THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 393

[2015 No. 589]

The President
Peart J.
Mahon J.

BETWEEN

MARGARET LYONS

PLAINTIFF

AND

JOHN DELANEY, ANTHONY LOCKE, PATRICK THORPE AND DELANEY LOCKE AND THORPE (A FIRM)

DEFENDANTS/APPELLANTS

AND

CATHAL O'SULLIVAN AND PARAIC O'KENNEDY PRACTISING UNDER THE STYLE AND TITLE OF O'SULLIVAN & ASSOCIATES

THIRD PARTIES

JUDGMENT of the President delivered on 15th December 2016

Introduction
1. The plaintiff, Margaret Lyons, issued proceedings against the defendants/appellants, a firm of accountants, arising out of a dispute concerning an investment property. The appellants joined Cathal O'Sullivan and Paraic O'Kennedy, partners in O'Sullivan & Associates Solicitors as third parties in order to claim contribution or indemnity from them in the event of the plaintiff succeeding in her claim against the defendants. The respondent (the second named third party, Mr. O'Kennedy) applied to the High Court to set aside the third party notice issued against him. As appears from the judgment, Binchy J. set aside the third party notice because of a 5-month delay by the appellants in delivering their files to their solicitors. The defendants issued a notice of expedited appeal but the respondent contended that the appeal ought to have been brought as an ordinary appeal. The necessity for adjudication of this issue arises because the appellants wish to adduce evidence on the appeal, further clarifying the activity which occurred during the 5-month period.

2. The appeal requires consideration of the meaning and effect of O. 86A, r. 4(b) of the Rules of the Superior Courts which is as follows.

> "4. Subject to the provisions of the Constitution and of statute—
>
> (b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

3. If the order made by Binchy J. comes within this rule, the defendants do not need leave to give further evidence. The order in question is the decision of Binchy J. in the High Court to strike out the third party notice served by the defendants. The third party submits that the decision under appeal is a final judgment or order, not an interlocutory one, and that special leave is needed for any new evidence. There is not a precedent directly in point, but the parties are agreed that the most relevant authority is the decision of the Supreme Court in *Minister for Agriculture v. Alte Leipzinger* [2000] 4 I.R. 32. The issue for the court is whether the order made by Binchy J. was an interlocutory judgment or order within the meaning of the rule such that the appellants/defendants are entitled to adduce fresh evidence on the appeal without getting special leave from the court.

Submissions
4. The defendants/appellants submit that the Supreme Court decision in *Minister for Agriculture v. Alte Leipziger* is supportive of their case. They rely particularly on the following passages from the judgment of Barron J. at p. 44 of the judgment:

> "In my view, an interlocutory application is one which is purely procedural in nature and an interlocutory order is an order made on foot of an interlocutory application, whereas a final order would normally dispose of the action of proceedings. The order in the instant case does not readily fall into either category.

It is an order which disposes finally, subject to appeal, of a substantive right collateral to the main issue in the proceedings. On the other hand a final order determines the rights of the parties in relation to the subject matter of the proceedings, while an interlocutory order determines the rights of the parties in the context of the proceedings as a whole. In the case of a motion to dismiss for failure to plead a cause of action or for want of prosecution, no rights are being finally determined. The order either determines that there is nothing to be litigated or that the right to have a matter litigated has been forfeited.

In the present instance, the right which has been affected by the order is the right of the defendant to object to the jurisdiction of the Court. It is not an order which deals with the merits of the cause of action, but neither is it an order made in the context of that cause of action. An interlocutory order is an order made on an application which in effect prepares the way for the final hearing which I believe to be the view of the English Court of Appeal in *White v. Brunton* [1984] QB 570. The present order has no such effect. It is much more of the nature of a final order than of an interlocutory one."

The defendants submit on the basis of this passage that in the instant case no rights were finally determined but the High Court instead decided that the right to have the matter litigated was forfeited by reason of the 5-month delay. It follows on this argument that the order is interlocutory in nature.

5. Barron J. provided two examples of motions which were interlocutory in nature, one of which was a motion to dismiss for want of prosecution which the defendants submit is a species of application to dismiss for delay. This is what Barron J. was referring to when he said that the order on such a motion determined that the right to have the matter litigated had been forfeited.

6. All of the judgments in *Minister for Agriculture v. Alte Leipziger* refer to the Supreme Court case of *Toal v. Duignan (No. 2)* [1991] ILRM 140, which was an appeal against a refusal to dismiss for want of prosecution in a medical negligence action. Finlay C.J. held that the order in that case was interlocutory in nature. The defendants submit that it is significant that none of the judgments in *Minister for Agriculture v. Alte Leipziger* suggested that *Toal v. Duignan* was wrongly decided. That authority was subsequently applied in *Byrne v. Heffernan & Brennan* [2014] IEHC 424, in which Kearns P. held that the motion with which that case was concerned, namely, dismissal on the grounds of delay, was an interlocutory order on the hearing of which hearsay evidence could be relied upon.

