



THE COURT OF APPEAL

Neutral citation Number: [2019] IECA 7

Record No. 2018/295

Whelan J.
Baker J.
Kennedy J.

BETWEEN/

MICHAEL EGAN

APPELLANT

- AND -

FINTAN MURPHY

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of January 2019

1. This appeal arises from the order of Mr Justice Noonan in the High Court on the 11th June 2018. Having considered the statement of grounds filed by the appellant on the 6th February 2018 together with an affidavit sworn by him on the 13th February, the said judge refused to grant leave to apply by way of application for judicial review of the order made by the Roscommon County Registrar in Circuit Court proceedings, Record No 2017/00183 on the 20th November 2017. The latter order merely adjourned the case to the judge's list of the Roscommon Circuit Court for the 20th February 2018.

2. The notice of expedited appeal is dated the 18th of July 2018. Eight separate grounds are identified including the quashing/overturning of the order refusing leave made by Mr Justice Noonan on the 11th June 2018 as well as orders for costs and punitive damages. The appellant seeks a wide variety of other remedies including an order dismissing the aforesaid Circuit Court proceedings. However, this court's function is confined to determining whether the appellant has established a case in law entitling him to be granted leave to seek judicial review of the order made by the Roscommon County Registrar.

Basis of application for judicial review

3. The original High Court *ex parte* docket issued by the appellant and dated the 21st May 2018 identifies the reliefs being sought as including, *certiorari*, prohibition, "an order quashing/overturning the decision of Mr Fintan Murphy to allow said Circuit Court case number 2017/183 to proceed to trial (the judges list)."

Statement of Grounds

4. From the Statement of Grounds dated the 6th February 2018 the following facts appear to arise: Pepper Finance Corporation (Ireland) DAC ("Pepper") instituted proceedings record number 2017/00183 against the appellant and his wife, Eileen Egan, before the Circuit Court, Midland Circuit, County Roscommon. The proceedings seek possession of a dwelling house. It appears that on or about the 29th of September 2017 the appellant purported to enter a conditional appearance pursuant to Ord.12, r. 26 of the Rules of the Superior Courts ("RSC"). The defendants also challenge the lawful *bona fides* of the plaintiff to be before the court and the *bona fides* of the affidavit of Caroline Loftus sworn on behalf of Pepper. Additionally, they challenge its compliance with Ord. 40 of the RSC. The conditional appearance also asserted that:

"... jurisdiction to proceed in said matters is lawfully denied and NO CONSENT has/is being given, conferred and/or granted to the said plaintiff and/or court to proceed subject to all the conditions herein being strictly being adhered to (sic)..."

5. This appeal involves a *de novo* consideration of the application for leave to seek judicial review of the Roscommon County Registrar's order of the 20th November 2017.

6. In essence, on the hearing of this appeal, the argument advanced by the appellant, who is a litigant in person, centred on the failure of the County Registrar, Fintan Murphy on the 20th November 2017 to accede to the pre conditions imposed by the appellant and specified in the conditional entry of appearance dated the 29th September 2017. The conditions were three in number:

- i. that Pepper prove to the satisfaction of the defendants, Mr Egan and his wife, that they "have a lawful cause of action";
- ii. that Pepper prove that an affidavit of Caroline Loftus sworn in support of the plaintiff's claim fully complies with the RSC and S. I. No. 15/1986 and Ord.40, r.1 -33; and
- iii. that the Circuit Court – "...be it the County Registrar and/or the Presiding Judge – declare that they have established lawful jurisdiction and a lawfully constituted court to proceed in the matter ... If said Declaratory Order be refused, it is taken that the said Court do not and have not established Lawful Jurisdiction, said matters to be dismissed with Prejudice, with costs in favour of the said defendant(s)."

7. The matter was returnable before the County Registrar of the Midland Circuit County Roscommon on the 20th November 2017. An order was made by the County Registrar, Mr Fintan Murphy, on the said date and perfected thereafter on the 30th November 2017 which provided as follows:

"the defendants having been duly served with the Civil Bill herein and the same coming before the court this day WHEREUPON and on reading the pleadings and documents filed and on hearing what was offered on behalf of the plaintiff and personally by the first named defendant THE COURT DOTH ORDER: 1. That the matter be adjourned to Roscommon Circuit Court Judges list on 20 February 2018."

