



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 207

Record Number: 2019 No. 18

Peart J.  
McGovern J.  
Costello J.

IN THE MATTER OF KELLY TRUCKS LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS  
1963-2014

BETWEEN:

COSTELLO TRANSPORT LIMITED

APPLICANT/RESPONDENT

- AND -

NEHALL SINGH

RESPONDENT/APELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF JULY 2019

1. The application before the Court for determination is one made by Anne Kelly, a former director of Kelly Trucks Limited (In Voluntary Liquidation) ("the company") for an extension of time to appeal against an order of the High Court (Baker J.) dated 19th May 2015.

2. The order which Mrs Kelly wishes to appeal against was made (i) under O. 28, r.11 RSC ("the slip rule") whereby two minor clerical errors appearing in an order dated 13th April 2015 were corrected, and (ii) the costs order made therein against Kelly Trucks Limited was deleted and replaced by a costs order against Mrs Kelly personally, as it was she, and not the company who had strenuously but unsuccessfully opposed the making of the amendments. Mrs Kelly was not present in court when this order was made, and I will return to the question of whether she was on notice of the application.

3. The order dated 13th April 2015 had itself made certain amendments under the 'slip rule' to an earlier order made on the 17th February 2014. That slip rule application was strenuously opposed by the present applicant/appellant Mrs Kelly, a former director of the company, such that very unusually for such an application the hearing lasted half a day. She had been put on notice of the proposed application to be made on the 13th April 2015 by order of the High Court (Cregan J) dated 9th March 2015, and was present in court to oppose it. There was no appeal lodged against the said order dated 13th April 2015, and no application for any extension of time was sought to do so. The present application to extend time to appeal is confined to the order dated 19th May 2015.

4. On this application for an extension of time to appeal, the Court is not concerned with the history of the litigation that has arisen. It is lengthy and complex, and there is much acrimony between the parties from what I can see from the papers filed in this Court. But that background is of no relevance to the straightforward application now before this Court for determination, which essentially involves a decision by the Court as to whether Mrs Kelly has satisfied the criteria that she must establish to the satisfaction of the Court in accordance with the principles in *Eire Continental Ltd v. Clonmel Foods Ltd* [1955] IR 170. Those principles are essentially (i) that she must have formed an intention to appeal against the order within the time permitted by the Rules for doing so; (ii) that due to something akin to mistake, she failed to do so; and (iii) that she can demonstrate arguable grounds of appeal.

5. It is clear also that the Court has a discretion as to whether to extend time, and all the circumstances of the case can be had regard to in the exercise of that discretion. In other words, as appears from the judgment of Geoghegan J. in *Brewer v. Commissioners of Public Works in Ireland* [2003] 3 I.R. 539 it does not follow necessarily that where all the criteria are satisfied that time will be extended, and neither is the converse true, namely that where not all the criteria are satisfied that time will not be extended. The Court enjoys a wide discretion on such applications.

**(i) Was an intention to appeal formed within time permitted?**

6. The affidavit sworn by Mrs Kelly on the 24th January 2019 grounded the present application. It is a lengthy affidavit considering the nature of the application which it grounds, but none of it addresses the question as to whether within the time permitted to appeal the said order she formed an intention to do so. The nearest she comes to that question is in para. 2 where she states the following:

"I say that I seek and am entitled to an Order abridging the time permitted to file and serve a Notice of Appeal and or leave to Appeal the herein matter owing to the fact in law that the Order of Baker J of the 19th day of May 2015, the Order complained of herein, was made by surprise and without Notice and or service of any proper application whatsoever to the Appellant/Respondent in the complained of proceedings bearing record number 2014/28COS."

7. The said affidavit did not state directly why a period of almost four years has elapsed before her application for an extension to appeal against it was lodged, or the date on which she first became aware that it had been made by the High Court.

8. In response to the averment that the said order was obtained by surprise and without notice or proper service of an application on her, Cormac O'Regan, solicitor acting for Costello Transport Limited has exhibited two documents in his replying affidavit sworn on the 8th March 2019, namely (i) a letter from the Courts Service to Mr & Mrs Kelly dated 8th May 2015, and (ii) a "notice" dated 18th May

2015 which was signed by Mrs Kelly and circulated to, *inter alia*, 34 named judges of the High Court.

9. The letter to Mr & Mrs Kelly from the Courts Service was in the following terms:

"I wish to notify you that the above matter will be listed before Ms. Justice Baker on Tuesday the 19th May 2015 at 10.30am for the purpose of clarifying the part of her order made on the 13th April 2015 as relates to the costs order only."