7. The appellants argue that the third party issue here is quite different from the determination of a jurisdictional issue in the sphere of conflict of laws, which was the case in *Minister for Agriculture v. Alte Leipziger*. The distinction drawn by Barron J. is significant and both he and Hardiman J. considered that the determination of a jurisdictional question was unusual and different from other determinations in the case law. Hardiman J. considered that the issue in that case was sui generis. The appellants emphasise the distinction drawn by Barron J. between determining the rights of the parties in relation to the subject matter of the proceedings and determining rights of the parties in the context of the proceedings. He held that in an interlocutory order the right to have the matter litigated was forfeited. This is very different on this submission from a case of justiciability.

8. In respect of the distinction drawn in the English authorities between two approaches characterised as the order approach and the application approach, it was submitted that the order approach has been disapproved by the English Court of Appeal in *White v. Brunton* and that what is now favoured is the application approach. On this basis, there is no question but that this is an interlocutory appeal, it is argued. The defendants also point to the provisions in s. 31 of the Civil Liability Act which provide a limitation period for claims for contribution or indemnity independently of the third party procedure envisaged by s. 27. Therefore, even if a party has failed to avail itself of the facility under s. 27 to have the third party issue determined in the plaintiff's proceedings, that is not the end of a claim for contribution or indemnity. There is a potential sanction because of the provision as to the discretion of the court on failure to comply with the requirements of s. 27 but obviously that discretion would have to be exercised judicially in appropriate circumstances.

Submissions of the Respondent Third Party (Mr. O'Kennedy)

9. The respondent draws attention to the terms in which the appellants set out their intention or request to adduce further evidence. However, this is a relatively minor point and the real debate concerns the application of the *Minister for Agriculture v. Alte Leipziger* decision. This party argues that the majority of the Supreme Court held that the order in that case was a final order. That was an appeal from the decision of the High Court to refuse the defendant's application to set aside service of the proceedings on the ground that the contract in question in the case conferred sole jurisdiction on the commercial tribunal in Paris. Again, the judgment of Barron J. is prayed in aid. Counsel for Mr. O'Kennedy cites two sentences that immediately precede the quotation above from Barron J's judgment as follows:

> "In my view, the order in the instant case was in its nature final. It was not a final order because it was not a decision on the merits. But it would never have been said to have been interlocutory in nature."

I think the meaning of this passage is that Barron J. is saying that the order in question as to jurisdiction is final, not because it was a decision on the merits but because it was in its nature final and could never have been said to be interlocutory. Barron J. went on at p. 45 to state:

> ". . . The present application deals with the issue as to whether a particular cause of action is justiciable in this jurisdiction. In my view the determination of such an issue should be final, subject to appeal. To treat it otherwise is in effect to allow the issue to be tried twice. That is quite clear in the instant case. Counsel for the appellant accepts that there would be new issues of fact arising out of the fresh evidence which would have to be determined in the High Court.
>
> In all the circumstances of this case I consider that the order appealed from is for the purposes of [the relevant order] a final order. I would disallow the appeal."

10. Hardiman J. agreed with Keane C.J. that the Irish decision of *Toal v. Duignan (No. 2)* [1991] ILRM 140 was of limited assistance. He said at p. 50:

> "In my view, it is quite sufficient if the order in question finally disposes of a particular issue between the parties, at least where that issue is discretely raised by some proper procedure."

11. Hardiman J. also made a number of citations from English authority including *Dale v. British Coal Corporation* [1991] 1 WLR 964. In that case, the Court of Appeal said:

> "The effect of the determination on limitation by the judge in the present case is to determine finally any question of limitation in these proceedings. It would have so determined any question of limitation, in fact, whichever way the judge had decided the issue before him, because if he had held that the Act of 1980 was not to be thus applied under s. 33, then the claim would have inevitably failed."

The emphases in this quotation were added by Hardiman J who held that this approach was satisfactory.

12. The third party submits that the order of Binchy J. finally disposed of a particular issue between the parties that was discretely raised by proper procedure and was thus a final order for the purpose of O. 86A, r. 4. In fact, it is submitted, the High Court order finally determined the entire issue between the defendants in the proceedings but this is not actually correct because it is possible for a claimant defendant to issue proceedings independently of s. 27 as mentioned above.