Application for leave

8. The test for leave to commence judicial review was set out in *G v Director of Public Prosecutions* [1994] 1 I.R. 374 by Finlay C.J. at pp 377-378:

"An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters: -

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the application has been made promptly and ... within the ... [relevant] time limits...

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

9. In discussing the above test, in *Esmé v Minister for Justice* [2015] IESC 26, Charleton J stated the following at para 15:

"Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstateable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a *prima facie* legal argument has been established."

10. In my view the *G v. DPP* test is applicable in the current case.

Conditional appearance

11. As set out in Delaney and McGrath, *Civil Procedure in the Superior Courts* (Dublin; Round Hall; 4th edition; 2018), paragraph. 4-13:

"The concept of an appearance to contest jurisdiction derives from the principle of submission to jurisdiction whereby, regardless of whether a court would otherwise have jurisdiction, it will acquire jurisdiction where a defendant submits to the jurisdiction of the court by entering an unconditional appearance to proceedings before that court."

12. The authors noted that this basis of jurisdiction was recognised at common law. The authorities cited include *Heffernan v. Atkin* [1913] 47 I.L.T.R. 245, *Moore v. Moore* [1871] I.R. 5 Eq. 172 and *Re Dulles' Settlement* (No.1) [1951] Ch 265

13. The appellant relies on Ord. 12, r. 26 of the RSC. It provides as follows:

"A defendant before appearing shall be at liberty to serve notice of motion to set aside the service upon him of the summons or of notice of summons, or to discharge the order authorising such service."

14. It is clear that the appropriate course for a defendant to take when challenging the service of a summons upon him is to serve a notice of motion prior to entering any appearance although it is contemplated under Ord.12, r. 2 (3) that a defendant may enter a conditional appearance. This arises particularly in proceedings with a transnational dimension or where the provisions of the Brussels Convention, the Lugano Convention or Regulation (EC) number 1215/2012 and number 2201/2003 arise. A conditional appearance entered for the purpose of contesting jurisdiction, may preserve the right to bring an application to contest jurisdiction

15. The appellant entered a conditional appearance in the present case, not to contest jurisdiction as such but because he wanted to challenge the right of Pepper to seek an order for possession. The appellant grounded this on the submission that the affidavit on which Pepper relied on was not admissible. The conditional appearance therefore raised matters relating to the substance of the matter before the court, and not the jurisdiction of the court to determine the matter in the first place.

16. A conditional appearance is entered by a defendant who wishes to challenge jurisdiction, as the entry of such an appearance is not to be regarded as a submission to jurisdiction. A conditional appearance is not the mechanism by which a party defends the claim on its merits or substance.

17. The papers submitted by the appellant have failed to identify any conflict of laws, point or issue with regard to the jurisdiction of the Circuit Court to make determinations in the possession proceedings instituted by Pepper. It does not appear that the appellant brought a motion before the Circuit Court, whether pursuant to Ord. 12, r.26 RSC or otherwise under the rules of the Circuit Court, seeking to set aside service of the proceedings on any grounds relating to jurisdiction or otherwise. The Circuit Court is established as a court of local and limited jurisdiction in accordance with Art. 34.3.4 of the Constitution.

Ground 1: "lawful cause of action"

18. The appellant has repeated assertions in his statement of grounds and affidavit that Pepper are obliged to prove to the court that they are a *bona fide* plaintiff and have a lawful cause of action. However, the appellant has failed to identify any basis for the contention that there is a lack of *bona fides* on the part of Pepper. The Rules of the Circuit Court make clear that the merits of a claim are to be contested by delivering a defence which should state the grounds on which a defendant disputes the plaintiff's claim.