10. The notice circulated by Mrs Kelly is too lengthy to set forth, and in any event does not for the most part address matters relevant to the present application. But it states the following which indicates an awareness on her part that the matter back before the High Court on the 19th May 2015, and also that there was a risk of something adverse to her interests might occur. The sentence to which I refer is on p. 3 of the document and states: "*We know we cannot prevent your actions on the 19th May 2015*, but we also know that whatever actions you take, if any of them are illegal or injure us in any way we will bring this unlawfulness and illegality to the attention of the highest Courts and Human Rights Courts organisations one honest true of heart and with a clear conscience judge decides that enough is enough". [Emphasis provided]

11. At the hearing of this application Mrs Kelly's attention was drawn to the need for her to address the question of why her appeal was not lodged within the time prescribed by the Rules and whether she had formed an intention to appeal within that period. She responded *inter alia* by stating that she had become aware that the order of the 19th May 2015 had been made only when she saw a reference to it in a written judgment of Murphy J. which was handed down in January 2019, and that as soon as she became so aware she lodged the present application for an extension of time to appeal on the 24th January 2019. That was something which she had not put on affidavit. Neither was the content of the response given by counsel for the respondent on affidavit for the obvious reason that Mrs Kelly had made no averment to this effect. Counsel made reference to a bill of costs having been drawn pursuant to the order of the 19th May 2015, and sent to Mrs Kelly and therefore that she must have been aware of the existence of the order long before January 2019 as she had stated.

12. When the hearing of the application concluded, this Court reserved its decision. Thereafter the members of the Court considered it desirable that factual matters relied upon by both sides in relation to when Mrs Kelly first had knowledge that the order of the 19th May 2015 had been made should be put on affidavit, and in those circumstances asked the Court's Registrar to communicate to the parties the Court's wish that they should file an affidavit in this regard and a time frame for doing so was given.

13. Mrs Kelly swore an affidavit on the 27th May 2019 to which an affidavit in response was sworn by Mr O'Regan on the 28th June 2019.

14. In her said second affidavit Mrs Kelly makes a number of averments that go beyond what was required in order to address the date of her knowledge of the existence of the order that she wishes to appeal against. I do not propose to set out all that content as it is unnecessary to do so. But in relation to the issue to be addressed she states at paras. 8 - 9:

"8. For the avoidance of all doubt, and for clarity, I have not been "served" with any bill of costs from any person and/or entity whomsoever, who is legally entitled and or obliged to serve a bill of costs for and on behalf of the respondent (Costello Transport Limited) at any time since the 10/5/2015 to the date of swearing the herein. Nor was I notified of same, in fact as the evidence and record show, the facts of the matter of the 19/5/2015 have been withheld and suppressed from me at all material times.

9. I say that when such a bold statement is made, there is a legal onus on the maker of such a statement to document and verify same. If I was "served" with any bill of costs, then the alleged "server" of same ought to be in a position to provide "*proof of service*" [emphasis in original]. Otherwise their words are extremely hollow, and ought not to have been promulgated before a Court of law as purported fact. I say that the maker of same statement cannot at law back same statement up, and therefore there ought to be consequences for him and his client, where such statements can only have been designed to mislead the Court."

15. At para. 10 Mrs Kelly states, *inter alia*, "I did not know about this hearing [i.e. the 19th May 2015], nor was I "served" with any form of Notice of any formal Motion being listed for hearing on the 19/5/2015 ...".

16. At para. 13 Mrs Kelly states "the fact that I did not appeal this order of 19/05/2015 until now, is further proof that I was not aware of same", and she goes on to refer to the fact that she has appealed against all other orders made in these proceedings.

17. Unlike Mrs Kelly's affidavit, Mr O'Regan's affidavit addresses the issue that the Court asked to be addressed, and also responds to her affidavit. For convenience I will set forth *verbatim* the contents of paras. 7 and 8 of his affidavit:

"7. It is not the case that Mrs Kelly learned of the Relevant Order only in January 2019. Mrs Kelly has been fully aware of the Relevant Order since it was made, or very shortly thereafter. I say that notwithstanding that Mrs Kelly did not attend Court on 19 May 2015. I do so on the basis of the following record:

(a) By letter dated 8 May 2015, Registrar Marie O'Carroll of this Honourable Court wrote to Mrs Kelly (and her husband James Kelly) to advise that this matter would be listed before the High Court (Baker J.) on Tuesday 19 May 2015 "for the purpose of clarifying the part of her order made on 13 April 2015 as it relates to the costs order only". A copy of that letter appears at exhibit COR2 to the Respondent's first affidavit.

(b) By a notice dated 18 May 2015 and signed by her, Mrs Kelly addressed certain statements to a lengthy list of addressees, including Baker J and my firm. That notice referred (at para. 4) to the hearing scheduled for Tuesday 19 May 2015 and also (at para. 2) to the issue of costs, which had been referred to in the Registrar's letter of 8 May 2015. A copy of that notice signed by Mrs Kelly appears at exhibit COR 3 to the Respondent's first affidavit. Given this document and that referred to at paragraph 7 (a) above, it is plain that Mrs Kelly was fully aware in advance of the hearing scheduled for 19 May 2015.

