THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 48

Record Number: 2017 No. 185

Ryan P.
Peart J.
Irvine J.

BETWEEN:

BARRY WHITE

APPLICANT/RESPONDENT

- AND -

THE BAR COUNCIL OF IRELAND

RESPONDENT

- AND -

MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT/APPELLANT

- AND -

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF FEBRUARY 2018

1. By order of the High Court (Barrett J.) dated 5th April 2017, Mr White's claims against the Bar Council of Ireland were refused, but certain reliefs which he sought against the Minister were granted.

2. By the same order, the Bar Council was awarded its costs against Mr White, who in turn was awarded his costs against the Minister, Ireland and the Attorney General. This order was made under Ord. 99 of the Rules of the Superior Courts and on the usual basis that costs follow the event. There is no appeal against that part of the costs order.

3. However, by the same order, Mr White, who made an application in this regard, was granted an 'order over' against the Minister that he recoup from the Minister, in addition to his own costs, the further costs which he is liable to pay, and does pay, to the Bar Council. This particular order was sought, and was granted, pursuant to s. 78 of the Courts of Justice Act, 1936 which provides:

> "78. – Where, in *a civil proceeding* in any court, there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the Court, if having regard all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded, shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed." [Emphasis provided]

4. It is only the 'order over' against the Minister that is the subject of the Minister's appeal herein. The Minister's submission is that the s. 78 jurisdiction in relation to an 'order over' is not applicable to these judicial review proceedings, and that the trial judge erred in his conclusion that it was.

Summary of the parties' submissions
5. While the Minister argued in the High Court that s. 78 was not applicable to the present case, an argument that a judicial review proceeding is not 'a civil proceeding' within the meaning of s. 78 was not advanced in the High Court. Rather, it was argued that the section did not apply because the claims made against the Bar Council were entirely different and distinct from those brought against the Minister and where no question of potential joint liability could arise.

6. It is accepted by the Minister that the 'civil proceeding' argument was not advanced below, and that the Court's leave to argue the point on this appeal is required. I should address that application at the outset.

Leave to argue new ground:
7. The traditional approach to be taken to permitting a new ground of appeal to be argued is that stated by Henchy J. in *Movie News Limited v. Galway County Council* (unreported), Supreme Court, 15th July 1977, namely that only in an exceptional case ought it be permitted in the interests of justice, since it effectively deprives the other party of a right of appeal to which he/she has a constitutional entitlement. That principle was reiterated by Finlay C.J in *K.D v. M.C* [1985] I.R. 679 where he stated:

> "It is a fundamental principle, arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice."

8. This question has been the subject of further consideration more recently in the Supreme Court in *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 IR 227. In his judgment in that case O'Donnell J. stated at para. 28:

> "There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument on the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K. D. (otherwise C) v. M.C.* [1985] I.R. 697) for example); or where a party seeks to make an argument which was actually abandoned in the High Court (…) or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point on appeal. At the other end of the continuum lie cases where *a new formulation of argument* was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which *was closely related to arguments already made* in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."

9. In *ACC Bank plc v. Lynn and another* [2015] 2 I.R. 688, Charleton J. had to consider this question. In that case a new point was sought to be argued on appeal. t was a point which arose for argument in the light of a judgment of the Supreme Court in another case which was delivered after the decision in the High Court, and which concluded that there was no jurisdictional basis for making the type of order that was the subject of the appeal in *ACC v. Lynn*. Charleton J. in allowing that new ground to be argued in such circumstances stated that "the effect of not allowing this point to be argued was responsibly accepted by ACC Bank as meaning that an order of the High Court would be upheld by this court where the original order was made without jurisdiction". Echoing O'Donnell's reference in *Lough Swilly*, to "a continuum" of such cases Charleton J. stated also at p. 694:

> "[10] The argument of points on appeal not considered at first instance encompasses circumstances that point to potentially extreme contrasts between the factors which enable the exercise by this court of what is a broad discretion. There is a continuum between lack of merit in bringing fresh points on appeal simply because they have occurred to the parties or their lawyers late in the day and cases where the discretion should favour the appellant. In exercising that discretion, the fundamental point is where the balance of fairness lies."

