



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 164

[2019 No. 162]

**The President
Edwards J.
Baker J.**

BETWEEN

TIMOTHY CUNNINGHAM

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA AND

THE CRIMINAL ASSETS BUREAU

RESPONDENTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND DANSKE BANK

NOTICE PARTIES

JUDGMENT of the Court delivered on the 5th day of June 2019 by Birmingham P.

1. This is an application to extend the time within which to appeal a decision and order of O'Regan J. in which she refused the reliefs sought by way of judicial review. The decision was the subject of a written judgment delivered on 14th February 2019, and the relevant order is dated 1st March 2019, which was perfected on 4th March 2019. The substance of the matter at hand concerns the fallout from the Northern Bank Robbery of December 2004.

2. The judicial review proceedings before O'Regan J. had seen the applicant seek the following reliefs:

- (i) An order of Mandamus to compel the First Named Respondent to provide the applicant with a detailed and comprehensive report setting out the statutory provision under which his monetary property was seized, detained and distributed, along with any and all Orders of the Court which authorised the search, detention, forfeiture and/or distribution of said monies; and the provision of related documentation as set out in the applicant's Pre-Action Letter dated 4th August 2017;
- (ii) An order of Mandamus to compel the Second Named Respondent to provide the applicant with a detailed and comprehensive report setting out the statutory provisions under which his monetary property was seized, detained and distributed, as set out in the applicant's Pre-Action Letter dated 21st July 2017;
- (iii) A Declaration that the applicant's monies were unlawfully seized and detained by the first named respondent;
- (iv) A Declaration that the applicant's property rights under Article 40.3 of Bunreacht na hÉireann have been infringed by the respondents;
- (v) An injunction restraining the Second Named Respondent, as the Applicant's Inspector of Taxes, from taking any further action in the enforcement of any revenue liabilities pending the outcome of the within judicial review proceedings;
- (vi) Such further or other Order as to this Honourable Court may deem meet, including an extension of time if necessary.
- (vii) An Order providing for an award of the costs of those proceedings to the Applicant.

3. In the course of her judgment in the High Court, O'Regan J. set out what she described as a brief, relevant chronology which this Court gratefully adopts and was as follows:

- "(a) On the 16th February 2005, the applicant's home was searched under s. 29 of the Offences Against the State Act 1939 as amended and £STG.2.4 million was removed;
- (b) On the 27th March 2009, the applicant was convicted under ten counts connected to the colloquially known Northern Bank Robbery;
- (c) On the 23rd February 2012, the Supreme Court issued its decision *Damache v. DPP* [2012] 2 IR 266, where it found that a s. 29 warrant to search was repugnant to the Constitution;
- (d) In April 2013, the applicant was successful in having the order of the 27th March 2009 quashed;
- (e) On the 18th February 2014, the applicant pleaded guilty to two counts of the nine remaining counts for which the applicant was retried;

(f) On the 27th February 2014, the applicant was sentenced and an order was made confiscating and/or forfeiting the monies which are the subject matter of these proceedings;

(g) In a letter of March 2017, the applicant's solicitor was advised that the order of the 27th February 2014 incorporated a forfeiture order in respect of the monies aforesaid under s. 61 of the Criminal Justice Act 1994 and a letter was enclosed bearing date the 30th April 2014 between An Garda Síochána and the State Solicitor for the DPP which confirms the making of the forfeiture order and the fact that no appeal or challenge was made thereto;

(h) A Certificate of Conviction bearing date the 26th February 2014 (although the order was not made until the 27th February 2014) refers to the relevant monies having been confiscated by order of the 27th February 2014.

(i) The order of forfeiture was drawn up on the 4th March 2018 on behalf of the within respondents and was furnished to the applicant on the 14th May 2018."

4. In the proceedings before the High Court, the applicant swore four affidavits and made written and oral submissions. The High Court Judge records him as arguing:

"(a) The money was taken from his home and this is prima facie evidence of his ownership;

(b) The order was not drawn up (and no explanation given) until the 4th March 2018;

(c) The order did not take effect until perfection;

(d) The court is not being asked to make an order determining ownership of the money;

(e) It would be unfair of the respondents to take issue with the time limits provided for by the Rules of Court."

5. The High Court took the view that the applicant had failed to establish any basis in order to secure an enlargement of time to maintain the within judicial review proceeding, and that, indeed, there had been no formal application to the Court in that regard. The High Court also found that the applicant had failed to discharge the onus on him to establish that the relevant monies belonged to him, in particular, post the making of the forfeiture order, and in the circumstances, was of the view that all the reliefs sought should be refused.

6. The application to extend time now before this Court is grounded on an affidavit of the applicant's solicitor sworn on 4th April 2019.

