THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2018] IECA 133

2017 No. 505

Irvine J.
Hogan J.
Whelan J.

BETWEEN/

KEN TYRRELL

PLAINTIFF /

RESPONDENT

- AND -

DAVID WRIGHT AND ROPE WALK CAR PARK LIMITED

DEFENDANTS /

APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 15th day of May 2018

1. This judgment relates to an application brought by the first named defendant, Mr. David Wright ("Mr. Wright") to extend the time to appeal an order of the High Court (McGovern J.) of the 19th June 2017. By his order the High Court judge struck out Mr. Wright's claim in proceedings bearing title and record number *David Wright v. Launceston Property Finance Limited and Ken Tyrrell*, no. 2017/4909P ("the Launceston proceedings") as frivolous and vexatious pursuant to Ord. 19, r. 28 of the Rules of the Superior Courts. He also struck out the proceedings as an abuse of process pursuant to the rule in *Henderson v. Henderson*, [1843] Hare 100 and also on the basis that the claim pleaded disclosed no reasonable clause of action. The High Court judge then proceeded to award the plaintiff, Mr Ken Tyrrell ("Mr Tyrrell") his costs of the application and of the proceedings and directed that they be taxed in default of agreement.

Background Facts
2. To assess the validity of Mr. Wright's application it is necessary to briefly recite some of the background facts to the within proceedings.

3. According to Mr. Tyrrell, he was appointed receiver over three properties owned by Mr. Wright on the 22nd August 2016. Because Mr. Wright and his co-defendant, Rope Walk Car Parks Limited, refused to deliver up possession of the relevant properties Mr. Tyrrell brought an application seeking interlocutory relief. That relief included orders for possession of the properties and orders restraining the defendants from interfering with his efforts to take possession and sell the properties.

4. By her order dated the 24th April 2017, the High Court (Costello J.), granted the relief sought by the receiver. That order was appealed by Mr. Wright and the appeal was heard by this court on the 21st February last. Judgment is awaited. It is relevant to note that the substantive proceedings in the High Court remain live but have been adjourned pending the outcome of Mr. Wright's appeal.

5. With the assistance of a new firm of solicitors, Lohan & Company, Mr. Wright commenced the Launceston proceedings on 30th May 2017 wherein he sought, *inter alia*, a declaration that the deed of appointment dated the 22nd August 2016, whereby Mr Tyrell was appointed receiver, was null and void and of no legal effect. He also claimed an order restraining the defendants from taking possession of, disposing of or otherwise dealing with the properties earlier mentioned. *Prima facie*, therefore, the relief sought in the Launceston proceedings seeks to unwind the orders for possession made by Costello J. on the 24th April 2017.

6. From the steps later taken by Mr. Tyrell and Launceston, it is clear that they viewed the commencement of this new action on the part of Mr. Wright as an abuse of process and a collateral challenge to the judgment of Costello J. of the 17th February 2017. Accordingly, they brought a motion to strike out the Launceston proceedings as an abuse of process by reason of the rule in *Henderson v. Henderson* and also on the grounds that the claim was frivolous and vexatious and bound to fail.

7. This court has been provided with the transcript of the hearing of that application which took place on the 19th June 2017 from which it is clear that the High Court judge had read in advance the papers filed by the parties in relation to the defendants proposed application, as is common practice in the Commercial Court.

8. At the commencement of the hearing the High Court judge queried the conduct and proposed approach of Mr. Wright's legal team in that he asked counsel, Mr Lohan B.L., whether it was Mr Wright's intention to pursue the Launceston proceedings in light of the receiver's application. He also queried whether counsel had read the judgment of Costello J. and the correspondence which had emanated from the defendants' solicitors concerning that judgment.

9. When advised by counsel that he had instructions to defend Mr Wright's entitlement to pursue the Launceston proceedings and that he had considered both the judgment of Costello J. and the correspondence from the defendant solicitors, the High Court judge asked counsel whether he wished to consider his position. In so doing McGovern J. advised counsel that, having read the papers, he

was concerned that there could be professional consequences for him and his solicitor if, having heard the motion, he were to conclude that the proceedings amounted to a flagrant abuse of process. The High Court judge also reminded Mr Wright's legal team of their professional obligations to the court.

