THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 270

Record Number: 2016/526 & 2017/46

Peart J.
Irvine J.
Hogan J.

BETWEEN:

KEN FENNELL

PLAINTIFF/RESPONDENT

-AND -

GERRY WARD AND MONEYBRAIN LIMTIED

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 31ST DAY OF JULY 2018

1. Before the Court for determination are two motions brought by the appellant, Gerry Ward. These motions are brought in advance of any hearing of his substantive appeals against orders made by the High Court on the 25th November 2016 (Reynolds J.) ("the November order") and on the 27th January 2017 (McDermott J.) ("the January order") respectively.

2. Before describing the reliefs sought by Mr Ward in these motions, it is worth noting the nature of the two orders which are the subject of the substantive appeals.

3. The November order made on foot of a notice of motion issued by the plaintiff receiver seeking to attach and commit the appellant for his failure to comply with an order of the High Court (O'Connor J.) dated the 28th July 2016 directed that the motion "do stand adjourned peremptorily against [the appellant] to the Ct 5 list on Monday, 5th December 2016". The January order is one whereby the High Court (i) refused to grant a stay on the order made by O'Connor J. on the 28th July 2016 requiring him to deliver up possession of a premises in Dundrum, and (ii) adjourned generally with liberty to re-enter the notice of motion to attach and commit the appellant which was the subject of the November order.

4. It is worth noting also at the outset that the plaintiff receiver has by now taken possession of the Dundrum property, which means inevitably the motion to attach and commit the appellant for his failure to hand over possession is now for all practical purposes moot, given the primarily coercive nature of the committal jurisdiction, and in any event the receiver has decided not to pursue that relief further and the motion has been adjourned generally with liberty to re-enter.

5. Since the motion to attach and commit is moot, the complaints that the appellant makes for the purpose of challenging the lawfulness of various orders made earlier in these proceedings really need not be addressed substantively. Nevertheless I will address the principal issues raised lest it be thought that by failing to address them they may have some merit. They have not.

Notice of motion dated 24th July 2017

6. In this motion the appellant seeks four reliefs as set forth therein. In summary he seeks the following orders:

> (i) that counsel retained by the solicitors acting for the receiver "be recused/removed from the matter/case" because of what he contends are counsel's efforts to interfere with due process and "[counsel's] proclivity to repeatedly maliciously slander [him] and her repeated attempts to deceive and misrepresent the facts and truth to the Court";
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> (ii) that the two substantive appeals (record numbers 2016/526 and 2017/46) be adjourned or stayed until two applications that he has brought before the Supreme Court have been determined;
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> (iii) that the receiver be prohibited from marketing the Dundrum premises for sale until all legal proceedings have been finalised, and
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> (iv) that "the matter" be referred to the Director of Public Prosecutions and/or the Garda Fraud Squad for a criminal investigation in the light of various matters to which he refers.

7. In relation to (i) above this Court has no power to do as the appellant requests, even if there was any justification for the complaints which the appellant seeks to make against counsel for the receiver. His complaints amount to saying that where counsel opened to the High Court on different occasions, and relied upon, the contents of affidavits sworn by or on behalf of the receiver against the appellant, and with which the appellants disagrees, counsel is engaging not only in slandering the appellant but in lying to and deceiving the court contrary to the ethical and professional standards expected of the barristers' profession, and for that reason counsel should be removed from the case by the Court or otherwise forced to recuse herself from the case. This is an unstateable proposition. The receiver is entitled to retain solicitor and counsel of his choice. The fact that the appellant has a different view of the facts and/or of the law to what is urged upon the court by counsel against him does not mean that counsel is engaging in deception or behaving unethically or unprofessionally before the Court. Litigation is an adversarial process where the parties will

almost inevitably have a different view of the facts and the law to urge upon the Court in support of their respective arguments. That is the nature of litigation. The appellant, who is not professionally represented needs to understand this.