Discussion

13. The decision of the High Court that is the subject of this appeal was to order that the third party notice be struck out because it

was not served as soon as reasonably possible as required by s. 27(1)(b) of the Civil Liability Act 1961. That provision is that a concurrent wrongdoer claiming contribution

> "shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."

14. The effect of the order is to dismiss the third party from the action between the plaintiff and the defendant. The third party will not in those proceedings incur any liability to make contribution or indemnity to the defendant in respect of any award the court of trial makes in favour of the plaintiff. However, that does not mean that the third party is free of any potential liability to contribute. The defendant may proceed for contribution following the determination by judgment or settlement of the plaintiff's case, subject to the discretion of the court to refuse to impose such liability if it considers that to be just in all the circumstances.

Section 31 provides as follows:

> "An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater."

15. The order under appeal deprives the defendant of having the contributor's liability decided at or about the same time as the plaintiff's claim and as of right, that is, not subject to possible discretionary refusal. The order made by the High Court is final in its determination of the application by the third party to strike out the notice previously authorised by the court. It might also be said that it is final in respect of the third party proceedings brought by the defendant. Either way, the position is clear subject of course to appeal but that is not relevant. Obviously, the case as a whole has not finally been determined, neither has the question of liability between the defendant and his potential contributor been brought to ultimate finality.

16. The two majority judgments in *Minister for Agriculture v. Alte Leipziger* hold that the decision on a discrete issue in the case is a final order and not an interlocutory one, for the purpose of the equivalent rule, with the result that additional evidence on the appeal cannot be adduced as of right and requires special leave of the court. The order in that case was that the proceedings would be allowed to continue in the Irish court, rejecting the defendant's application. It was final in one sense, but not so as to determine ultimate liability. In my judgment, the present decision has to be considered final in the sense of the judgments of Barron J. and Hardiman J. with which their two colleagues concurred. I refer to the citations from the judgements that appear above in the section dealing with submissions. That means that special leave is required before additional evidence may be introduced. The case represents clear relevant authority to assist the court.

17. I confess to finding the rationale of this rule or, more particularly, this part of the rule to be less than obvious. In the case of an interlocutory order such as an injunction, it is easy to see how events subsequent to the making of the order do not require leave to be put before the court but that situation is expressly provided for in the other limb of the rule. Where no such justification can be found in the nature of the order, the difficulty I have is to see why the appellant should be able to make a new case. General fairness is a consideration and also the appellate nature of the function of the court seems to me to militate against such liberty. Barron J. pointed out in his judgment in the above case that the introduction of new facts could mean that the application was in effect heard twice over. What is the interest of justice in this instance that is served by an appellant having a right to put extra evidence before the court without leave which, by implication, includes material that was available but not adduced in the High Court? It therefore seems to me that procedural fairness also supports the reasoning in *Alte Leipziger.*

18. This view is, I think, reinforced by the decision of the Supreme Court in *Toal v. Duignan (No. 2)* [1991] ILRM 140 which the judges in the *Alte Leipziger* case found to be of limited assistance but which I find to be reassuring as to the fundamental justice of the approach that I think is correct in this case. That was a case of alleged medical negligence, in which the defendant argued that it would be unjust to be required to defend the action because of the length of time that had elapsed between the events on which the proceedings were based and the time of the application. The High Court refused to dismiss the proceedings and the defendant appealed. In the course of his judgment Finlay C.J. said at p. 144:

> "This Court ruled at the commencement of this appeal that the applications were interlocutory in nature and that it was appropriate that in the interests of justice further evidence should be adduced by both sides, both of whom were anxious to have the court consider further affidavits which they sought to file."

Although Keane C.J. felt that this passage was of limited assistance because of the absence of reasons for the particular ruling, it seems to me that it is significant that Finlay C.J. did not rely simply on the interlocutory nature of the motion. He evidently did not consider the matter as one of a right to adduce further evidence because the court ruled that it was appropriate in the interests of justice that further evidence should be received. This seems to me to represent something of a via media between the right to adduce further evidence in an interlocutory application properly so considered and the special leave which is required when there is no such entitlement. It also deals, as I see it, with another point that arises on any view of the application of the rule as to interlocutory applications, namely, the question of what is appropriate and just in the circumstances.

Conclusion

19. I consider that the principle enunciated by the majority in *Minister for Agriculture v Alte Leipziger* is applicable to this case. Although the motions are different, the reasoning in that case is applicable in this instance. It also seems to me that this position is in accordance with procedural justice, a view that is reinforced by the approach adopted by Finlay CJ in what he acknowledged was an interlocutory appeal.

20. My conclusion, accordingly, is that the appellant is not entitled as of right to adduce fresh evidence on the appeal but can only do so with special leave of the court.