10. Following this cautionary note, counsel took instructions from his solicitor and presumably his client after which he advised the court he was satisfied that his client was entitled to bring the Launceston proceedings and that he intended resisting the receiver's application.

11. The transcript, which runs to some seventeen pages, demonstrates that the High Court judge fully engaged with both parties in the course of the hearing and that Mr. Lohan was giving ample opportunity to make such submissions as he considered appropriate on behalf of Mr. Wright. That is not to state that he was not, at times, challenged on his submissions by the High Court judge. However, what can be said with some degree of certainty is that it appears that counsel for Mr Wright was afforded a full and proper opportunity to resist the receiver's application. He made a number of detailed submissions and supported them by reference to various documents and case law.

12. Following the conclusion of the legal argument the High Court judge gave an *ex tempore* ruling. This starts at p. 14 of the transcript. The High Court judge concluded that it had been open to Mr. Wright on the hearing of the interlocutory injunction before Costello J. to dispute the validity of the receiver's appointment. However, he had not done so and that being so he was satisfied that, in seeking to raise the issue in the Launceston proceedings, he had offended the rule in *Henderson v. Henderson*. The High Court judge also concluded that the new proceedings amounted to a collateral attack on the judgment of Costello J. insofar as she had granted the receiver possession of the properties and had made an order restraining the defendants from impeding Mr Tyrell in his efforts to take possession and sell the properties.

13. In the course of his ruling the High Court judge stated that he viewed as extraordinary the contention advanced by Lohan & Co in their letter of the 30th May 2017, that the receiver had no legal or equitable right to take possession of Mr. Wright's properties having regard to the order of Costello J. He has initially countenanced the possibility that at the time that letter was written that the solicitors concerned might not have been aware of the order made by Costello J. However, any such doubt had been dispelled by the letter that had been sent by the receiver's solicitors, Hayes and Sons, which had advised that an order for possession had been made in favour of the receiver.

14. Having regard to the fact that he was satisfied that Mr Wright's legal team were aware of the order of Costello J. and had been afforded the opportunity to consider the propriety of resisting the receiver's application, the High Court judge stated that they were not to be "granted a fool's pardon". They should not have lent their names to the position which they had adopted on behalf of their client. Thus it was that McGovern J. referred the papers before him to the Law Society and the Bar Council for their consideration as to whether or not the respective codes of conduct had been adhered to by counsel and solicitor.

The application to extend time to appeal

15. By notice of motion and grounding affidavit dated the 3rd November 2017 Mr Wright seeks an extension of time to appeal the order of McGovern J. His proposed notice of appeal is dated the 3rd November 2017 and his intended grounds of appeal as therein set forth are as follows:-

> "1. that the learned judge erred in fact and law in wrongly determining a true and correct construction thereof, and
>
> 2. that the learned judge behaved in a manner unbefitting a member of the judicial bench demonstrating such bias as to be conflicted in dealing with the case and in so doing flouted respect for article 6 of the ECHR."

16. It should be said that it was clear from the oral submissions made by Mr. Wright that his first proposed ground of appeal is intended to challenge the High Court judge's ruling that there is no basis upon which he might lawfully challenge the validity of the appointment of Mr Tyrell based upon the deed of appointment of 22nd August 2016.

17. The application was resisted by the receiver based upon the affidavit of Jeremy Erwin of Hayes solicitors, sworn on the 4th April 2018. I will return to the content of that affidavit later.

Legal principles

18. The principles that apply on an application to extend time to appeal are to be found in the well-known decision of Lavery J. in *Eire Continental v. Clonmel Foods Limited* [1955] I.R. 170. In his judgment he identified the factors to which the court should give consideration on such an application. These are:-

> 1. whether the applicant has demonstrated that he/she had formed the intention to appeal the order in question within the time prescribed by the rules of court;
>
> 2. whether the applicant can point to some mistake which caused him/her to miss the time limit prescribed for the appeal, and
>
> 3. whether the applicant has demonstrated a *bona fide* ground of appeal.

