THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 153

Appeal Number: 2017/59

Peart J.
Whelan J.
Baker J.

BETWEEN:

BARRY ENGLISH

PLAINTIFF/APPELLANT

- AND -

NIALL O'DRISCOLL, GEAROID O'DRISCOLL AND DAN MURPHY, A FIRM PRACTISING UNDER THE STYLE AND TITLE OF NIALL AND GEAROID O'DRISCOLL AND COMPANY

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 29TH DAY OF MAY 2019

1. This is an appeal from the judgment and order of the High Court dated 25th October 2016 [2016] IEHC 584. It raises an unusual yet fundamental question as to whether the plaintiff/appellant was afforded a fair opportunity to address an issue raised, not by the defendant but by the trial judge himself, after the evidence in the case had concluded, and which the trial judge in his judgment described as "a key question for the consideration of the court". The trial judge's consideration of that "key question" led him to conclude that these professional negligence proceedings against the defendant accountancy firm should be dismissed on the basis that the investment scheme at the heart of the dealings between the plaintiff and the defendant firm was one designed to perpetrate a fraud upon the Revenue by facilitating a scheme to incorrectly claim capital allowances, and that the Court as a matter of public policy should refuse assistance to either party since to do so "would be to implicitly approve of the unlawful scheme in which the parties were engaged".

2. Since for the reasons that will appear, I am of the view that the order dismissing the proceedings cannot stand, and that constitutional fair procedures dictate that the proceedings must be remitted to the High Court for a fresh hearing before a different High Court judge, it is desirable that I say little about the nature of the investment scheme in question or express any view whatsoever as to whether the scheme does or does not amount to one which is tainted by the kind of illegality found by the trial judge. As I have said, such an allegation was not made by the defendants as part of their defence to the proceedings. A question may arise in the future as to whether on any rehearing of the case in the High Court the Revenue Commissioners should be joined to the proceedings given these developments. But that is not a question upon which this Court is called upon to express a particular view, and I do not do so.

3. Before addressing the question of whether fair procedures were not afforded to the appellant, it is helpful to set out a passage from the trial judge's judgment in which he refers to the fact that the appellant commenced his proceedings against the defendant firm on the very last day prior to the expiry of the applicable limitation period under the Statute of Limitations, 1957, as amended, namely the 30th May 2007, and even though in the trial judge's view the appellant had sufficient details about his claim from May 2008 to have been in a position to proceed to a hearing of his claim, he did not serve notice of trial until July 2015, resulting in a trial occurring in March 2016. The following passage gives a flavour of the view formed by the trial judge during the trial, but in respect of which the appellant argues that he was given no opportunity to respond in any way during the course of his evidence or the hearing at all, because the trial judge kept these concerns to himself until he gave his judgment. Commenting on the delay in getting the case to trial, the trial judge stated the following:

> "113. One possible explanation for all of this [delay] is Mr English's desire to ensure that his claims for capital allowances in the five years beginning in 2001 are not re-opened by the Revenue. If this case had been heard in the period 2007 – 2010, the fact that these allowances had been incorrectly claimed is likely to have led to the recovery of all or substantially all of those allowances by the Revenue, without the Revenue having to establish fraud on the part of Mr English.
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> 114. However, in the absence of the Revenue being able to prove fraud on the part of a taxpayer, there are time limits regarding the re-opening of capital allowances claimed in previous years. Since 15 years since the investment and almost 10 years since the last of the capital allowances were claimed, and even though Mr English accepts that they were claimed based on a 'sham and a fraud', it may now be too late for the Revenue to recover these capital allowances, in the absence of fraud on the part of Mr English.
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> 115. It is this Court's view that a likely reason for the delay in Mr English first instituting proceedings and secondly in prosecuting its claim, was his desire to ensure that the Revenue were not in a position to recover capital allowances from him, since he knew that his proceedings were going to disclose that he had incorrectly claimed capital allowances. Mr English had an incentive to claim the full extent of the capital allowances, based on the valuations which she has sworn where an 'obvious fraud', but by delaying making his claim against Mr Murphy, it would seem to this Court that he has reduced the chance of those capital allowances being clawed back by Revenue.

> 116. If Mr English was a genuinely innocent participant in this investment scheme (and there was absolutely no risk of his being implicated in an attempt to defraud the Revenue) this Court could see no reason why the proceedings were not instituted and prosecuted much earlier so as to be heard much earlier than 13 years after the scheme collapsed. It is this Court's view that the timing of the institution of the proceedings and the timing of the prosecution of the claim provides further evidence of the level of understanding of Mr English regarding the true nature of the scheme, not just after it failed, but also at the time of the investment. Mr English's attention to detail and skill as a business man as well as his financial numeracy leads this Court to conclude that he is someone who was at all times (and not just after the scheme collapsed) very conscious of the entitlement of the Revenue to claw back capital allowances, which were based on a sham and a fraud. Indeed, as previously noted, this is evident from Mr English's decision to make his payment of the £160,000 fee to Mr Murphy conditional on a scheme (which he now acknowledges was a sham and a fraud) being successful and which conditionality, he suggested in evidence, applied to all the professionals advising on the scheme."

