come to the conclusion on the consideration of the particular facts of this case that the issue which has been raised and which is the subject of the High Court judgment and indeed this appeal does not in fact fall for decision.

13. In these plenary proceedings, which are the only proceedings before this Court, Mr. McCaughey is named as the second defendant in the action.

14. The receiver accepts that in that capacity Mr. McCaughey may raise all and any points and arguments and adduce any evidence which he wishes pertinent to the issues in the proceedings. The receiver accepts that this can include points, arguments and indeed the adducing of evidence which will inure for the benefit of the company. Thus, Mr. McCaughey may adduce any relevant evidence which he wishes touching upon the issues which will arise in the litigation, whether they arise at interlocutory or plenary hearing stage and whether they benefit him as a named defendant or the company.

15. Given the fact that Mr. McCaughey has been joined and the approach of the receiver there could in my view be no objection on the part of the court to such a course being followed.

16. Thus, in this particular case, the question of the entitlement of Mr. McCaughey to represent the limited company does not need to be decided. No doubt this is an issue which will arise in some other case in the future, but as a decision is not required in order to deal with this particular case, I do not think it appropriate that the court should answer a question which it is not required to answer.

17. In coming to this conclusion I have not lost sight of the fact there are other proceedings brought by the receiver pursuant to the provisions of s. 316 of the Companies Acts. Those proceedings raise questions as to the validity of the floating charge. Pursuant to an order made by Gilligan J. in the High Court, those related proceedings are linked with the plenary proceedings and are listed along with them.

18. The receiver has made it clear through his counsel that the questions raised in those s. 316, proceedings will fall to be decided in the instant proceedings. So, for all practical purposes, the s. 316 proceedings are redundant. It has also been made clear that the plenary proceedings will be heard first and consequently it is highly unlikely that any issue at all will arise to be decided in the s. 316 proceedings. In the unlikely event that some issue does arise in the s. 316 proceedings and Mr. McCaughey wishes to be heard in a representative capacity for the company in those proceedings, then that is a matter which will have to be dealt with in the High Court. I regard that as so remote a possibility that for all practical purposes it may be ignored. The plenary proceedings will be heard first and the receiver through his counsel has made it clear that all issues including issues touching upon the conduct of the bank and the validity of the floating charge will fall to be considered and decided in those proceedings.

19. In these circumstances I am of the view that the appeal should be allowed and that the order of the High Court should be varied in the circumstances which I have outlined in this ruling. The variation will make it clear in the curial part of the formal order that in the particular circumstances of this case, the second defendant will be allowed to advance all arguments and to adduce all evidence relevant to the issues to be tried, even such arguments and evidence as might inure for the benefit of the company.

Mr. Justice Peart: I agree with what has been stated by Mr. Justice Kelly in his judgment.