10. At para. 11, Charleton J. went to state:

> "Of course, it is not possible to give any definitive list of factors. In addition, however, to those stated above, the urgency or importance of decision on a point of law which affects a multitude of cases and the conduct of the litigation may also be important. In *Koger Inc. v. O'Donnell* [2013] IESC 28, (unreported, Supreme Court, 18th June, 2013) the argument of a new point on appeal was disallowed where it was completely opposed to the points raised during the trial in the High Court. On the other hand in *Cussens v. Brosnan* [2015] IESC 48, (unreported, Supreme Court, 20th May 2015) a fresh ground which was closely related to the arguments advanced at first instance was allowed, it being regarded as arising from the questions already posed in the case. In the context of the fundamental obligation of the courts under the Constitution to seek to dispense justice to litigants, earlier cases on the exercise of this discretion are of limited assistance … . Any discretion to enable a new point to be argued on appeal is to be exercised in order to pursue the aim of fundamental fairness within the limitations of the constitutional structure."

11. Of particular significance in that case was the undoubted fact that if the new point was not permitted to be argued the Supreme Court would have been obliged to do an injustice by affirming an order of the High Court where that Court had lacked jurisdiction.

12. The present case before this Court is very different. t is accepted that the new argument was simply overlooked in the court below. Wile that has been very candidly stated by the appellant, my view is that it can be seen as a new formulation of an argument made in the High Court, namely that the words used in s. 78 indicate that the section is not intended to be used in relation to judicial review proceedings. t may also be seen to be an argument closely related to an argument made in the High Court that the section did not apply. On either view it is within the range of cases referred to by O'Donnell J. in *Lough Swilly* where some indulgence may, s a matter of fairness, be permitted to a party to make a new argument on appeal, particularly where there is no particular prejudice to the respondent in meeting that argument.

13. There is in my view no injustice to the respondent in allowing the new argument to be advanced. It relates to the statutory interpretation of s. 78, the same section that was under consideration in the High Court. It is not a complex point, and it has not been suggested by the respondent that there is any prejudice in circumstances where there was ample notice of the point in the notice of appeal and in written submissions, and the respondent was in a position to deal with it, and did so without disadvantage.

14. But the decisive point in favour of allowing the ground to be argued in my view is that the proper interpretation of s. 78 of the 1936 Act goes to the question of the jurisdiction of the High Court to make the order under appeal. I appreciate that there are other arguments made by the appellant as to why the section does not permit such an order to be made in a judicial review proceedings, and that it would be only in the event that the Court found against the appellant in respect of those other issues that the new ground might become decisive. Nevertheless, the issue of jurisdiction is an important issue, just as it was in *Irwin v. Deasy*, and it is important for the administration of justice that an order of the High Court should not be allowed to stand where this Court is satisfied that there was no jurisdiction to make it. It is appropriate therefore to permit the new ground to be argued for that reason, in addition to the reasons already stated above, in case it is decisive. I would therefore allow it to be argued and considered by this Court. But, as I come to explain, I do not believe that the new argument being advanced that a judicial review proceeding is not a 'civil proceeding', and therefore outside the ambit of the section, holds.

> The 'civil proceeding' point

15. The Minister has sought to exclude a judicial review application from the meaning of 'civil proceeding' as used in the section on the basis of Ord. 1, r. 1 of the Rules of the Superior Courts where the words "civil proceedings" are used. It provides:

> "Save as otherwise provided in these Rules, civil proceedings in the High Court shall be commenced by a summons of the Court to be called an originating summons".

16. The Minister has referred to the fact that an originating summons may be a plenary summons, a summary summons or a special summons. Parties to those summonses are referred to as either plaintiff or defendant, whereas in a judicial review proceeding the parties are described as applicant or respondent, or, historically, prosecutor or respondent. The Minister accordingly argues that a judicial review matter is not a 'civil proceeding', and therefore outside the section.

17. In my view, however, that argument relies upon a matter of mere nomenclature, which cannot survive the fact that quite apart

from the obviously civil nature of these judicial review proceedings (as opposed to criminal), the opening words of O.1, r.1 RSC are "*Save as otherwise provided* in these Rules … ". The Rules do indeed otherwise provide in relation to the commencement of judicial review proceedings – viz. O.84 RSC. Therefore the nomenclature argument evaporates.

18. Quite apart from that conclusion I would refer to Article 34.3 of the Constitution which provides:

> "3. The Courts of First Instance shall include a High Court vested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, *civil or criminal*". [Emphasis provided]

19. This provision makes clear that the matters over which the High Court has jurisdiction are either civil in nature or criminal in nature. There is no third category. The present proceedings are self-evidently not criminal in nature. *Ergo*, they are civil in nature. Even absent that sort of deductive reasoning, the nature of the appellant's claims against both the Bar Council and the Minister are self-evidently civil in character as that word is understood not just by lawyers but a wider community. A criminal proceeding is one where a person is prosecuted for a criminal offence alleged to have been committed by him/her. Everything else is civil in nature, including judicial review.