19. Each of the aforementioned factors are, as Lavery J. stated, proper matters for the consideration of the court rather than binding pre-requisites. The overarching obligation of the court is to have regard to all of the circumstances of the case and to avoid visiting an injustice on either party. That said, it is clear from decisions such as that of Murphy J. in *O'Sullivan v. O'Halloran*, (Supreme Court January 2002) that compliance with the third leg of the test is of the utmost importance given that unless the court is satisfied that the proposed appellant has an arguable ground of appeal, it could not appropriately make an order extending time.

20. Whilst there is nothing in Mr. Wright's grounding affidavit indicating when he first formed the intention to appeal the order of McGovern J. of the 19th June 2017, it is nonetheless evident from an email dated the 19th July 2017 sent by A.C. Pendred & Co. solicitors to Ms Dermody, registrar of the High Court, that they had received instructions from Mr Wright to appeal. That being so it would appear that Mr Wright has met the first leg of the *Eire Continental* test.

21. Mr. Wright in his grounding affidavit of the 3rd November 2018 does not seek to address the second leg of the *Eire Continental* test. Furthermore, as Mr Erwin observed in his affidavit, Mr Wright fails to explain why he only issued his present application four months after the order against which he appeals was perfected allied to which is the additional factor that during the period within which he ought to have filed his appeal, Mr Wright was at all times legally represented.

22. Regardless of these facts, I take the view that if Mr Wright could establish an arguable ground of appeal, it would be unjust, having regard to what is at stake for him in these proceedings, to refuse the extension of time sought solely by reason of his failure properly to address the second leg of the *Eire Continental* test. As I have already stated, the most important factor to be considered by a court on the present application is whether or not Mr. Wright has established any arguable ground of appeal and that it would be unjust in all of the circumstances for the court to refuse his application. I will now direct my attention to these issues.

***Bona fide* ground of appeal**
23. As earlier advised, the grounds upon which Mr Wright wishes to appeal the decision of McGovern J are two in number:

> "1. the learned judge erred in fact and law in wrongly determining a true and correct construction thereof, and
>
> 2. that the learned judge behaved in a manner unbefitting a member of the judicial bench demonstrating such bias as to be conflicted in dealing with the case and in so doing flouted respect for article 6 of the ECHR."

24. I will now give my decision in relation to each of these grounds of appeal having considered the submissions of the parties.

The Deed of Appointment (ground 1)
25. Notwithstanding the submissions advanced by Mr Wright on the present application, I am not satisfied that he has demonstrated any arguable ground of appeal against the trial judge's conclusion that he could not lawfully challenge the validity of the deed pursuant to which Mr Tyrell was appointed receiver or his entitlement to possession of the properties referred to in the schedule to the plenary summons in the Launceston proceedings. There is simply no basis upon which Mr Wright can hope to argue that the trial judge erred in law when he concluded that those proceedings were frivolous, vexatious, bound to fail and in breach of the rule in *Henderson v. Henderson*.

26. The first two claims set out in the general endorsement of claim on the plenary summons in those proceedings reads as follows:-

> "AND THE PLAINTIFF CLAIMS:
>
> 1. a declaration that the purported deed of appointment of receiver dated the 22nd August 2016 and relating to the properties described in the schedule to the plenary summons herein, is null and void and of no legal effect;
>
> 2. an order restraining the defendants, or either of them, their servants or agents, from attempting to take possession of, transferring, disposing or otherwise dealing with the properties (or their contents) described in the schedule to the plenary summons;"

It is perfectly obvious that relief of this nature can only be viewed as a collateral attack on the order for possession made by Costello J on the 24th February 2017. The same can be said of all of the other reliefs set forth in paragraphs 1 to 12 of the said plenary summons.

