THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 75

[2015 No. 638]

Finlay Geoghegan J.
Irvine J.
Sheehan J.

BETWEEN

CORNELIUS M CAGNEY

PLAINTIFF/APPLICANT

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 10th day of March 2017

1. This judgment is given on a motion issued on 18th December, 2015 in which the applicant seeks an order extending the time to lodge an appeal against an order of the High Court (Hedigan J.) made on 8th May, 2015 and perfected on 26th May, 2015.

2. The proceedings in which the order of the High Court was made were defamation proceedings commenced by plenary summons on 17th July, 2012. The applicant claimed that the respondent ("the bank") defamed him by causing certain entries to be made in the Irish Credit Bureau ("ICB") record against his name, namely the letter "K" denoting that the applicant's credit card account had been revoked by the bank and "L" denoting that the applicant had settled the said credit card account for less than the amount due or short. The bank delivered a full defence to the claim on 3rd May, 2013 in which it denied that it had defamed the applicant and pleaded *inter alia* that the said communications to the ICB were made on occasions of qualified privilege.

3. The proceedings were heard in the High Court before Hedigan J. and a jury on 6th and 7th May, 2015. The applicant was represented during the trial by solicitor and counsel.

4. At the end of the evidence counsel for the bank applied for the case to be withdrawn from the jury on the grounds that the publications complained of were made on occasions of qualified privilege. The trial judge, having heard submissions from counsel for the bank and counsel for the applicant, decided that there was no case to put to the jury and withdrew the case from the jury on 7th May, 2015. On that day he informed the parties and the jury of his decision and indicated that on the following morning, 8th May, 2015 he would give his reasons for his decision. On the 8th May, 2015 the trial judge delivered a written judgment *Cagney v Bank of Ireland* [2015] IEHC 288 setting out the reasons for his decision. He then made an order dismissing the applicant's claim and awarding the costs in favour of the bank.

5. On 3rd October, 2015 the applicant applied to the bank for consent to the late filing of a notice of appeal. Consent was not forthcoming and the motion was issued on 18th December, 2015 and grounded upon an affidavit sworn by the applicant on 17th December, 2015. The applicant also lodged a draft notice of appeal.

6. In his grounding affidavit he sets out the reasons for which he seeks the extension of time to appeal as being:

> "(a) I am a lay litigant and unfamiliar with court processes.
>
> (b) I have significant health problem and I was not well enough to deal with my legal affairs in the immediate aftermath of the trial.
>
> (c) It is in the interests of justice that I be allowed to appeal. There was a breach of my constitutional rights in the manner in which the trial was conducted and I have a *bona fide* appeal."

7. In the draft notice of appeal the grounds identified are:

> "(1) Right to [have] my action considered and determined by jury.
>
> (2) The decision of [the trial judge] has infringed my constitutional rights.
>
> (3) No DAR available.
>
> (4) Bias perception in the case."

8. A replying affidavit was sworn by Emer Lumsden, solicitor for the bank; a further affidavit was submitted by the applicant and there were written submissions. The outline written submissions of the bank refer to the principles in the case of *Éire Continental Trading Company v. Clonmel Foods* [1955] I.R. 170 to which the Court should have regard in determining this appeal. The criteria to be considered are:

> 1. Whether the applicant has shown that he had a bona fide intention to appeal formed within the permitted time.
>
> 2. Whether he has shown the existence of something in the nature of a mistake as to procedure.
>
> 3. Whether he has established that an arguable ground of appeal exists.

9. The applicant appeared in person and submitted that he had formed an intention to appeal within time and that this was evident from the fact that he had filed a motion in the High Court seeking a copy of the DAR on 18th May, 2015. He referred to his health difficulties but did not adduce any evidence of same. He submitted that the decision of the trial judge to withdraw the case from the jury was made without his knowledge or input. He submitted that the decision of the trial judge was made before 8th May and was available online on 7th May but that his judgment was not delivered in court until 8th May. He also submitted that he had roughly 8 cases before Hedigan J. and that the trial judge had ruled against him every time. He did not refer the Court to any specific cases but submitted that this was evidence of bias and prejudice against him. He referred in submission to the breach by the bank of his constitutional rights by reason of the publication in question and the removal of the case from the jury.