20. I would reject the new ground argued. Judicial review proceedings are not outside the ambit of s. 78 on this basis. But this conclusion is not dispositive for reasons I shall cone to.

Different claims

The Minister's submissions
21. The Minister argues that even if a judicial review proceeding is within the meaning of 'a civil proceeding' in s. 78, the section still does not apply on the facts and circumstances of the present case where Mr White's claims against the Bar Council were entirely different and distinct from those brought against the Minister, and depend on different facts – in other words they are different causes of action, and that the trial judge erred in concluding that an order should be made under the section on the basis that the claims "were fundamentally joined together by the circumstances".

22. The Minister submits that there are no circumstances in which the Bar Council and the Minister could be adjudged to be joint wrongdoers in the same cause of action, as regularly occurs in an action, say, for negligence arising from a road traffic accident where there are, say, two defendants and where either or both may be found liable to the plaintiff arising from the same cause of action and the same facts, depending how the liability issues are determined at trial. Neither was it ever conceivable that the Bar Council would be found to have a liability for the claims made against the Minister or *vice versa*. Therefore the context of the section makes clear that even though a judicial review matter may be a civil proceeding as opposed to a criminal proceeding, the very nature of a judicial proceeding makes it obvious that it is inapplicable to the facts and circumstances of the present case, and these parties.

23. The trial judge at para. 35 of his judgment on the 'order over' application ([2017 IEHC 200]) stated:

> "It seems to the court having regard to the factual matrix to which reference was made by counsel for Mr White in his submissions that the proceedings against the Minister and the Bar Council *were fundamentally joined together by the circumstances"*. [Emphasis provided]

It is submitted that this statement is erroneous, and does not provide a proper basis for making an order under s. 78 of the Act.

24. As a fall-back argument, the Minster submits that even if the Court is satisfied that the trial judge had a jurisdiction to make the order under s. 78 of the 1936 Act, it was a matter for the exercise of his discretion, and that in all the circumstances, and on the facts of this case he wrongly exercised that discretion.

Mr White's submissions
25. Mr White submits that the mere fact that the reliefs sought against the Bar Council are different from those sought against the Minister does not take the case outside the section, since the section specifies no requirement that the reliefs sought against the different defendants must be the same, and/or that the reliefs sought against each must be interlinked.

26. He submits that the argument advanced by the Minister on the basis that there can be no joint and several liability finding in the present proceedings is misplaced in circumstances also where the section makes no reference to joint or concurrent wrongdoers, or joint and several liability.

27. It is submitted also that the trial judge was clearly alive to the fact that the reliefs sought against the Bar Council were different and distinct from those sought against the Minister, but that he was correct to conclude that they were "fundamentally joined together by the circumstances". It is submitted that this finding is factually sustainable because of the Minister's approach to Mr White's application to the Minister to have his name included on the Legal Aid Panel. In particular, reference is made to the fact that upon receipt of that application, the Minister in fact wrote to the Bar Council, and met with its representatives, both in the absence of Mr White and without any notice to him. It is submitted also that the Minister determined the application on the basis of what was contained in the Bar Council's letter to the Minister dated the 5th December 2014 which is referred to at para. 12 of the judgment of this Court dated the 6th December 2016 delivered by Ms. Justice Finlay Geoghegan on the substantive appeal herein [2016 IECA 363].

28. It is further argued that even if s. 78 does not apply, the court may make an order over pursuant to its inherent jurisdiction, where the facts and circumstances make it just to so order. It is submitted that the wide inherent jurisdiction of the Court in relation to the costs finds recognition in the provisions of Ors.99 of the Rules of the Superior Courts which provide, *inter alia*, that the costs of and incidental to all proceedings shall be in the discretion of the courts. It is submitted that s. 78 of the Act simply describes one form that the court's discretion may take, but that the court's power to make such an order is not dependent as such upon s. 78 being applicable to judicial review proceedings. The Minister counters this submission by referring to the opening words of Ord. 99, r.1 of the Rules of the Superior Courts which state: "Subject to the provisions of the Acts [i.e. Courts (Establishment and Constitution) Act, 1961 and Courts (Supplemental Provisions) Acts, 1961 to 1981, and any other statutes relating to costs …". In other words, it is submitted that the inherent jurisdiction of the court by reference to the discretion in relation to costs provided for by Ord. 99, r.1 of the Rules of the Superior Courts is expressly limited by, inter alia, s. 78 of the 1936, and that the Court is not at large in this regard.