27. It is clear from the submissions made by Mr. Lohan in the High Court that he considered his client was entitled to challenge the validity of the appointment of the receiver notwithstanding that no such challenge had been made at the time the receiver sought possession on his application for an injunction. In this regard it is important to make clear that by letter dated the 24th August 2016, two days after Mr. Tyrrell's appointment as receiver, Mr. Wright claimed that his appointment was invalid. Of further import is the fact that in the course of her judgment on the receiver's application for possession, Costello J. specifically referred to the fact that notwithstanding the aforementioned correspondence Mr. Wright had not sought to challenge the validity of the deed of appointment or for that matter the mortgage of the 18th December 2016. Relevant also in this regard is the fact that Mr. Wright was legally represented in the course of the two-day injunction hearing.

28. In the aforementioned circumstances it is not arguable, in my view, that McGovern J. erred in law in concluding that the Launceston proceedings were frivolous and vexatious, in the legal sense in which those words are understood, and also offended the rule in *Henderson v. Henderson*. It was Mr. Wright's obligation to raise every point by way of defence at the time the receiver applied for possession. He failed to do so. Mr Wright was accordingly debarred from raising in the Launceston proceedings this issue which he might have raised in the within proceedings at the injunction stage.

29. Having read the transcript of the hearing before McGovern J. I reject the argument made by Mr. Lohan that just because Costello J. had not been asked to consider the issue as to whether the receiver had been validly appointed, that left open the entitlement to Mr Wright to pursue that issue at a later time. That, in my view, is an unstateable legal proposition given that the receiver was only entitled to the order for possession in the event that his appointment was valid. That being so, the time to raise any issue concerning the validity of the appointment of the receiver was on the hearing of that application.

30. The other argument advanced by council on behalf of Mr. Wright was that the Launceston proceedings were not vexatious or an abuse of process or in breach of the doctrine in *Henderson v. Henderson* by reason of the fact that the documentation upon which Mr Wright wished to challenge the validity of Mr. Tyrrell's appointment had only come into his possession after the order for possession had been made and the receiver was in the process of selling the property.

31. In the High Court counsel for Mr. Wright had sought to rely upon the fact that the deed of appointment referred to a deed of mortgage dated the 18th December 2006 whereas it now appeared the mortgage pursuant to which the receiver had been appointed may have been dated the 12th December 2006. Further, Mr Wright had become aware of another mortgage relating to the same properties which, whilst signed by him, was undated. These documents had come to Mr Wright's attention in that they were attached to a contract for sale of one of the properties and had appeared on the selling agents' website.

32. It is not necessary to detail the engagement between McGovern J. and counsel for the respective parties concerning these documents which it was accepted had come to Mr Wright's attention following the delivery of the judgment of Costello J. Suffice to say that Mr. Lohan submitted that the existence of these documents cast doubt upon the validity of the appointment of the receiver as the deed of appointment had referred to a mortgage dated the 18th December as opposed to the 12th December 2006. Counsel argued that, in those circumstances a plenary hearing was warranted to establish whether or not the deed of appointment was valid.

33. Counsel for the receiver maintained that the deed of mortgage was correctly described as one dated the 18th December 2006 and explained that this was clear in circumstances where this was the date upon which Mr Wright had signed all of the statutory declarations in relation to his land. His s. 72 declarations and his declarations in respect of the Family Home Protection Act had all been sworn on the 18th December 2006.

34. Counsel for the receiver further argued that even if the date of the mortgage in the deed of appointment should have been the 12th December 2006 rather than the 18th December 2006 that would not invalidate the appointment of the receiver or the orders for possession which he had earlier obtained. There had been no dispute that valid mortgages had been registered against the properties referred to in the Launceston proceedings. Further, it was not disputed that that under clause 10 of the relevant mortgage it was provided that in the event of default that a receiver might be appointed and there was no doubt that the receiver had been properly appointed in accordance with the required formalities. There was also no dispute but that Mr Wright was in default of his repayment obligations. Thus, even if the date of the mortgage was incorrectly recited in the deed of appointment, that would not afford Mr Wright any entitlement to maintain the present proceedings in the hope of challenging the validity of Mr Tyrrell's appointment. All of those arguments are legally correct and leave open no possibility of any delayed challenge on the part of Mr Wright to the validity of the receiver's appointment.

