THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 42

Record Number: 2017/321

Peart J.
Costello J.
Kennedy J.

BETWEEN:

DOLORES MANNION

PLAINTIFF/APPELLANT

- AND -

THE LEGAL AID BOARD

1st DEFENDANT

- AND -

THE MINISTER FOR JUSTICE AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

2ND, 3RD AND 4TH DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 20TH DAY OF FEBRUARY 2019

1. By order of the High Court (Barrett J.) two sets of proceedings commenced by the plaintiff, the appellant in this appeal, by way of plenary summons were struck out as against the 2nd, 3rd and 4th named defendants on their application brought by way of notice of motion dated 3rd January 2017. The basis on which those defendants sought to have the appellant's proceedings struck out was pursuant to the inherent jurisdiction of the Court and on the basis that the claim as pleaded against them is unsustainable and bound to fail and or that her claim against them is frivolous and vexatious.

2. I will refer to the said proceedings simply as "the 2010 proceedings" or "the 2013 proceedings", or simply as "the proceedings" where no distinction is required.

3. The factual background to how the plaintiff came to institute the proceedings in question is well summarised in the judgment of the trial judge. An important feature of that background is that an earlier judicial review proceeding commenced by the plaintiff against the Legal Aid Board in 2006 was heard and determined by the High Court (McGovern J.). For reasons set forth in his written judgment ([2007 IEHC 413]) he refused the reliefs she was seeking, including a declaration that the Legal Aid Board had failed to provide her with a solicitor in private practice, rather than a solicitor employed by the Legal Aid Board. She had contended that this decision constituted a breach of her constitutional rights and that it was also contrary to the provisions of the European Convention on Human Rights, she had contended also that the Civil Legal Aid Act, 1995 fails to satisfy the constitutional obligations of the Minister for Justice and Ireland and the Attorney General in relation to the provision of free legal aid for civil cases in breach of Art. 6 of the European Convention on Human Rights. The dismissal of her judicial review proceedings on all grounds was the subject of her appeal to the Supreme Court. That appeal was unsuccessful.

4. It was following the dismissal of her said appeal in the Supreme Court that the appellant commenced the 2010 proceedings by way of plenary summons. However, as noted by the trial judge, she did not deliver a statement of claim until 16th February 2015. Prior to the delivery of that statement of claim she had commenced the 2013 proceedings on 9th December 2013 and in respect of which she delivered her statement of claim on 2nd March 2015. As the trial judge notes in para. 4 of his judgment, "although both statements of claim differ in certain non-material respects, they both arise from the same set of circumstances and have the same or practically similar objectives" as the earlier 2006 proceedings already referred to.

5. On 29th September 2015, the Chief State Solicitor's office wrote to the plaintiff on behalf of the present respondents stating that the proceedings were bound to fail and that they were frivolous and vexatious. That office wrote again in November 2016 to inform the appellant that they intended to bring an application to have both sets of proceedings struck out, but went on to offer that it would not seek costs against her if she would agree simply to discontinue both sets of proceedings. However she declined to do so and that decision by her resulted in the issue of a notice of motion in both the 2010 and 2013 proceedings in which the present respondents sought to have her claims against the second, third and fourth defendants struck out on the basis that the claims against them as pleaded were bound to fail, and also on the ground that those claims were frivolous and vexatious since the issues raised had already been the subject of final determination in the 2006 proceedings.

6. In his written judgment delivered on 1st June 2017 the trial judge set out a detailed background and chronology of relevant events. He examined the statement of claim in each proceeding, and also referenced her affidavit filed in response to the respondents' motion and her submissions. Having done so, he stated as follows at para. 10:

> "10. Essentially when one has regard to the just-quoted text [from her grounding affidavit] and to [the plaintiff]'s submissions at hearing, it appears that her complaints are that the Act of 1995 allows the Legal Aid Board (so Ms. Mannion claims) to behave in an unconstitutional manner, that the constitutionality of the Act of 1995 was not the subject of [her] previous applications, and that the Minister, etc. must be a party to any challenge to constitutionality. In this regard, the court cannot but note again that McGovern J. expressly found in his decision in *Mannion v. The Legal Aid*

> *Board and ors* [2007] IEHC 413, 21 that he did not consider that there was *"any failure on the part of the respondents [being the Legal Aid Board, the Minister, Ireland and the Attorney General] to meet the requirements of natural and constitutional justice"*. Thus [the plaintiff] in a case deriving from the same set of circumstances and with practically similar objectives, is seeking to commence from the starting-point that the Legal Aid Board has been empowered to behave and has behaved in an unconstitutional manner, notwithstanding that this is a starting- point which flies in the face of the just-quoted finding arrived at by McGovern J. in his judgment, which finding was not upset by the Supreme Court." [italics in original]

7. Having so stated, the trial judge in his judgment then proceeded to refer to the well-known authorities which set out the legal principles which require to be observed and applied when deciding if proceedings are frivolous and vexatious, and in relation to *res judicata* and the rule in *Henderson v. Henderson*. The cases referred to include *Barry v. Buckley* [1981] IR 306, DK v. AK [1993] ILRM 710, *Fay v. Tegral Pipes* [2005]2 I.R. 261, *Behan v. McGinley* [2011] 1 I.R. 47, *Ewing v. Ireland* [2013] IESC 44, *Riordan v. Ireland (No.5)* [2001] 4 I.R. 463, *Sweeney v. Bus Atha Cliath/Dublin Bus* [2004] 1 I.R. 576, *O'Driscoll v. McDonald* [2015] IEHC 100, and *Moffit v. Agricultural Credit Corporation plc* [2007] IEHC 245.

