

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 718 J.R.]

BETWEEN

BRENDAN CUMMINS

APPLICANT

AND

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. This telescoped judicial review application concerns a challenge to an order for the possession of the applicant's family home.
2. Possession proceedings were issued by the Bank on 5th March, 2015, in Dublin Circuit Court. On 25th April, 2016, the applicant prepared a motion for the County Registrar seeking production of "*originals of all documented evidence that [the Bank] may rely upon*". The motion was to be returnable for 27th June, 2016.
3. On 5th May, 2016, the matter was before the County Registrar, and the motion was filed on that date. The matter was put in for mention on 12th May, 2016, and the County Registrar directed that the parties should meet between 5th and 12th May, 2016, to allow the Bank provide documents to Mr. Cummins. There was a slight difference between the parties as to how the decision of the County Registrar was phrased but I am of the view that nothing fundamental turns on this. In his grounding affidavit, at para. 3, the applicant suggests that the County Registrar "*made an order*" that the Bank produce documents, whereas at para. 11 of the affidavit of Karen Molloy on behalf of the Bank, she says that the County Registrar "*directed that Mr. Cummins telephone the offices of Whitney Moore Solicitors to arrange to view and inspect the documents as requested*".
4. There does not seem to me to be a fundamental difference between these versions for any purpose relevant to anything I have to decide, but if there is, the applicant, who bears the burden of proof, has not sought to cross-examine the respondent's deponent (and on the same basis he cannot overcome any other evidential conflict with the respondent's deponent), nor in the case of this specific matter has he produced any formal order as suggested.
5. A meeting took place on 9th May, 2016, for the purpose mentioned, although the applicant was unhappy with the documentation provided and viewed on that occasion.
6. On 12th May, 2016, the applicant filed an affidavit alleging that he was the victim of a fraud, on foot of which the matter was adjourned to the judge's list for hearing on 5th July, 2016.
7. In the meantime, the applicant's motion for production came on for hearing on 27th June, 2016. There being no appearance by the applicant on that date, the matter was struck out. The applicant has sought to explain his non-attendance by reference to being away from his home during that time. But this was his motion, and the return date appears on the face of it. No irregularity or unfairness is made out in the circumstances.
8. When the matter came before Her Honour Judge Jacqueline Linnane, on 5th July, 2016, she made an order for possession in favour of the Bank following a contested hearing.
9. That order was appealable on the merits to the High Court. Mr. Cummins says that he did not avail of this option because the Circuit Court order "*wasn't fair*".
10. Having directed a telescoped hearing by agreement I have heard from the applicant in person and Mr. Michael O'Sullivan B.L. for the respondent and in this judgment I determine the substantive judicial review application.

Legality versus merits

11. The rough dividing line between points suitable for judicial review and those suitable for appeal is that between legality and merits, as set out in the Supreme Court decision in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) *per* Clarke J. at paras. 3.8 to 3.15. By way of example, as I pointed out in *Crowley v. A.I.B.* [2016] IEHC 154 (Unreported, High Court, 18th March, 2016) at para. 16, any argument that the impugned decision is incorrect on the evidence is one as to merits. The Supreme Court decision in *Sweeney v. Fahy* is the context and prism through which I must view an application for judicial review of an order of this kind.

Grounds of challenge

12. The applicant's statement grounding the application lists eight grounds of challenge.

13. Ground 1 is by way of factual and legal background.

14. Ground 2 is a complaint that "*Judge Linnane did ignore my right to see the original documents as ordered by the Dublin County Registrar which was bias against me thus denying my right to due process and natural justice under law contrary to Article 40.3 of the Constitution and is a breach of convention*". This ground is misconceived because it presupposes that the applicant has a right to see original documentation that is anterior to the jurisdiction of the court to proceed to hear and determine an application before it. Clearly despite some argument at the margins, the applicant was given some opportunity to view at least some of the original materials. He did not attend to prosecute a motion seeking a further order in this regard. A decision by Judge Linnane not to permit the applicant yet a further opportunity to view original material did not constitute bias, or even error, but even if it did amount to error, the more appropriate remedy is appeal rather than judicial review.

