THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 243

Record Number: 2017 288

Peart J.
Whelan J.
McGovern J.

BETWEEN

LAURENCE CORRIGAN

PLAINTIFF/APPELLANT

- AND -

KEN FENNELL

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Michael Peart delivered on the 10th Day of October 2019

1. The appellant appeals against the order of the High Court (Twomey J.) dated 14th March 2017 whereby it was ordered that proceedings which he commenced against the respondent ("the receiver") by plenary summons on the 15th June 2016 be dismissed because they disclose no reasonable cause of action against him, and in addition that the proceedings amount to an abuse of process because what the appellant seeks to do is to challenge the validity of the receiver's appointment where that question has already been the subject of a judicial determination in other proceedings, and is therefore res judicata.

2. The receiver was appointed over four properties which were included as part of the security provided to KBC Bank when it advanced certain monies by way of loan, not to the appellant but to his brother, Hugh Corrigan, who owns the said properties. Those properties include a supermarket premises at Oulart, Co. Wexford from which, according to the appellant, he now trades under the Spar brand under a lease from his brother. He is refusing to yield up possession of these premises to the receiver even though an order for possession exists in respect of the four secured properties. The receiver has obtained possession of the other three properties, albeit not without some difficulty in respect of another supermarket premises at Kilmuckridge. Part of that history of difficulty encountered by the receiver includes having had to seek an order for the attachment and committal of, inter alios, the appellant who was in possession at the relevant time of the premises at Kilmuckridge. On that committal application the appellant gave an undertaking to vacate the Kilmuckridge premises. The receiver did not seek a similar undertaking at that time in respect of the Oulart premises because he had not anticipated that the appellant would subsequently defy the order for possession in respect of the Oulart premises.

3. That undertaking to the Court in respect of the Kilmuckridge premises was given by the appellant on the 15th June 2016. On that same date however, and unknown to the receiver, the appellant issued the plenary summons by which the present proceedings were commenced. In addition to issuing the proceedings he also issued a notice of motion, grounded on his own affidavit affirmed by him that same day. In his general indorsement of claim the appellant made four claims against the receiver, apart from

claims for damages under various headings. Those four claims were that the receiver (1) acted upon an invalid deed of appointment, causing financial loss, stress and anxiety, (2) acted as a trespasser by virtue of the invalid appointment, (3) trespassed causing loss and harm, (4) was grossly negligent. A statement of claim was delivered on the 21st June 2016 which expanded somewhat upon the claim that the receiver was not validly appointed, and I will come to that.

4. The notice of motion which issued on the 15th June 2016 sought one substantive relief, namely:

> "1. A declaration that the deed of appointment upon which the defendant relies to act unlawfully is invalid and of no legal effect".

5. The return date for this motion was the 21st June 2016. It appears that notwithstanding the fact that the receiver had not by that date been served either with the proceedings or the motion papers, and was not therefore represented before the Court (Binchy J.), the Court nevertheless dealt with the motion by refusing the relief sought in the motion.

6. The affidavit grounding that motion and the statement of claim delivered by the appellant provide the basis upon which the appellant sought to challenge the validity of the receiver's appointment. The appellant claimed that he was the proprietor of the Spar supermarket trading out of the Oulart premises. He stated that he had traded from the premises from 13th February 2008 under the Londis brand until May 2015, and thereafter under the Spar franchise. He referred to a letter from the receiver dated 29th April 2016 informing him that an order for possession had been granted over certain properties and that the receiver intended to instruct his agents to secure possession of, *inter alia*, the Oulart premises. He went on to claim that having perused the copy deed of appointment of the receiver he considered that "the purported deed does not comply with either contract or statute, namely s. 115 (Table A) of the first schedule of The Companies Act 1963 nor s. 64(2)(b)(ii) of the Land and Conveyancing Act 2009."

7. At paras. 11-13 of the statement of claim the appellant expanded somewhat upon his challenge to the validity of the deed as follows:

> "11. The purported deed of appointment lacked any validity as the purported deed of appointment should have been signed by persons holding proper office and authority.
>
> 12. Neither Ian Larkin nor Kevin Geraghty, the alleged authorised signatories, had proper authority to execute the alleged deed at the time of signing or at all.
>
> 13. Neither Ian Larkin nor Kevin Geraghty, the alleged authorised signatories, were at the time Directors of the appointing bank KBC nor have they ever been directors of the appointing bank KBC."