35. In the aforementioned circumstances I am not satisfied that Mr. Wright has established any basis upon which he might arguably challenge the conclusion of McGovern J. that the Launceston proceedings were not frivolous, vexatious, bound to fail and also a breach of the rule in *Henderson v. Henderson*. His first proposed ground of appeal is doomed to failure.

The Conduct of the High Court Judge (ground 2)

36. It goes without saying that constitutional justice requires that litigants be afforded a fair, just and impartial hearing. However, that does not mean that a trial judge must remain mute and shy away from expressing any views in relation to matters either pending or at hearing before them. Judges are free to engage with the parties before, during or in the course of any application or proceedings once they do not do so in a manner which might deny a party their right to a hearing of the type just described.

37. It is often said that engagement between a trial judge and the parties may, in certain cases, prove positively beneficial in achieving a just and fair result. Such interventions often serve to focus attention on issues which are of particular concern to the judge and which, if not identified by him or her, may go unanswered to the detriment of one of the parties. Provided such interventions are not in any way sinister or threatening, solicitors and counsel will understand and should be in a position to reassure their client, if such be required, that any such intervention is not indicative of prejudgment or bias but rather an effort on the part of the trial judge to ensure that all matters upon which the outcome of an application or proceedings may depend have been addressed.

38. It has to be remembered in the context of the present application, that the hearing which Mr. Wright maintains may have been prejudicial and was not impartial, just or fair, took place in the Commercial Court where it is common practice for the presiding judge to have read, in advance, the papers lodged in respect of the applications listed for hearing. It is to be anticipated in such circumstances that, prior to the commencement of the hearing, the judge may direct the parties or their legal representatives to matters which he or she considers core to the issue or issues to be determined. There is nothing irregular about such an approach. Judges are not obliged to refrain from making observations or querying the approach of one or other party to an application.

39. It is obvious from my reading of the transcript that the trial judge was perturbed from what he had read in the papers filed in support of the application to dismiss the Launceston proceedings. He clearly harboured a concern that the respondent's legal team, in opposing the receiver's application, might be in breach of their professional obligations to the court and/or the code of conduct of the Bar Council and/or the Law Society.

40. I can well see how the trial judge, having taken the view he did from the papers before him, may have considered himself to be in somewhat of a dilemma. If he did not express his concern regarding the approach he understood was proposed on behalf of Mr. Wright and later, having heard argument, decided that he should to refer the papers to the disciplinary bodies of the Bar Council and the Law Society, it might be said of him that he gave no forewarning of his concerns such that the legal team might have reconsidered their position before proceeding further. The alternative was to do what he did, which was first to ensure that solicitor and counsel were fully conversant within the judgment of Costello J. and the subsequent *inter partes* correspondence and second were live to the possible potential consequences which might flow from pursuing their client's instructions to resist the receiver's application in light of that documentation.

41. Without doubt, the approach taken by the trial judge in asking counsel, before the application commenced, whether he wanted to "consider his position", was one which would probably not commend itself to the vast majority of his High Court colleagues faced with similar circumstances. I certainly feel that his approach was unwarranted and premature, even if he was concerned, from his reading of the papers, that the Launceston proceedings likely constituted a collateral attack on the judgment of Costello J. and were also in breach of the rule in *Henderson v. Henderson*.

42. If the High Court judge was correct in his view that Mr Wright's legal representatives would likely be in breach of their responsibilities to the court and their respective professional bodies should he find that the Launceston proceedings offended the rule in *Henderson v. Henderson* and/or constituted a collateral attack on the judgment of Costello J., it would seem to follow that in any case where a proceeding is struck out for similar reasons that the solicitor and counsel for the losing side might expect to be reported for professional misconduct merely for arguing against the dismissal of their those proceedings.