8. In relation to relief (ii) above, the appellant seeks to have his two substantive appeals to this Court adjourned until the Supreme Court has determined two applications by him to that Court for leave to appeal against the refusal by this Court of (i) a stay on the order for possession made by the High Court on 28th July 2016, and (ii) the refusal of an extension of time within which to appeal against the said order for possession. In my view there is no proper basis to accede to that application, since firstly the receiver has already taken possession of the premises in question on foot of the order for possession, and secondly, if it should happen that the Supreme Court grants his applications for leave to appeal, and finds in his favour on that appeal, the appellant will have an adequate remedy in damages against the receiver in the event that by then the premises have been disposed of by the receiver. In such circumstances the balance of justice would not favour the granting of the stay sought.

9. The third relief sought by the appellant in his notice of motion is that the receiver be prohibited from marketing the Dundrum premises for sale until all legal proceedings have been finalised. I would without hesitation refuse that relief since the receiver is in possession and has an entitlement to market and sell the property. This Court should not interfere with his actions in that regard. For the same reasons just given for refusing a stay on the order for possession, I would refuse this relief also. The appellant's remedy, if it should turn out that the premises should not have been sold by the receiver in order to recoup money borrowed from the bank by the appellant, is a claim in damages.

10. Relief (iv) seeks that "the matter" be referred to the Director of Public Prosecutions and/or the Garda Fraud Squad for a criminal investigation. It is not entirely clear what "the matter" refers to. But in so far as the appellant considers that there has been some criminal offence committed against him in relation to the recovery of possession of the Dundrum property by the receiver appointed by the bank which gave loans to the appellant secured by that property, or in relation to any other matter relating thereto, his proper course is to make his complaint to the appropriate authority so that it may be investigated in the normal way. It is no function of this Court to direct an investigation or make the referral sought. I would refuse this relief also.

Notice of motion dated 10th October 2017

11. In this motion the appellant essentially seeks to have all the proceedings against him dismissed, and his appeals allowed, on the basis that all the affidavits that have been sworn by or on behalf of the receiver are not in compliance with the Rules of the Superior Courts, 1986 (S.I. 15 of 1986), and specifically Ord. 40, r. 6 and r. 9 thereof.

> Rule 6 provides:
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> "(6) Every commissioner to administer oaths *shall express the time when and the place where he shall take any affidavit*, or the acknowledgement of any deed, or recognisance, otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the court; and every such commissioner shall express the time when, and the place where he shall do any other act incident to his office."
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> Rule (9) provides:
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> "(9) Every affidavit shall state the description and *true place of abode of the deponent*; and every affidavit of service shall state when, where and how, and by whom, such service was effected and in the case of delivery to any person, shall state that the deponent was at the time of such delivery acquainted with the appearance of such person."

12. The point being made by the appellant in relation to rule (9) is that in every affidavit sworn by or on behalf of the receiver the deponent has stated his/her address as being the address where he/she works during the day, and not his/her "place of abode" meaning in his submission the address at which they normally reside – in other words their home address.

13. The point being made in relation to rule (6) is that in every affidavit filed by the receiver in these proceedings to date the commissioner for oaths before whom such affidavits have been sworn has failed to include the time of day at which the affidavit was sworn. The jurat in every instance has simply stated the date of swearing and the address at which the affidavit was sworn.

14. On this motion the appellant has submitted that S.I. 15 of 1986 (the Rules) must be given a literal interpretation like any Act of the Oireachtas, and that where the rules to which he has referred have not been complied with as to the deponent's true place of abode and time of swearing, the affidavits should not have been admitted into evidence by the judge hearing the particular matter in which such affidavits were being deployed. In his grounding affidavit at para. 1(a) the appellant states:

> "(a) … the alleged affidavits of the plaintiff/respondent in these proceedings are not lawfully constituted in full accord with the rules of the Superior Court (THE LAW), wherein the affidavits of the plaintiff are not authentic, are unlawful and invalid, and are fraud and perjury before the Court, under Statutory Instrument 15 of 1986 Order 40, Rules 1 to 33".