8. The appellant went on to claim that he had called upon the receiver to prove that he was validly appointed and that his correspondence had been ignored.

9. In due course, following the delivery by the appellant of his statement of claim, the receiver delivered a defence and counterclaim, and responded to a notice for particulars from the appellant in which the appellant sought particulars of the counterclaim which was in effect seeking an order for possession of the Oulart premises, as well as certain injunctive reliefs against the appellant. In these replies, the receiver stated the following at reply 1:

> "1. The defendant maintains that he was lawfully appointed and the [plaintiff] has identified no material issue relating to the validity of his appointment. In this respect, this particular appears to seek further particulars of the plaintiff's own claim rather than of the defendant's counterclaim and as such is not an appropriate matter for particulars. Without prejudice, please find a copy of the deed of appointment dated 21 July 2014 enclosed. For the avoidance of doubt, the defendant maintains that any parties whose signatories appear on the said deed of appointment were appropriately authorised to take the steps at issue. The defendant further maintains that the seal was appropriately affixed. Further and/or in the alternative, if any issue did arise concerning authority to execute the deed of appointment, the steps taken on behalf of KBC Bank Ireland since the appointment of the defendant were sufficient to ratify his appointment."

10. On the 18th January 2017 the receiver issued a notice of motion seeking an order either under O. 19, r. 28 of the Rules of the Superior Courts or under the inherent jurisdiction of the court, dismissing these proceedings on the basis that they disclose no reasonable cause of action against the receiver, and/or are frivolous and vexatious and/or are an abuse of process. The motion was heard in the High Court on the 14th March 2017. The appellant appeared in person, and the receiver was represented by solicitor and counsel. Having considered the documents filed and the submissions made by the parties, Twomey J. granted the receiver's motion and gave his reasons in an ex tempore judgment. An approved copy of that judgment has been provided by the trial judge.

11. The trial judge noted the affidavit evidence of the appellant that he was the tenant of his brother in the Oulart premises. He noted also the basis of appellant's challenge to the deed of appointing the receiver, and noted also that the receiver had produced to the Court the original deed of appointment of the receiver dated 21st July 2014. He referred to the affidavit evidence adduced on behalf of the receiver as to the execution of the deed, namely an affidavit of Shane O'Connor sworn on the 17th January 2017. He stated in that regard:

> "… the defendant has provided a sworn affidavit of Shane O'Connor dated 17th January 2017 which provides compelling evidence that the Deed of Appointment in this case was in fact validly executed by Kevin Geraghty and Ian Larkin on behalf of KBC Bank Ireland pursuant to Article 84(c) of that Bank's Articles of Association and in the light of a Board Minute of the Bank dated 13th December 2013. The defendant has also produced to the Court the original Deed of Appointment duly sealed on the part of the Bank."

12. The trial judge went on to state that the appellant had produced no evidence to controvert the affidavit evidence of Mr O'Connor, and went on to conclude that "the plaintiff's claim that the Deed of Appointment is not valid does not have a reasonable prospect of success were this matter to go to a plenary hearing."

13. The trial judge then went on to address the question whether these proceedings were an abuse of process because the validity of the deed of appointment was already the subject of two previous judicial determinations, and could not once more be litigated without offending the principles in *Henderson v. Henderson* [1843] 3 Hare 100.

14. The first such determination to which the trial judge referred was when, on an interlocutory application for certain injunctive reliefs by the receiver against the appellant's brother, Hugh Corrigan, the High Court (McDermott J.) had dealt with the validity of the receiver's appointment before granting certain injunctive relief against High Corrigan.

15. The second such determination to which the trial judge referred was the occasion already referred to when on the appellant's own motion issued on the 15th June 2016 in which the appellant sought a declaration that the deed of appointment was invalid and of no legal effect. As I have already described earlier, that motion had not been served on the receiver prior to the return date, but nevertheless Binchy J. refused the declare the deed of appointment invalid.

16. The trial judge concluded that as a result of these two previous decisions the question of the validity of the receiver's appointment was already determined, and accordingly the present proceedings were an abuse of process.