10. The submission of the bank was that the applicant had not satisfied any of the *Éire Continental* criteria and that an extension of time should not be granted.

11. This Court received at the hearing of the motion a copy of the stenographer's transcript of the hearing before the trial judge and jury on 6th and 7th May. A stenographer was not present for approximately the first hour but that is not relevant to any issue which has to be considered on this motion. I have considered the transcript relevant to the submissions made.

Discussion and decision

12. I am prepared to accept that the applicant may have formed an intention to appeal when he sought the DAR by motion of 18th May, 2015. However even if that is so Dahmno proper explanation for the delay in lodging a notice of appeal. Whilst the applicant relies upon the fact that he is a lay litigant, the affidavit of Ms. Lumsden sets out multiple proceedings in which the applicant has been involved as a lay litigant and he must be considered to be an experienced lay litigant. He also relies upon what he states to have been a "significant health problem" but does not give any detail or provide evidence to support same. Again the affidavit of Ms. Lumsden sets out many times upon which the applicant appeared in courts in relation to other proceedings in the autumn of 2015. Even when he applied to the bank for consent in October, 2015 and was refused he still did not issue the motion until 18th December, 2015. For those reasons I could not be satisfied that he has established a factual basis for a mistake or other circumstances which would justify my forming the view that there existed something in the nature of a mistake or other justifiable reason for which he did not lodge a notice of appeal within 28 days from the perfection of the High Court order.

13. Notwithstanding, I have also considered whether Mr. Cagney has made out an arguable ground of appeal. I do not consider he has done so.

14. The decision of the trial judge to withdraw the case from the jury was made on 7th May, 2015 following submissions made to him by counsel for the bank and submissions made by counsel for the applicant. The trial judge announced his decision on that day and informed the jury of his decision. He also stated he would give his full reasons in a written judgment on the following morning. That approach cannot form the basis of an arguable ground of appeal.

15. The judgment delivered by the trial judge with his reasons sets out correctly and with care the applicable legal principles and then applies them to what were uncontested facts given in evidence.

16. The trial judge correctly stated that the jury decide the facts in any case submitted to them for their determination and as a general principle it is only when the judge is satisfied, on undisputed facts, no case in law exists, that he may withdraw the case from the jury. The trial judge correctly identified that the question of whether or not the occasion was one of qualified privilege such that a defence pursuant to s. 18 of the Defamation Act, 2009 exists is a question of law to be determined by the trial judge. There may be cases where the jury must decide any relevant facts in dispute before the judge can make that determination. This was not such a case.

17. The trial judge having considered s. 18 of the Defamation Act, 2009, relevant authorities and facts not in dispute concluded that the communications to the ICB were made on an occasion of qualified privilege. He also adverted to the fact that malice had not been pleaded by or on behalf of the applicant nor did he did not seek during the hearing to establish malice. The trial judge referred in his judgment to the fact that "the plaintiff himself said on a number of occasions that he did not know why the bank had communicated the information to the Irish Credit Bureau". That is not in dispute and could not be having regard to the evidence in the transcript.

18. In the absence of malice the trial judge concluded correctly that no defamation could arise from the communications made on an occasion of qualified privilege.

19. Accordingly I have concluded that the applicant has not adduced any arguable grounds of appeal against the ruling of the trial judge and decision to withdraw the case from the jury. He has not made out any arguable ground that any constitutional right was interfered with by the ruling.

20. I would add that a submission that the trial judge had ruled against the applicant on a number of other occasions in other proceedings (if that happened) could not form an arguable ground of appeal in relation to alleged bias of the trial judge. Again the transcript of the hearing does not disclose any arguable ground in relation to an allegation of bias of the trial judge.

21. For those reasons I refuse the application for an extension of time to appeal.