[2018] IEHC 606

THE HIGH COURT

[2006 57 J.R.]

SUPREME COURT 79, 102 AND 152/08

BETWEEN

DOLORES MANNION

APPLICANT

AND

THE LEGAL AID BOARD, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of October, 2018

1. This matter comes before the court by way of application by the first respondent ("the Board") for an order pursuant to O.42 r.24 of the Rules of the Superior Courts giving leave to issue execution on foot of an order of the Supreme Court made in these proceedings on the 26th February, 2010.

Background Facts

2. The within proceedings form part of a series of claims brought by the applicant, Mrs. Mannion, against a number of parties, including the Board, over a lengthy period of time. I will not attempt to summarise those proceedings, nor am I in a position to do so by virtue of the limited nature of the papers before the court in this application. However, a flavour of the proceedings as they stood in 2010 is to be gleaned from the judgment of the Supreme Court in this matter, delivered by Hardiman J. on the 26th February, 2010 (at p. 1):

> "These proceedings have a long and tortuous history. In 1989 the applicant purchased an apartment in Tralee, County Kerry. She instructed a firm of solicitors (Firm I) to act for her in that connection. She alleges that there were serious problems relating to the apartment and to the management company. Accordingly, she instructed another firm of solicitors (Firm II), to commence proceedings against the vendor of the apartment and her former solicitors, Firm I. These proceedings were instituted in 1994 but the applicant was unhappy about the manner in which Firm II dealt with these proceedings. She then sought the services of the Legal Aid Board, the first respondent here. However, she came to believe that it acted negligently in the matter and she sought the services of another firm of solicitors, (Firm III). Proceedings were issued by that firm against the board and Firm II in March 2001. Shortly after the proceedings were commenced Firm III sought to come off record for the applicant and was permitted to do so. In January of the following year another firm, (Firm IV), came on record but some years later that firm, too, sought to come off record and were eventually permitted to do so, apparently over the applicant's objections, by the High Court. This occurred in 2005. She then retained Firm V who later ceased to act for undisclosed circumstances. In 2005, the applicant contacted one of the 'law centres' through which the Legal Aid Board makes its services available for the purpose of providing legal services in relation to her action against the Legal Aid Board and Firm II."

3. In very brief summary, in these judicial review proceedings Mrs. Mannion claimed that the failure of the Board to assign a solicitor other than one employed by the Board to assist her in prosecuting her action against the Board was unlawful and should be quashed. She lost the case in the High Court but no order as to costs was made against her. She appealed to the Supreme Court and the Board appears to have cross appealed in respect of the costs order. The Supreme Court dismissed her appeal and awarded the costs of the appeal against her. It is that costs order which is the subject matter of this application.

4. Those costs were ultimately taxed and a certificate of taxation issued on the 22nd July, 2014.

5. Order 42 of the Rules of the Superior Courts provides in relevant part as follows:

> "23. As between the original parties to a judgement or order, execution may issue at any time within six years from the recovery of the judgement, or the date of the order.
>
> 24. In the following cases, viz.:
>
> (a) where six years have elapsed since the judgement or order, …
>
> (c) …the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just…"

6. This motion is grounded upon an affidavit of Niall Murphy, the Board's director of Civil Legal Aid who avers at para. 4:

> "I say and believe that at the date of taxation, the applicant's circumstances suggested that she did not have the capacity to address repayment and consequently execution of the said costs order was not warranted. However, I say and believe that the applicant's financial position has since improved and the first named respondent is seeking to execute the said order."

7. A replying affidavit was sworn by Mrs. Mannion, then representing herself. In that affidavit, she refers to the fact that she had prosecuted plenary proceedings for professional negligence against the Board which were compromised on the 24th January, 2017. Those proceedings were defended on behalf of the Board by its professional indemnifiers, Royal and Sun Alliance Insurance Company and a settlement was concluded as between counsel for Mrs. Mannion and counsel for the insurers. It resulted in the payment of a sum of money to Mrs. Mannion. That payment, although technically made by the Board, was of course discharged by the insurers who had no direct interest or involvement in the issue of the outstanding Supreme Court costs order.

8. I am satisfied from the evidence before the court that the change in the applicant's financial position referred to by Mr. Murphy in his affidavit is the payment made by the insurers to Mrs. Mannion. This is confirmed by Mrs. Mannion in her first replying affidavit where she avers:

> "16. I say, that contrary to the Board's assumption that I am in a position to cover these JR costs, I was deeply indebted prior to the settlement on the 24th January, 2017 and what little money I have left is being used to fund my present legal action against the Board for its grossly negligent performance on my behalf from 2004 to 2014.
>
> 17. I say that quite recently I had to borrow further funds to repay certain personal debts and to finance and progress my present cases."