8. I am satisfied that the authorities to which the trial judge was referred and which he considered fully and carefully by the appropriate authorities for the principles upon which he relied and which he applied when determining that the 2010 proceedings and the 2013 proceedings should be struck out. His conclusions in this regard are set out at para. 24 of his judgment as follows:

> "24. [the plaintiff] appears, regrettably, to hold the Legal Aid Board in low esteem. By reference to certain actions of the Board, which she alleges to be unconstitutional but which the High Court in proceedings concerning the same parties and arising from the same set of circumstances has previously held not to evince "any failure on the part of the respondents [including the Legal Aid Board] to meet the requirements of natural or constitutional justice", she now seeks to construct proceedings that would assail the constitutionality of the Act of 1995. Such proceedings, for the various reasons identified above, cannot stand. Every legal system must fix a boundary to the march of court proceedings which involve but a re-litigation of previously adjudicated disputes. That boundary is demarcated in our legal system by the triple fence erected by the law concerning frivolous and vexatious proceedings, the doctrine of res judicata, and the rule in *Henderson v. Henderson*. No matter what way one approaches the within proceedings, it seems to the court that to allow them now to continue would be, for the various reasons stated previously above, to allow a contravention of that law, a breach of that doctrine, and to defeat an important purpose of that rule. Any one of those consequences would suffice as a basis on which to strike out the within proceedings. The court considers all 3 to [be] present. Thus a strike-out of both sets of High Court proceedings presently in play between [the plaintiff] and the second, third and fourth-named defendants will now be granted. The court appreciates that this conclusion will likely come as a disappointment to [the plaintiff]; however, to the extent that she has sought, through the proceedings aforesaid, to highlight publicly such deficiencies as she perceives to present in the manner in which the Legal Aid Board operates and/or has operated (which deficiencies are but alleged) [she] at least has the comfort of knowing that she has now done so."

9. In her notice of appeal, the appellant relies on a remark made by Hardiman J. In his judgment in the appeal from the judgment of McGovern J. in the previously mentioned 2006 proceedings when he stated:

> "The applicant did not proceed in this Court, or apparently in the High Court, to urge the unconstitutionality of the statute (Civil Legal Aid Act 1995) or any part of it. This indeed is raised only ambiguously, if at all, in the pleadings. Accordingly, the Court, like the High Court, did not consider this aspect and *would not in fact have been properly constituted to do so*. The applicant's case was, rather, that the Board itself had failed to fulfil its constitutional duties". [Emphasis added]

10. The appellant's reliance upon this statement is misplaced simply because she misunderstands it. The point she makes on this appeal is that if the High Court was not properly constituted to deal with the question of constitutionality (as she contends is what Hardiman J. stated), she cannot be caught by the rule in *Henderson v. Henderson*. But Hardiman J. is not saying in that passage that the High Court was not properly constituted to deal with an issue of constitutionality. He was simply referring to the fact that if the Supreme Court was dealing with an issue of constitutionality it would sit as a court of five judges, whereas it was sitting only as a three judge court when hearing that particular appeal.

11. The appellant also has submitted that the 2010 and 2013 proceedings relate to events that did not exist at the time of the 2006 proceedings, and therefore could not be found to fail on the basis of *res judicata*, or on the basis of *Henderson v. Henderson* principles. She describes these as constituting "further constitutional breaches by the Legal Aid Board which did not exist at the time of the Judicial Review". She contends also that the need to join the State parties as defendants "arises out of entirely different actions and circumstances to those which gave rise to the Judicial Review Application in 2006".

12. I have carefully perused the statement of claim in each of the 2010 and the 2013 proceedings in the light of the appellant's contention that those claims arise from events that post-date the 2006 proceedings. It is certainly the case that later events are recited by way of narrative, but it is not the case that any fresh cause of action against the respondents in this appeal arise from those narrated events. It is important to stress that the present appeal is against an order made on the application by the present respondents only, and not the Legal Aid Board, the first named defendant. It follows that it is the contents of the statements of claim setting out the case being made against these present respondents to the appeal that are relevant.

13. I find nothing to indicate any error on the part of the trial judge as to his conclusion that there is either no cause of action disclosed by the appellant in either statement of claim against the respondents that has any prospect of succeeding, or that has not already been determined in the earlier 2006 proceedings, or that comprises a claim that could have been, but was not brought, in those 2006 proceedings. It is worth mentioning also that in an effort to try to find out what claim the appellant was making against the respondents in her 2010 and 2013 proceedings, the Chief State Solicitor wrote to the plaintiff sending a notice seeking further and better particulars of her claims against these respondents. The reply which was received provided no further enlightenment.

14. While I, like the trial judge, acknowledge the depth of feeling that the appellant endures arising from what she sees as wrongful treatment by the Legal Aid Board, I am afraid there is no case made out against these particular respondents that is either not bound to fail, or where the issue sought to be agitated has not already been the subject of a judicial determination, as I have explained and as the trial judge explained with clarity.

15. For these reasons, I would dismiss this appeal.