43. In my view, the intervention made by the High Court judge before the commencement of the application was, with respect, both premature and unwarranted, and in other circumstances might have had such a chilling effect on counsel and/or solicitor that they might well have advised their client not to resist the application. In my view counsel on behalf of Mr Wright was entitled make the argument, albeit one which I consider was without merit, that the Launceston proceedings were not in breach of the rule in *Henderson v. Henderson* and were not a collateral attack on the judgment of Costello J. without fear that if he was unsuccessful he might be reported to his professional body for professional misconduct. I have no doubt that the judge's intervention and the stoppage for instructions which followed would reasonably have caused Mr Wright to fear that McGovern J. had possibly prejudged the receiver's application with the result that he might receive a fair or impartial hearing.

44. As it happens, it does not appear that this exchange between the trial judge and counsel had any obvious adverse effect on the manner in which the application was dealt with. It does not appear that Mr. Wright or his legal term were intimidated or deterred in their actions by the early intervention of the trial judge in that he was not asked to recuse himself on the basis that he had prejudged the issue or demonstrated bias against Mr. Wright. That is not to say that the failure to make such an application is determinative of the issue. Regrettably, and perhaps with some justification, counsel in such circumstances could apprehend that if they made such an application and it were to be refused, they might have further damaged their client's prospects of a successful outcome.

45. Whilst a transcript is a sterile document and often fails to capture the tension or tone of exchanges between counsel and the court, the transcript in this case on its face is one which appears benign and consistent with Mr. Wright's legal team having been given a proper opportunity to demonstrate why it was reasonable for Mr Wright, in legal terms, to resist the receiver's application

46. Notwithstanding the somewhat comforting factors to which I have just referred, it is nonetheless arguable in my view that the intervention of the trial judge when he asked counsel to "consider his position" could be interpreted as an indication of possible prejudgment of the issue which he was yet to determine.

47. It follows from that I am satisfied that if Mr Wright is permitted to pursue his appeal out of time he might successfully argue that the conduct of McGovern J. was such that he should be afforded a rehearing. However, that is not the end of the matter as this court has to consider whether that fact alone would render it unjust to refuse the extension of time sought in the proper exercise of its discretion.

48. Notwithstanding my view as to the arguability of Mr Wright's second ground of appeal, in my view, it would only be unjust to refuse the extension if satisfied that Mr. Wright has something to gain from granting him the relief he seeks. Regrettably, I am satisfied that he can gain nothing even if he were to succeed on his appeal. The optimum scenario from his perspective is that the Court of Appeal might direct a rehearing of the receiver's motion in the High Court. However, any such order could yield no positive result for Mr Wright insofar as it is clear from the court's judgment on the present application that he has no arguable grounds upon which he might resist the receiver's motion regardless of the judge assigned to hear the application. Accordingly, I take the view that it would not be unjust of this court to exercise its discretion so as to refuse Mr Wright the extension of time which he seeks. To grant that relief would not be in his best interests and it would have the effect of exposing both parties to additional costs in the Court of Appeal and the High Court apart from the fact that to do so would adversely impact on the court's own scarce resources.

49. For the aforementioned reasons I would refuse his application.

Conclusion

50. For the reasons earlier advised, I would not refuse Mr Wright's application by reason of his failure to comply with the second leg of what is commonly referred to as the *Eire Continental* test.

51. I am however satisfied that Mr Wright's application should be refused in circumstances where he has failed to establish any arguable ground upon which he might challenge the determination of the High Court judge that the Launceton proceedings offend the rule in *Henderson v. Henderson* and amount to a collateral challenge to the judgment of Costello J. of the 17th day of February 2017.

52. Even though Mr Wright has established an arguable ground of appeal in reliance on the conduct of McGovern J. on the hearing of the receiver's application, for the reasons set out at para. 48 above, it would not be unjust in all of the circumstances to refuse the relief sought.