29. In so far as the Minister has argued also that it is clear the s. 78 applies only where a number of defendants are sued in respect of the same cause of action and therefore on the same facts, again Mr White points to the fact that such a requirement is nowhere to be found in the wording of the section. It is urged that the Court should, as did the trial judge, find the correct meaning of the section from the precise words used by the Oireachtas to express its intention, and that those words do not exclude judicial review

proceedings such as the present proceedings from its ambit, and that it would have been easy to exclude them if that was what the Oireachtas had intended.

30. As stated by Ms. Justice Finlay Geoghegan in her judgment in the substantive appeal herein, the claims by Mr White against the Bar Council were primarily concerned with the lawfulness of Rule 5.21 of the Code of Conduct of the Bar of Ireland. In that regard, he sought certain declaratory reliefs *i.e.* that the rule was *ultra vires* the Bar Council, was in restraint of trade, and was a disproportionate interference with his constitutionally protected right to earn a livelihood. He also sought a declaration that the decision to make his readmission to the Law Library subject to compliance with Rule 5.21 of the Code of Conduct was unreasonable. Those claims were dismissed. It is self-evident that any reliefs granted on foot of those claims could never be made against the Minister. That is so obvious in my view that it requires no further elaboration.

31. The primary claim made against the Minister was for an order of *certiorari* to quash the Minister's decision to refuse to include Mr White's name on the panel of counsel eligible to be paid for services provided under the Criminal (Legal Aid) Regulations, 1965. In addition he sought certain declarations linked to that decision, such as a declaration that the decision of the Minister to require Mr White to be a member of the Law Library and/or otherwise be in compliance with Rule 5.21 of the Code of Conduct as a condition of eligibility for inclusion on the Legal Aid panel constitutes a decision to give the force of law to the Bar Council's Code of Conduct contrary to Article 15.2 of the Constitution. Again, it is self-evidently the case that no relief on foot of such claims could be granted against the Bar Council.

32. The claims made and reliefs sought against each of these parties are distinct and different. When dismissing the claims made against the Bar Council, the trial judge could never have gone on to grant those reliefs against the Minister. Neither are they claims for which there could be found to be any joint liability.

33. Having concluded that the case law to which he had been referred did not constrain the application of s. 78 of the 1936 Act to "the same cause of action" or to "a genuine alternative claim and alternative potential liability (to which conclusions I will return), the trial judge stated as follows at paras. 33-35 of his judgment:

> "33. First, the court does not see that Byrne and O'Keeffe seek to constrain the application of s. 78 two where there is "the same cause of action "(Byrne) or "a genuine alternative claim and alternative potential liability" (O'Keeffe). Rather, they involve recognition and application of transcendent legal principle in cases where such further factors present.
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> 34. Second, that transcendent principle, it seems to the court, also applies in the circumstances of the within application: reasonableness is what counts in applications such as those now presenting. Was it reasonable in all the circumstances of a particular case to join both parties? For the reasons offered by counsel for Mr White in his submissions, the court's answer to the question just posed in the context of the within case is 'yes'.
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> 35. Third, although the Minister has sought to present the claims against the Minister and the Bar Council as having been fundamentally different, it seems to the court having regard to the factual matrix to which reference was made by counsel for Mr White in his submissions that the proceedings against the Minister and the Bar Council were fundamentally joined together by the circumstances. Shortly put, the critical issue that underlay the entirety of the within proceedings concerned the regulation of a barrister who previously held the job of judge. That is why Rule 5.21 of the Code of Conduct of the Bar of Ireland came to pervade the case."

34. In my view these conclusions do not assist the proper interpretation of s. 78 of the Act, and do not justify the jurisdiction found by the trial judge within the section for the 'order over' that he made. His comments may be relevant to a consideration of an appropriate order as to costs on the basis of a discretion under Ord.99, r.1 of the Rules of the Superior Courts where those circumstances may be found sufficient to constitute a special reason for departing from the normal rule that costs will follow the event. But the fact that Rule 5.21 of the Code of Conduct was part of the overall factual matrix in the case, or some sort of common thread, does not in my view justify a conclusion that s. 78 provides a jurisdiction to make the 'order over'. I do not consider that because the words of the section make no specific reference to "the same cause of action" or "a genuine alternative claim and alternative remedy", the Court can proceed to interpret the section as granting a jurisdiction to make such an order on the facts of the present case.