15. Ground 3 is an allegation that "*I was denied due process and natural justice as the respondent named herein never proved locus*

standi or proof of ownership of the alleged debt and exposed me to injustice. I had a legitimate expectation to have my right to have my case struck out on the day." Arguments about evidential shortcomings in the Bank's proofs are quintessentially a matter for trial or appeal and not for judicial review. Evidential shortcomings are not a denial of due process and natural justice because the applicant has the opportunity to make submissions as to such evidential gaps either at trial or on appeal. In any event, no legal basis for the contentions made has been established.

16. Ground 4 is that *"the order for possession was granted without my consent and the order for possession was not signed by Judge Linnane"*. Unfortunately for the applicant, the order of possession does not require his consent. Nor does it require to be signed by the judge.

17. Ground 5 is an allegation that the affidavits of the bank (which specify a date, but not a time of the day, on which they were taken) are in breach of the Rules of the Superior Courts, O. 40, r. 6, which requires the Commissioner to specify the *"time when"* the affidavit is taken. This ground is misconceived. Firstly, the Rules of the Superior Courts do not apply. The affidavit was filed in the Circuit Court and is, therefore, subject to the rules of that court which are differently worded.

18. In any event, I previously held in *Crowley* at para. 20(iv) that the word *"time"* in O. 46 r. 6 means date. Mr. O'Sullivan has now drawn my attention to the decision of Irvine J. in *Danske Bank v. Kirwan* [2016] IECA 99, (Unreported, Court of Appeal, 18th February, 2016), where a similar conclusion is arrived at (para. 12(ii)).

19. Ground 6 is that *"the order made by Judge Linnane was unreasonable and there was no stay on execution"*. The more appropriate forum in the circumstances to address that complaint would have been an appeal rather than judicial review. In any event, no basis for the contention that the order was unreasonable or that the failure to allow a stay was wrongful has been made out. Even if it was wrongful that is a merits point.

20. Ground 7 is that *"Judge Linnane had no power to make an order in the circumstances or in the alternative, erred in law and acted in excess of jurisdiction"*. This ground is misconceived, because the learned judge clearly had jurisdiction to make a repossession order. No basis for any other conclusion has been established on the materials before me.

21. Ground 8 is that *"the erroneous order of Judge Linnane who was misled by the respondent made on 5th July, 2016, was unfair and procedural impropriety and has provided the respondent with an unjust advantage to claim possession from me which the respondent where (sic) clearly not entitled to as they never proved locus standi and never provided me with a detailed Bill which made their originating document procedurally defective"*. This ground is misconceived. The Bank clearly had *locus standi*. Failure to provide a *"detailed Bill"* does not make the order of the Circuit Court defective. The applicant has not established that the Bank or anyone on its behalf misled the court. Serious allegations of this kind must be clearly established which is not the case here.

22. Overall, the grounds have not been made out but if I am wrong in any respect about that I would hold that appeal would have been the appropriate remedy rather than judicial review because the applicant's complaints as a whole go to the merits of the decision rather than its legality. As it was put in submissions by counsel for the respondent in *Crowley*, *"the applicant's failure to seek [to appeal] cannot have the effect of making judicial review appropriate where it would not otherwise be so"* (para. 18).

Order

23. I am grateful to Mr. Cummins for the economical and concise nature of his submissions in this matter, and I have every sympathy for him in the unfortunate predicament in which he finds himself in that he is facing the loss of his home; but unfortunately, having regard to the decisions of the Supreme Court and Court of Appeal in *Sweeney v. Fahy* and *Danske Bank v. Kirwan* which are binding on me, the legal considerations set out in this judgment require me to order that the application for substantive relief by way of judicial review be dismissed.