17. In addition the trial judge made some reference to whether the appellant had locus standi to challenge the receiver's appointment at all given that he was not the owner of the premises. He did not make a final determination on that question, but rather stated that it was not necessary to decide the matter, but that it was "questionable" whether the appellant had standing. The appellant has submitted that he has standing since, being in occupation under a lease from his brother he stands to be affected by any action taken on foot of the order for possession, and that he was not party to the proceedings in which that order was made. The receiver maintains that the appellant has never established the existence of such a lease, and therefore has not established his standing.

18. This Court does not need to address the issue of *locus standi*. The trial judge made no determination in that regard, and in so far as the matter was determined by the trial judge on a substantive basis and not on the basis of any lack of standing on the part of the appellant, there is no cross-appeal by the receiver on that basis. I therefore desist from expressing any view one way or another on the question.

19. While neither the order made by the Court dismissing the proceedings, nor the note of the trial judge's ex tempore judgment, refer to any refusal by the trial judge to accede to an application to the trial judge by the appellant to permit him to amend his pleadings in

order to include a claim for damages on the basis of injury to his business reputation, or otherwise amend his proceedings in order to show a reasonable cause of action, the first two grounds of appeal contained in the notice of appeal rely on such refusal. It is important to note that in this regard the appellant was not seeking to add an additional ground of invalidity of the receiver's appointment, but merely to add an additional heading of damages to those already claimed in the general endorsement of claim and the statement of claim. The claims for damages made already, and that which the appellant wished to add by way of amendment of his claim, are all dependent for their success upon a finding that the receiver's appointment was invalid and of no legal effect. Damages would be consequential upon such a finding of invalidity. In other words, only if the receiver was found to have been invalidly appointed could be found to have acted unlawfully, thereby giving rise to a possible claim for damages under any of the heads of damages claimed by the appellant. It follows therefore that the proposed amendment, even if permitted, would not have "saved" the proceedings from being found to have no reasonable prospect of success on the primary issue of the validity of the receiver's appointment. I would hold against the appellant in respect of grounds (1) and (2) of his notice of appeal as regards the refusal of leave to amend.

20. Ground (3) of the notice of appeal states that the trial judge erred "by offering the defendant an unsolicited application, of an Isaac Wunder order as against the plaintiff, who had but one set of proceedings ever listed in the courts …". This refers to what is stated by the trial judge in the final paragraph 13 of his *ex tempore* judgment where, having referred to what was stated by Denham J. in *Vantive Holdings* [2010] 2 I.R. 118 at 14, he stated:

> " … it may be that the only way for the defendant to prevent further attempts by the plaintiff to challenge the Bank or the receiver in pursuing its legal rights is for there to be an application for an Isaac Wunder Order, should there be any further attempts at re-litigating issues which are related to the borrowings and the enforcement of security in this case".

It is unnecessary for this Court to reach any determination in relation to this ground of appeal since no Isaac Wunder order was made, or applied for. It is simply a comment by the trial judge but not a determination or decision of the High Court, and therefore no appeal lies.

21. Ground (4) essentially is a claim that the appellant was denied fair procedures. In his submissions to this Court the appellant has submitted that the constant references in the judgment of the trial judge to the Hugh Corrigan proceedings indicates that he was unfairly influenced against the appellant by the various proceedings both by and against his brother, Hugh Corrigan. He complains also that the trial judge referred to him in his judgment as being a director of his brother's company, Melphia Enterprises Limited, and he says that he has never been a director of that company. In relation to ground (4) I am not satisfied that it is established that any constitutional unfairness occurred. If there are some errors of a factual nature in what the trial judge said in his judgment, they are

certainly not sufficient to invalidate the hearing of the receiver's motion. The central issue before this Court by way of appeal (even though not expressly raised in the notice of appeal) is whether the trial judge was correct to conclude that the proceedings must be dismissed as disclosing no reasonable cause of action against the receiver. The factual errors asserted to exist, even if correct, do not speak to, or affect that central question.

The central question – is there any reasonable prospect of success/reasonable cause of action shown in the proceedings?