35. The interpretation contended for on a literal interpretation by Mr White leads to an absurdity in my view, namely that a party A against whom a plaintiff succeeds in claim (1) could be required to pay the costs of party B in respect of a separate claim (2) brought in the same proceedings, but for which party A has no responsibility, and in truth is not even *a legitimus contradictor*, and which has been dismissed, simply because of some factual background which is common to both claims. That in my view is an absurdity, and a manifest injustice that could never have been intended by the Oireachtas when enacting s. 78. It also overlooks the context in which the section must be read and, frankly, the way in which the section has always been understood by lawyers to operate in practice over decades since its enactment. I appreciate that how the section has operated in practice does not mean of itself that the section must be so interpreted, but it is worthy of note that the Court have not been referred to any case in which the section has been previously applied in a judicial review-type proceeding.

36. Before proceeding further with this point, I would refer to the provisions of s. 5 of the Interpretation act, 2005 which provides:

> "5. In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction):–
>
> (a) that is obscure or ambiguous, or
>
> (b) *that on a literal interpretation would be absurd or would fail to reflect the plain intention of*:-
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertain from the Act as a whole." [Emphasis provided]

37. In my view s. 78 exists in order to provide the court with a statutory jurisdiction to make an 'order over' where there are two defendants who may have a liability either jointly or severally in respect of the same wrong, and where the plaintiff is entitled on the known facts not to be certain which of those defendants may ultimately be found to be liable. It may only be at trial that a conclusion on liability as between two potential defendants can be determined. It would be a manifest injustice to a plaintiff in such circumstances to have to decide (in racing parlance) to put his money on one horse or the other. The section enables him to back both horses (to pursue the betting analogy still further) without the certainty that where liability is found only against defendant A, the plaintiff will have to pay the costs of B against whom he/she has been unsuccessful. It is nevertheless at the judge's discretion whether or not to make the order over under s. 78 at the conclusion of the trial. But an *absolute sine qua* non has always been, and it makes complete sense of course, that both named defendants have a potential liability to the plaintiff in the same cause of action arising on the same facts. The trial judge will take various factors into account when exercising the discretion to make such an order over under s. 78. One of those factors will normally be whether as a matter of fairness to both defendants what has become known as an "O'Byrne letter" was sent to each defendant prior to the commencement of the proceedings in which both are named as defendants. If not, it might, though not necessarily, be considered unfair to make the order over against the plaintiff. In a footnote to para. 28.03 of Delany & McGrath: *Civil Procedure in the Superior Courts* (3rd ed. Roundhall) the authors explain that the O'Byrne letter " … is a letter which is designed to trigger the application of s. 78 of the Courts of Justice Act 1936". That has always been the understanding of the purpose of the O'Byrne letter. It puts multiple potential defendants on notice that the intending plaintiff alleges that an injury or damage was caused by the negligence of one or more of them, or perhaps loss and damage as a result of a breach of a contract, and that the plaintiff has no way of knowing which defendant is liable or the degree to which any of them may be liable. It calls upon them to admit liability, or to a certain degree of liability, and warns that the letter will be used at trial in relation to the question of costs. That does not pretend to be a comprehensive description of the letter's contents but it suffices as a description to illustrate the context in which s. 78 operates, namely where there are a number of different parties who may be found to have a liability to the plaintiff in respect of the cause of action and for the same damage or loss. It protects the plaintiff, in the event of succeeding against only one such defendant, against the costs of the party or parties in respect of whom no liability is found at trial, by enabling the plaintiff to obtain an 'order over' against the party against whom he/she has succeeded.

38. Even though it is not stated in the section that the section applies only where the multiple defendants are sued in respect of the same cause of action and on the same facts, the absurdity to which I have referred is avoided only by applying an interpretation by reference to the obvious context in which its operation clearly makes sense. I would go on to add that this sensible interpretation is indicated also by the use by the Oireachtas by the words "plaintiff" and "defendant". That nomenclature clearly indicates the sort of proceeding to which I have referred and not to a judicial review type of claim where the parties are not so described.

39. I have already stated above that nomenclature alone does not assist in excluding a judicial review application from the category of 'civil proceeding', but that does not mean that it does not assist in the proper interpretation of the section by giving a context for the application of the section.

40. The section only makes sense and avoids an absurdity if it is construed as applying to the type of plaintiff/defendant litigation to which I have referred, and which involve the same cause of action against the defendants, arising from the same set of facts. These judicial review proceedings do not. As I have said, the claim against each respondent are completely different, and where the relief sought against the Bar Council could never have been granted against the Minister, and vice versa. I consider, very respectfully, that the trial judge's conclusion that he had jurisdiction under s. 78 to make the 'order over' in these proceedings is erroneous.

41. Since it is clear from the trial judge's judgment that he made that order under s. 78 of the Act, I would allow the appeal, and vacate that part of the order made by the High Court dated 5th April 2017 whereby it was ordered that Mr White recoup from the Minister the costs which he is liable to pay, and does pay, to the Bar Council.