15. The appellant has submitted that these rules must be given a literal interpretation since the words used are clear and unambiguous, and has sworn in his grounding affidavit that in circumstances where various judges have permitted the affidavits to be adduced as evidence and relied upon in court each and every such judge has facilitated fraud and/or perjury, and by so doing "are deemed to have vacated his/her office". He goes on to urge that until these points of law have been fully addressed and determined to his satisfaction the Court of Appeal has no jurisdiction to proceed in relation to his appeals, and that the Court "will not be recognised as a lawfully constituted Court". In the alternative he seeks that the proceedings under Record Number 2016/6238P (being the receiver's proceedings against him in the High Court) be dismissed on the basis that all the plaintiff's pleadings are not lawfully constituted, and where six named judges who have dealt with various applications and motions in those proceedings "are deemed to have vacated their respective offices as judges under Article 34.6.4 of the Constitution, and have facilitated perversion of justice in favour of the plaintiff/respondent". He goes on to seek costs in a sum not less than €175,000.

16. At the outset I should note that the issues now raised in this motion regarding non-compliance with Ord.40, rr. (6) and (9) of the Rules were never raised in the High Court. For that reason alone this Court should not determine the point raised on this motion. The time to raise issues of that kind is when they first arise. That is when the application, which is grounded upon the affidavit about which complaint is being made, is before the High Court for hearing. The fact that the appellant may only have thought of the point, or considered the particular provisions of the rules relied upon at some later stage does not entitle him to raise the issues in a motion to this Court. Having not raised the issues in the High Court he is precluded from relying on it now.

17. But in any event, the point is without any real merit. While the rules identified by the appellant say what they say, they are not a penal statute requiring the kind of inflexible strict and literal interpretation urged by the appellant. They must be applied with common

sense and practicality. In my view the Rules of Court prescribe procedures designed primarily to enable things to be done, and not to prevent things from being done. Litigants must, of course, adhere to the procedures provided. But there are within the rules themselves certain provisions which, for example, make clear that where a time is provided for the doing of any act or taking some step in the proceedings, that time can be extended or indeed abridged. There is flexibility built into the scheme of the rules to enable things to be done. For example, where in Ord. 12, r. 2 a period of 8 days is provided for the entry of appearance following the service of a summons on a defendant, Ord.12 goes on to provide at r. 13 that "a defendant, save in actions for the recover of land, may appear at any time before judgment …". One particular rule must not be read in isolation where another rule is also relevant.

18. In relation to the appellant's submission both in relation to the address of the deponent and the failure to provide the time of day at which the affidavit was sworn, that these affidavits are inadmissible for failure to adhere strictly to the rules identified by him, he fails to have regard to Ord. 40, r.15 which contains a specific provision that clearly indicates that Ord. 40, rr. (6) and (9) are not to be applied with the kind of strict interpretation contended for which truly would be to require form to triumph over substance. Order 40, r.15 provides:

> "(15) The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received".

19. Clearly, had the appellant raised these particular issues before the judge dealing with matters at first instance, that judge would have considered the appellant's application to have the affidavits excluded, and in the unlikely event that he agreed that the affidavits were so out of conformity with the rule in question as to render it appropriate that they be excluded, he would, nevertheless, have had a discretion to permit them to be used under Ord.40, r. 15. He would be entitled to form a view as to whether the nature of the defect relied upon was of substance, or merely a technical divergence from the strict letter of the rule, and decided the issue accordingly as a matter of discretion. In fact, if such a purely technical objection was raised, the judge might also simply offer the plaintiff an adjournment to enable the affidavit to be re-sworn with a jurat which contained the time of day at which it was sworn, rather than have to rule on the objection. How the matter would be dealt with would be a matter for the judge's discretion. Either way, it is clear that no benefit could ultimately accrue to the appellant.