9. Mrs. Mannion has currently two extant cases against the Board and the State although there appears to be considerable overlap between the two and it is suggested that they may be consolidated. In those proceedings, instituted by Mrs. Mannion as a litigant in person, she is again suing the Board for negligence.

10. At the hearing of this motion, there was considerable controversy between the parties as to the terms of the settlement of the 24th January, 2017. Mrs. Mannion alleges that it was a term of the settlement that the Board would waive its entitlement to the costs of the Supreme Court appeal. This is disputed by the Board. Both parties have referred to correspondence passing between themselves and their respective legal teams in and around the time of the settlement. This correspondence is, apart from being contradictory, entirely hearsay. Neither party is represented in these proceedings by the legal teams that were involved in the settlement, as Mrs. Mannion appears to have discharged her then lawyers and is now suing them, and the Board was, as I have said, represented by the insurers' legal team.

11. It would of course be impossible for me in the within motion to reach any determination as to the terms of the settlement. However, in that regard, I merely pause to observe that if it was a term that the Board was waiving reliance on the Supreme Court order, it is somewhat surprising that it was not reduced to writing nor was any order sought from either this court or the Supreme Court on consent varying or setting aside that costs order. Further, it seems to me somewhat inconsistent with the proceedings now being pursued by Mrs. Mannion against the legal team who represented her in the settlement negotiations which I have not seen but am told include a claim for damages based on the fact that her legal team failed to ensure as part of the settlement that her obligation under the Supreme Court costs order was set aside.

12. It is also noteworthy that although the motion now before the court was issued in November, 2017, Mrs. Mannion has brought no proceedings against the Board either seeking to set aside the settlement on the grounds that the parties were not ad idem or alternatively seeking to enforce the settlement that she now alleges was arrived at by restraining the Board from seeking to execute the costs order.

Smyth v Tunney

13. The leading authority on applications of this nature is Smyth v. Tunney [2004] 1 I.R. 512. In the course of lengthy litigation between the parties, the defendants had obtained a number of costs orders against the plaintiffs. They did not execute those costs orders within the six year period because of the ongoing litigation and repeated warnings by the plaintiffs' solicitors that any attempt to do so before the litigation concluded would be strongly resisted. As the twelve year limitation period approached, concern arose on the part of the defendants that if no steps were taken to execute the orders they might become statute barred. The application was resisted by the plaintiffs on a number of grounds including that their financial positions had changed and they would now be prejudiced if leave were granted. The High Court granted the application and the plaintiffs appealed to the Supreme Court, whose judgement was delivered by Geoghegan J.

14. One of the issues agitated on the appeal was whether or not the orders would in fact be no longer capable of execution after the limitation period as a matter of law. The plaintiffs submitted that the defendants had taken an erroneous view of the law which undermined the adequacy of the explanation for the delay. Geoghegan J. rejected this argument holding that it was unnecessary to decide the legal question and it was sufficient if the apprehension of the defendants' lawyers that the orders would become statute barred was one that was reasonably held. He found that it was. The court analysed in detail the ancestry of the rule both here and in the courts of England and Wales. The court held that the power to grant leave to execute outside the six year period was one that was discretionary. The court noted (at p. 515):

> "Once the order is discretionary there must be something to which the judge can attach himself in exercising the discretion. I think that it can fairly be said that that much was accepted by all sides at the hearing of this appeal. The real issue is whether there had to be some quite exceptional or special reasons or whether it is sufficient that in a general way the applicant was reasonable in making the application at the stage he did."

15. I think it is fair to say that the Supreme Court was of the view that once some reason is advanced, the focus of such applications really shifts to the issue of prejudice arising from the delay. Thus Geoghegan J. observed (at p. 518):

> "For reasons which I will explain in greater detail when treating of the law, I am satisfied that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation at least for the lapse of time. It is, of course, accepted by all sides that even if a good reason is given the court must consider counterbalancing allegations of prejudice."

16. Indeed, Geoghegan J. drew attention to the fact that in England the application could be made *ex parte* (at p. 519):

> "Be that as it may, the fact that an application in England has traditionally been made at least in the first instance *ex parte* would suggest to me that no very strong or exceptional reasons that would have to be adjudicated upon were required. Some reason for delay had to be shown but no more."