22. It is well-established by the authorities that the Court's jurisdiction to dismiss proceedings either under O. 19, r. 28 RSC or under the Court's inherent jurisdiction is one that must be used sparingly and only in a clear case. Where material and relevant facts are in dispute those issues cannot be determined on affidavit by the judge hearing an interlocutory motion under the rule. The determination of such disputed factual issues should await a plenary hearing. On a motion to dismiss the plaintiff's claim must usually be taken at its height, and on the basis that the plaintiff will be able to prove at trial the facts on which his claim relies. That is the general rule.

23. However, where for example the plaintiff's claim relies on a net point of law, or as here, whether or not a document has been properly executed, and where no oral evidence will assist in the determination of that question, it is not inappropriate that the Court may determine that nett question at an interlocutory hearing and based on affidavit evidence and any legal submissions made. That position has been made clear, and of course it makes perfect sense that questions easily resolved in this way should not needlessly take up the time of the Court, and add to the legal costs of the parties by the question being left to be determined only after a full plenary hearing. Provided that the parties have a full opportunity to present their case and arguments at such a hearing there will be no prejudice to the right of each party to a fair hearing, either in terms of constitutional justice or under Art. 6 of the European Convention on Human Rights.

24. In *Lopes v. Minister for Justice* [2014] 2 I.R. 301, Clarke J. (as he then was) distinguished between the approach to be taken by the Court on an application to dismiss under O. 19, r. 28 RSC, and an application to dismiss under the Court's inherent jurisdiction. This is a judgment relied upon by the receiver, including by reference to a passage quoted therein by Clarke J. from another judgment delivered by him in *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207, as follows:

> "It is true that, in an application to dismiss as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the

terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim".

25. The trial judge did not refer to the above judgment when reaching his conclusion that no reasonable cause of action was disclosed in the appellant's proceedings. Clearly, however, it was within the inherent jurisdiction of the court to conclude as he did where he was satisfied from an examination of the deed of appointment which was produced to him, and the affidavit evidence adduced by the receiver, that the claim of invalidity as contended for by the appellant could not constitute a reasonable cause of action against the receiver – in other words had no reasonable prospect of success. In fact no ground of appeal is raised either on the appellant's notice of appeal nor in his written submissions. But making all allowance for the fact that the appellant is self-representing, I would say nonetheless that the conclusion reached by the trial judge on that issue was within jurisdiction, and it was open to him on the evidence adduced, including the original deed of appointment, to conclude as he did, and I would uphold his conclusion.

Abuse of Process

26. The trial judge was satisfied that these proceedings also represented an abuse of process because the question of the validity of the deed of appointment has been the subject of two earlier judicial determinations. In my view this conclusion should not be upheld because the determinations in question were made on essentially interlocutory applications, and I would not consider those determinations to be necessarily final determinations. When the court was granting interlocutory injunctive relief on the receiver's application, its conclusion would simply have been that a fair issue had been raised by the receiver that the deed of appointment was a validly executed deed. When the appellant's own application for a declaration as to invalidity was refused, the application was dismissed, but there is no evidence that the court made a determination that the deed had been validly executed. Indeed, there was no evidence of execution before the court given that the receiver had not been properly served with the motion, and therefore adduced no evidence whatsoever. The original deed of appointment was not before that court. So, in my view those decisions do not constitute final determinations of the question such that the question thereby became res judicata.

New grounds

27. On this appeal the appellant sought to argue some new grounds not relied upon by him in the High Court. One of those grounds is that the receiver was appointed only as receiver, and not as receiver/manager, and therefore that his appointment was invalid. This is an issue that is being raised by his brother, Hugh Corrigan, in his proceedings which have

apparently been heard in the High Court (Pilkington J.) but as yet no judgment has been delivered. If that issue is decided against the receiver, then his appointment will not have been valid. Such a result would inure to the appellant's benefit in so far as he is resisting steps being taken in respect of the Oulart premises. He should await the outcome of those proceedings, but he cannot seek to raise the issue in the present proceedings on appeal where he failed to raise the issue before the High Court.

28. Another ground of appeal sought to be advanced in oral submissions by the appellant was based on the existence of a lease of the Oulart premises to him from his brother, Hugh Corrigan. This was not an issue raised before the High Court, and the appellant in any event has never produced any evidence of such a lease. The appellant cannot seek to rely on that ground by way of an additional ground of appeal where it was not raised by him in the court below.

29. For all these reasons I would dismiss this appeal.