(c) I attended counsel (Garvan Corkery BL) at the hearing on 19 May 2015. That hearing was recorded by a stenographer. At conclusion of that hearing Court (Baker J) asked my counsel to arrange for a copy of the stenographer's transcript to be furnished to the Court, whereupon my counsel clarified with the stenographer before the court that he (the stenographer) had in fact been instructed by Mrs Kelly, and in those circumstances we were unfortunately unable to assist the Court in relation to the transcript. I beg to refer to a copy of my counsel's

contemporaneous manuscript note of the short proceedings 19 May 2015, reflecting the stenographer's presence, upon which, marked 2COR2 I have signed my name prior to the swearing hereof. I can only take that, having been engaged at significant expense by Mrs Kelly, the stenographer promptly furnished to her a transcript of the proceedings of 19 May 2015.

(d) After the hearing 19 May 2015, I wrote to all those who had been put on notice of the Slip Rule application by direction of Cregan J. including Mrs Kelly, to furnish to them a copy of the order of Baker J made on 19 May 2015, and a copy of the extemporaray [sic] judgement of Baker J of 13 April 2015, and I beg to refer to copies of those letters upon which, marked "2COR3" I have signed my name prior to the swearing hereof. As can be seen from the first of these letters exhibited there, Mrs Kelly was included in that correspondence, and accordingly furnished in May 2015 with a copy of the Relevant Order. (I note that Mrs Kelly had been present in Court personally on 13 April 2015).

(e) Mrs Kelly then sought, in the name of Mr Singh, to appeal the Slip Rule order that had been made by the High Court (Baker J) on 13 April 2015 and clarified by the Relevant Order, but unsuccessfully so. Costs were again awarded against Mrs Kelly by the Court of Appeal. Following dismissal of that appeal, I wrote to Mrs Kelly by letter of 25 November 2016 in relation to the question of costs, enclosing a copy of the Order of the High Court of 13 April 2015 and also the Relevant Order, together with a copy of the Order of the Court of Appeal of 19 October 2015, and the bill of costs in relation to the Slip Rule application in the High Court and in the Court of Appeal, and I beg to refer to a copy of that letter upon which marked "2COR4", I have signed my name prior to the swearing hereof.

(f) In view of the complicated procedural history of these proceedings and the related proceedings noted paragraph 6 (c) above, Murphy J in the High Court, who ultimately heard the substantive cases, directed that I deliver and file an affidavit recounting the procedural history, which I did in terms of the Procedural Affidavit (referred to at paragraph 6 (c) above). The schedule to the Procedural Affidavit contains a table setting out in detail the procedural history of all relevant proceedings, and at the top of page 11 of the affidavit, in that table, there appears an entry in respect of the hearing on 19 May 2015. A copy of the procedural affidavit was delivered to Mrs Kelly undercover of my letter to her of 19 December 2017, and I beg to refer to a copy of that letter upon which, marked "2COR 5", I have signed my name prior to the swearing hereof."

18. In my view the affidavit evidence of Mr Regan, which is cogent and corroborated by the exhibits to which he has referred, establishes clearly for the purposes of the present application on the balance of probabilities that Mrs Kelly's repeated assertions both orally and in her affidavit that she became aware of the order of the 19 May 2015 only when she saw a reference to it in the judgment of Murphy J. to which she has referred, are untruthful. I do not accept her assertion in that regard, and I have particular regard to the uncontroversial fact that she arranged for a stenographer to attend court on the 19 May 2015, and it beggars belief that she would not have received a copy of that transcript in the immediate aftermath, but in any event I'm satisfied that she was made aware of the order, and indeed received a copy of same long before January 2019.

19. There is no evidence before the court that Mrs Kelly formed an intention to appeal against the order of 19 May 2015 within the time permitted under the Rules for so doing. The position she has adopted is that she did not become aware of that order until January 2019. That is a position which I have rejected.

20. Accordingly, Mrs Kelly fails to satisfy even the first limb of *Eire Continental*, which is sufficient to dispose of her application by rejecting it. It is unnecessary to consider whether something like mistake on her part caused her not to lodge an appeal within the time permitted for doing so. Neither is it necessary to consider whether there are arguable grounds for contending that the said order should not have been made.

21. In circumstances where I have rejected Mrs Kelly's evidence that she became aware of the order only in January 2019, there is no explanation for the delay of almost 4 years which has passed since the making of the order which she seeks to appeal. The onus is upon Mrs Kelly to satisfy the court that she comes within the principles of *Eire Continental*, and in my view she has failed to discharge that onus for the reasons which I have stated.

22. I would therefore refuse her application for an extension of time is sought.