4. While the appellant in his notice of appeal disagrees with many of the findings of fact made by the trial judge, and argues that in so far as certain inferences were drawn for which there was no proper basis, the gravamen of this appeal, and the basis on which this appeal can be determined, is that the concerns that the trial judge expressed in his judgment as to the fraudulent nature of the investment scheme, which formed the basis for his conclusion that the proceedings should be dismissed on public policy grounds were never made known to the appellant during the course of the hearing, or put to him so that he might respond, or even that he might be recalled in order to have these matters put to him, and therefore that he had no opportunity to vindicate his good name, or otherwise deal with the matters which were clearly of such concern to the trial judge. As I have stated already the defendants made no allegation of fraud against the plaintiff in relation to the scheme, and did not seek to cross-examine the appellant's evidence on that basis. It is also the case that the third named defendant, Mr Murphy, who was the partner in the defendant firm with whom the appellant had dealt for the purposes of the investment was not called by the defendant firm to give evidence.

5. The hearing of these proceedings in the High Court was spread over seven days between 2nd March 2016 and 11th March 2016. The appellant gave his evidence, including by way of cross-examination, over a period of four days, at the end of which, the trial judge raised no questions. Following the completion of all evidence on 15th March 2016 the matter was put back for the preparation of written submissions. When the matter was listed for mention on 18th April 2016 the trial judge stated:

> "There is one issue that I would like to raise though for both parties, and that is if the court would find in relation to this matter that the purchase price for the vessels and for the tonnage, and, indeed the professional fees, where inflated or incorrectly apportioned for the benefit of some or all of the parties but the detriment of the Revenue … then in certain circumstances that could constitute an illegal arrangement. So what I would like the parties, ask the parties, do they have views as to whether it might be an illegal arrangement, and if so I would like to hear submissions from the parties in relation to this issue and the effect of a finding of potential illegality on the proceedings".

6. The potential illegality being adverted to by the trial judge centred on whether the valuation of certain vessels was overstated. There is no doubt that by the time the case came on for hearing the appellant had become aware through his own investigations that they were overstated. But his contention is that at the time the scheme was entered into he was not so aware. I must express no view on this question for the reasons already stated, and do not do so. But the question for determination is whether as a matter of fair procedures the trial judge was required to put his concerns related to overstated valuations and the issue of the potentially fraudulent nature of the investment scheme to the appellant before reaching the conclusions that he reached in his written judgment. Again, it must be noted that fraud was not an issue raised on the pleadings by the defendants, or suggested during the appellant's cross-examination.

7. The respondent argues that by raising the question as to the possible illegality of the transaction and the possible effect of such a finding by the High Court the appellant was given ample opportunity to address the issue, and thereby afforded proper fair procedures. The respondents make the point also that if the appellant had wished to give further evidence following the raising of the issue by the trial judge on the 18th April 2016 an application could have been made for him to be permitted to do so. In their submission, the issue was sufficiently flagged by the trial judge to enable the appellant to address it after the 18th April 2016.

8. The respondents have gone further and have argued that in fact the trial judge would have exceeded his role as trial judge if he had intervened during the plaintiff's examination and cross-examination in order to make an allegation of fraud. They refer to the judgment of Lord Greene MR in *Yuill v. Yuill* [1945] All ER 183 who stated at p. 189:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows that the demeanour of a witness is apt to be very different when he is quick being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

9. I have little doubt that these words are wise, and no less correct now than they were when uttered some 74 years ago. However, the context in which they were uttered was very different to that of the present case. Those wise words are perhaps more relevantly directed towards a judge who might interfere excessively in the examination of a witness, or take over the questioning of a witness to such an extent that the trial risks becoming an unfair trial, and in that sense "enter the arena" – see for example J*ones v. National Coal Board* [1957] 2 QB. 53 *per* Lord Denning; *Donnelly v. Timber Factors Ltd* [1991] 1 I.R. 553 *per* McCarthy J.; and *Murtagh v. Minister for Defence* [2018] IESC 37.

10. The present case is one more akin to *MacDonncha v. Minister for Education & Skills* [2018] IESC 50 where, having heard a judicial review application to its conclusion, the trial judge disposed of the proceedings against the Minister on the basis of an issue that had clearly not been raised on the pleadings by the applicant, had not been argued at hearing, or raised by the trial judge as an issue during the hearing, and where on appeal the Minister was successful in arguing that as the point had not been pleaded, or raised by the trial judge during the course of the hearing, the Minister had not had a fair opportunity to address the issue either by way of adducing necessary evidence in answer to the point, or to make submissions in relation thereto. It was in such circumstances that the matter was remitted to the High Court on that single issue so that it could be dealt with before a different judge.