20. I would further add that the construction of Ord. 40, r. 6 urged by the appellant would lead to a manifest absurdity. A statement that a particular affidavit was taken by the Commissioner, at, say, 10 a.m. without adding the date in question would be meaningless and pointless. In these circumstances, it is, I think, permissible to invoke the provisions of s. 5(2)(b) of the Interpretation Act 2005 ("the 2005 Act") which provides:

> "In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—
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> ….
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,
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> the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

21. If the reference to "time" is simply to time in the sense of time of day, then the provisions of Ord. 40, r.6 simply do not reflect the plain intention of the drafters of the 1986 Rules. I think it plain that in using the word "time" they intended to have an appropriate record for court purposes of when the affidavit was taken before the Commissioner. In these circumstances, it is permissible, having regard to the provision of s. 5(2)(b) of the 2005 Act, to treat the word "time" as it appears in Ord. 40, r. 6 as referring not simply to the time of day, but as also embracing the date on which the affidavit was also taken.

22. In the present case, I am completely satisfied that the issues raised under Ord.40, rr. (6) and (9) by the appellant fall into the category of purely technical defects if they are defects at all. In fact, having regard to the fact that it is permissible to have regard to the provisions of s. 5(2)(b) of the 2005 Act, I do not consider them to constitute a breach of Ord.40.

23. As to the address of the deponents being stated as their workplace address and not their place of abode in the sense of their home, the phrase "place of abode" must be given a sensible meaning in line with its clear purpose. I appreciate that if one seeks a dictionary meaning for the word "abode" it will state dwelling or some such to indicate a place were a person lives. But given the perfectly obvious purpose of the requirement to state an address for a deponent, the context of litigation must enable that word to include the address at which the deponent works, and hence where he may be found should that be necessary for any particular purpose. I do not consider the insertion of a workplace address to breach Ord. 40, r. (6). But even if it did it is certainly a purely technical breach well capable of being disregarded by any court for the purpose of allowing the affidavit to be used.

24. The issue as to failure of the commissioner for oaths to state the time of day in the jurat has already been the subject of a judgment of Irvine J. in *Danske Bank v. Kirwan* [2016] IECA 99. She concluded as follows:

> "I do not read Ord. 40, r.6 of the Rules of the Superior Courts as requiring a commissioner who witnesses the signature of a deponent to insert the time of day upon which they did so. Indeed, I find it hard to recollect any occasion upon which I have ever seen such information included in an affidavit. I am satisfied that the requirement of the rule has been properly met insofar as the Commissioner has inserted in the affidavit the date upon which he witnessed the deponent's signature. However, even if I am incorrect in this regard, the court has power under Ord. 40, r. 15 to receive an affidavit notwithstanding any irregularity in the form thereof. The failure to state the time on an affidavit is a defect of form only and can safely be regarded as a form of harmless error. I do not believe that any court would treat Ms O'Connell's affidavit as inadmissible by reason of the absence of this information as no prejudice is visited upon Mr Kirwan as a result of its omission."

25. I agree, and would add this. If "time" as expressed within r. 6 is to mean the time of day as opposed to the date, it would give rise to an absurdity since then the rule would read as meaning that while the time of day was required to be inserted in the jurat, the date of swearing would not. That would make no sense at all, and cannot have been the intention of the drafters of the rules either in 1986, or the much earlier versions of the rules many of which were carried into the 1986 rules, including Ord.40, r. (6) and r. (9). In my view the word "time" as used in the rule under scrutiny must be given a meaning that makes sense, and that must be that it

means the date of swearing, and not simply confined to the time of day. But, as Irvine J. has stated, even if I be wrong to give the word "time" such a purposive interpretation in the context in which it is used, it is an objection of such a technical nature and with no prejudice to the appellant that it comes well within the type of technical defect more than amply covered by Ord. 40, r. 15.

26. For these reasons I would also refuse the reliefs sought in the appellant's motion dated the 10th October 2017.