7. The affidavit addresses some, but not all of the issues identified in the seminal case of *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] IR 170. The solicitor avers that he spoke to the appellant after the judgment was delivered, and again after final order, and the applicant gave instructions that the matter be appealed. The solicitor says that the applicant formed the intention to appeal within the relevant 28-day period. However, he goes on to say that funding the appeal presented a considerable obstacle to the applicant, he having been prohibited from engaging in financial business for five years following his plea of guilty at the Cork Circuit Criminal Court. He says that the applicant instructed that he had made extensive efforts to source funding for the appeal, and on 1st April 2019, managed to obtain and transfer to the solicitor's office the Stamp Duty fees required for the Notice of Appeal.

8. The affidavit does not engage with the question of whether there is an arguable ground of appeal or say anything about what the strengths of an appeal might be. Likewise, there is nothing to indicate that there was anything in the nature of a mistake, as discussed in *Eire Continental*.

9. In correspondence, and subsequently on affidavit, Danske Bank, the notice party, has opposed the extension of time. The position adopted by Danske Bank has been supported by the respondents. In a letter dated 5th April 2019, Danske Bank identified the request for consent which was in issue at that stage as an extraordinary request. It contended that was so for four reasons:

"[f]irstly, given the importance of compliance with the time limits prescribed by the Rules of the Superior Courts generally, and particularly in the context of judicial review and appeal proceedings, it is remarkable that you have offered no explanation for your client's failure to file and serve the Notice of Appeal within the permitted period. The High Court handed down its judgment on 14th February 2019. The Order was perfected on 4th March 2019. Your client had over six weeks in which to prepare the Notice of Appeal. Please explain the delay.

Secondly, your client's delay in initiating the appeal is all the more extraordinary in the light of your client's delay in initiating judicial review proceedings in the first place. As appears from the recent High Court judgment, your client (i) delayed in issuing proceedings; (ii) made no meaningful attempt to explain or justify his delay in issuing proceedings and (iii) failed to establish any basis to secure an extension of time to maintain them.

Thirdly, in the High Court, our client argued that these proceedings constituted an abuse of process because of, inter alia, your client's delay. This position is reinforced, both by the High Court judgment and by your client's subsequent attempt to initiate an appeal outside the period permitted by the Rules of the Superior Courts.

Finally, and importantly, the armed robbery of the Northern Bank caused significant disruption to our client's business and, more importantly, enormous distress and trauma for its staff and their families. Masked and armed raiders held the families of two of our client's employees at gunpoint. The masked gunmen threatened to kill these innocent individuals to force the employees to facilitate the armed robbery. Your client pleaded guilty to laundering monies stolen from our client. Your client also admitted in Garda interviews that he knew that the enormous sums of foreign currency on his premises originated from the robbery."

10. In the course of the affidavit and in the course of submissions to this Court, Danske Bank makes the case that the current application for an extension is the latest in a litany of delays on the applicant's part since the forfeiture order, delays which would be unacceptable in any proceedings, but which are even more inappropriate in the context of judicial review. Indeed, the delay becomes more problematic bearing in mind that these proceedings constitute the applicant's belated attempt to challenge a forfeiture order made on 27th February 2014 following the applicant's guilty plea to money laundering charges.

11. The applicant, with the benefit of legal representation, did not object to the forfeiture order when it was made and did not appeal the order until the virtual eve of the High Court hearing. While the applicant initially denied that he had been legally represented on the hearing of the forfeiture order; on the day before the hearing, in his fourth affidavit, he admitted that he had in fact been legally

represented.

12. The forfeiture order concerned substantial sums of Northern Irish currency found on the applicant's property in County Cork and the applicant admitted to the Gardaí that he believed them to have been stolen from Northern Bank (which was subsequently purchased by Danske Bank) in the course of the armed raid on its premises in December 2004.

13. In response to submissions that the applicant had not explained the provenance of the monies, despite that question having been put in issue in the affidavits, O'Regan J. concluded at p. 12, para. 27 of her judgment that:

"the applicant had failed to discharge the onus on him to establish that the relevant monies belonged to him . . ."

14. In the Court's view, if regard is had to the indicative criteria referred to in *Eire Continental* then the applicant has failed to establish an arguable ground of appeal and has not established that the failure to lodge an appeal in time was due to something in the nature of a mistake. Taking a broader view, it is true that the extension of time sought is a short one, and ordinarily, this would militate in favour of granting an extension; on the other hand, the failure to lodge an appeal within the time allotted has to be seen in the context of the fact that what is sought is to be challenged, directly or collaterally, is an order made on 27th February 2014. The applicant has failed to put before the Court anything that could cause the Court to believe that any of the merits of the case are with him on even a *prima facie* basis.

15. In the circumstances of the case, the Court has not been persuaded that the interests of justice would be served by the extension of time, and indeed, is of the view that the contrary is the case.

16. In the circumstances, the Court will refuse the application.