11. The present case is slightly different to *MacDonncha* given what was asked of the parties by the trial judge after the hearing had concluded and when the case was listed for mention on the 18th April 2016. To that extent, or so it is argued by the respondents, the issue upon which the case was determined by the trial judge was at least raised in advance of judgment, and submissions

requested. However, the appellant argues that the precise issue upon which the proceedings were dismissed, and what the trial judge described in his judgment as "the key issue for determination", was not raised in a sufficiently detailed way to afford a fair opportunity for the appellant to address it either by way simply of submissions, or by seeking an opportunity to adduce further evidence in relation to it despite the fact that the trial had concluded, subject to judgment being delivered.

12. Some weeks later on the 1st July 2016 the case was again before the trial judge for oral submissions. Written submissions had been prepared and exchanged by the parties. Those submissions were based on the evidence adduced and directed to the legal issues that arose, including to some extent the particular issue that the trial judge had requested the parties to address him on, namely the effect upon the proceedings of a finding by him that the investment scheme was an illegal arrangement. But it is fair to say that neither party seems to have anticipated that what the trial judge had in mind was that such a finding, if made, would lead to a dismissal of the proceedings simpliciter on the basis stated by the trial judge in his judgment.

13. It has to be borne in mind that these proceedings are brought in negligence. They are not proceedings in which the plaintiff was seeking to have enforced against the defendants' obligations on foot of a contract which is found to have a fraudulent or other illegal component or purpose – see for example *Quinn v. Irish Bank Resolution Corporation* [2015] IESC 29 *per* Clarke J. (as he then was); *Starling Securities Limited v. Woods & ors*, unreported, High Court (McWilliam J.), 24th May 1977; and *Kavanagh v. Caulfield* [2002] IEHC 67.

14. Nevertheless, the principle has been stated more broadly. For example, in *McIlvenna v. Ferris & Green* [1955] I.R. 318, again being a case in relation to the enforceability of a contract, the Court stated:

> "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the Court, *and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him.*" [Emphasis provided]

15. Similarly, *albeit obiter*, Finnegan P. in *Anderson v. Cooke* [2005] 2 I.R. 607, stated:

> "As the issue historically was policy based I consider it appropriate that the court may itself raise the issue even if the defendant does not: there are cases in which the court has regarded it as contrary to policy to lend assistance to a plaintiff involved in joint illegal activity even though the defence of *ex turpi causa* is not raised by the defendant by way of defence I recall an action for an account of a joint venture between two highwaymen."

16. In the present case in their written submissions to the High Court the respondents submitted that "it is clearly the case that if the Court finds, as a matter of fact, that the plaintiff was a party to that fraud [on the Revenue], the agreement must be unenforceable and the plaintiff cannot be allowed to benefit from his own wrongdoing". They went on to submit that "since the Taxes Consolidation Act 1997, as amended, is an Act that ought to be found to ground a defence of unenforceability – the Courts ought not to be used to reward or incentivise the defrauding of the Revenue Commissioners".

17. The difficulty in the present case, as I see it, is that the plaintiff's evidence was that he was unaware for a long time after this investment scheme was entered into that the two vessels in question were significantly overvalued for the purposes of the scheme. No contrary evidence was adduced by the defendants. The appellant could be found to be a party to a fraudulent transaction only if he entered into it knowing that the vessels were overvalued, thereby facilitating fraud upon the Revenue. The appellant's evidence, which was uncontroverted, was that it was the third named defendant Mr Murphy who was to obtain an independent valuation, that he was organising the particular transaction and controlling same, and that Mr Murphy did not obtain such an independent valuation. That is what essentially gives rise to the claim in negligence. The defendants gave no evidence to refute this. There was no evidence given to establish that the appellant was a party to such a fraud, and it was not suggested to him in cross-examination that this was the case. If this had been put to him, either by the defendants or indeed by the trial judge if he was concerned about this aspect of the transaction, he would have been able to respond to the allegation, notwithstanding that the question of fraud was not pleaded by the defendants against the appellant.

18. It appears to me that the conclusions reached by the trial judge are based on matters, or inferences drawn from matters, that were never put to the appellant. I am not to be taken as saying that the trial judge may not of his own motion raise with either or both parties the question of whether or not the investment scheme was unlawful as being a fraud upon the Revenue. Of course, he may, and ought to do so. But where conclusions are reached that a transaction at the heart of the proceedings is so tainted with illegality that the Court should not countenance affording the plaintiff any relief or assistance in relation to same, such conclusions must be based on the evidence given, or inferences properly drawn from such evidence given at trial.

19. In so far as the trial judge concluded that the appellant was a knowing party to an investment scheme designed to defraud Revenue of certain capital tax allowances, such conclusions were reached in my view without those pertinent matters being put to the appellant. In my view, the request for submissions from the parties on that question was not sufficient in circumstances where the trial judge in his judgment made adverse findings of fact against the appellant which were not based on evidence given at trial, and were never put to him. In my view, there was a want of fair procedures in the manner in which this occurred.

20. I would therefore set aside the order dismissing these proceedings, and remit the case to the High Court for rehearing before a different judge.