17. The court then went on to analyse in some detail four earlier judgments both in Ireland and England and concluded (at p. 524):

> "The general thrust of the four judgments is that in special circumstances which would have to be proved on affidavit, the order could be made *ex parte* but otherwise as a matter of natural justice, the application must be made on notice contrary to the English procedure. The emphasis is then essentially on prejudice to the defendant though obviously some reason must be given by the applicant. Although in this case it has not been fully proved that the relevant defendants could not have executed the judgment by some means within the six year period, they have nevertheless shown sufficient reason why they allowed a lapse of time and should still be allowed to execute if they can. Essentially, the conduct of the

> plaintiffs heavily contributed to the delay in execution."

18. As I have noted above, one of the reasons advanced by the plaintiffs in opposing the application was that their financial position had disimproved. In that regard, Geoghegan J. "heartily endorse[d]" the dicta of the High Court (McCracken J.) dealing with this argument (at p. 518):

> "The plaintiffs further complain that they are prejudiced by the delay because the second plaintiff is now in a much worse financial position than it would have been had the parties moved earlier. I find this an astonishing proposition in the present circumstances. The plaintiffs can hardly be heard to say that they are prejudiced because they failed to pay their own debts due by them on foot of judgment. It is also true the first plaintiff has sold his interest in the second plaintiff. But of course this sale must have been with the full knowledge of the debt of both parties."

19. Consequently, the court concluded that steps taken by a party to alter its position in the full knowledge of the outstanding judgment could not be relied upon as a prejudice which could defeat an application for leave to execute. The appeal was dismissed.

Discussion

20. I think what emerges from *Smyth v. Tunney* is that once some reason is advanced for the failure to execute within the six year period, the focus of a leave application shifts to the issue of prejudice. The reason advanced does not have to be unusual, exceptional or very special. Nor does it have to be necessarily correct. Once the belief that attempts at execution would be futile is one that is reasonably held, that is sufficient.

21. Although counsel for Mrs. Mannion submitted at the hearing of this application that the reason advanced by the Board for not executing within the six year period is insufficient, I do not accept that submission. The Board at all material times during the six year period believed that Mrs. Mannion did not have the capacity to pay the costs and that there was no point in attempting execution. That is not in dispute but even if it was, there is nothing to suggest that this belief was unreasonable or irrational in any way. Further, the Board, reasonably in my view, concluded that as a result of the settlement with its insurers, Mrs. Mannion's circumstances had significantly changed so that she might now be amenable to execution.

22. That being so, the issue becomes whether it would be unfairly prejudicial to Mrs. Mannion to allow execution now. The only evidence of alleged prejudice to Mrs. Mannion is to be found in those paragraphs of her affidavit to which I have already referred. These appear to me to amount to little more than a suggestion that she cannot afford to pay because she has decided to invest the settlement proceeds in settling other debts and funding her further litigation. If Mrs. Mannion ordered her affairs so as to leave herself unable to discharge the costs order, that was her decision. The words of McCracken J. above quoted are apposite in that regard. She may now say that she believed the order would not be enforced but the fact remains that there is a valid and subsisting order of the Supreme Court upon which the Board are entitled to rely unless and until otherwise ordered.

23. For largely the same reasons already given with regard to the alleged terms of settlement, I cannot accept the proposition contended for by counsel for Mrs. Mannion that the Board are estopped from pursuing this application. Here again, suggestions in correspondence between Mrs. Mannion and her own solicitors about what was represented by the Board are not matters that to my mind the court can rely upon to determine that some estoppel arises in the face of countervailing but equally hearsay evidence on the other side.

24. Counsel also sought to argue that because these proceedings have been ongoing in some shape or form since 2006, this amounts to a breach of Mrs. Mannion's rights under Article 6 of the European Convention on Human Rights incorporated into our domestic law by the European Convention on Human Rights Act, 2003. Even if a breach of Mrs. Mannion's Article 6 rights had occurred, upon which I express no view, that cannot be taken as affecting a valid and subsisting order of the court. If her Convention rights have been infringed, then Mrs. Mannion's remedy is to bring proceedings against Ireland in the appropriate forum. She has not done so.

25. Finally, it was urged by counsel for Mrs. Mannion that if the court were disposed to grant leave to the Board to issue execution, that should be stayed pending the determination of Mrs. Mannion's current proceedings against the Board. I have seen only the statement of claim in the two claims against the Board and the State which may now be consolidated and date from 2015. They do not appear to have been pursued with any particular vigour but even a cursory reading of the statement of claim suggests that Mrs. Mannion is going to face some fairly significant hurdles in these proceedings. It must of course also be borne in mind that if Mrs. Mannion is correct in her contention that her legal team failed to act on her instructions in settling the case without having the Supreme Court costs order disposed of, she has the prospect of recouping any loss arising from now having to meet that order.

Conclusion

26. I therefore propose to grant the Board's application for leave to issue execution for the reasons I have given and I will refuse a stay pending the determination of the other proceedings.