Ground 2: Compliance of affidavit of Caroline Loftus with the Rules

19. With regard to a grounding affidavit apparently sworn in behalf of Pepper by Caroline Loftus in the Circuit Court repossession proceedings the appellant failed to identify any legal basis upon which he could validly challenge the *bona fides* of the deponent or any aspect of the affidavit. Whilst Ord. 40, r.s 1 – 33 are referenced, no non-compliance or breach of the said rules is specifically identified.

Ground 3: County Registrar and/or Judge – declare that they have established lawful jurisdiction and a lawfully constituted court

20. In response to a query from this Court, the Appellant agreed that Ground 3 effectively derives from Grounds 1 and 2 specified in his conditional appearance. The notion apparent from the face of the appellant's conditional appearance is that were the Circuit Court to refuse to grant a declaratory order that he seeks and proceeded to assume jurisdiction to hear the proceedings brought by Pepper that this could give rise to the proceedings being dismissed as specified his conditional appearance. This is wholly novel and without any legal basis whatsoever.

Order of County Registrar of 20th November, 2017

21. The order of the County Registrar for County Roscommon merely adjourns the proceedings to the Judge's List for Roscommon Circuit Court for the 20th February 2018 -three months after the said order being made. The functions of the County Registrar, who is a court officer and not a judge, are quite limited in scope. In possession proceedings these include ascertaining that proceedings have been properly served, determining whether a mortgagee has filed all relevant documentation for the case that is before the court and evaluating whether the case is ready to be heard before a Circuit Court judge if necessary.

22. As a matter of law it was not open to the County Registrar on the 20th November 2017 to embark upon a comprehensive evaluation of issues as to jurisdiction, particularly where the appellant had not brought a motion identifying such an issue. It was entirely appropriate and reasonable that the matter be adjourned to the Circuit Court Judge's List in the relevant county. Further, the period of the adjournment being in excess of 12 weeks afforded ample opportunity to the appellant to bring any motion as he might see fit challenging jurisdiction or raising any other substantive issue he consider to be appropriate or to deliver any defence as he considered appropriate.

23. In addition, and insofar as it is raised by the appellant, the County Registrar does not have the power to adjudicate upon a contest as to jurisdiction. The County Registrar must, when a jurisdictional matter is raised, transfer the matter for determination by a judge.

24. Order 18, r. 3 of the Circuit Court rules provides as follows:

"If any matter appears to the County Registrar proper for the decision of the judge, the County Registrar may refer the same to the judge who may either dispose of the matter or refer the same back to the County Registrar with such directions as he may think fit."

25. Order 18, r. 7 provides that:

"any party dissatisfied with any certificate, ruling or decision of the County Registrar, may, within ten days from the date of such certificate, ruling or decision, apply to the Judge by motion on notice to review such certificate, ruling or decision, and the Judge may thereupon make such order as he shall think fit."

26. On the basis of the available information having due regard to Ord. 18 of the Circuit Court Rules together with s. 34 (1) and also the Second Schedule of the Courts and Court Officers Act 1995, the order made by the County Registrar, Fintan Murphy, on the 20th November 2017 was appropriately and in accordance with his powers. The appellant has not identified any basis upon which the order could be validly impugned. It was of course at all material times open to the appellant to appeal against the order so made.

Order 11th June 2018

27. Turning then to the decision of Mr Justice Noonan on the 11th June 2018, it was incumbent on the appellant to demonstrate that the facts averred to in his affidavit would be sufficient, if proven, to support the stated ground for the form of relief sought by way of judicial review. In the affidavit sworn on the 13th February 2018 by the appellant he recounts his recollection of events before the County Registrar in County Roscommon on the 20th November 2017 in connection with his repossession proceedings. He recounts that he had asserted that Pepper lacked bona fides in the matter and that the deponent of Pepper's grounding affidavit had failed to comply with the rules in connection with the swearing and making of affidavits and further, that the court was not properly constituted. The appellant contends that the County Registrar did not have lawful jurisdiction to send the matter forward to the Judge's List.

The standards of a rational preliminary analysis

28. I am satisfied that these contentions are not supported by any cogent evidence whatsoever if one applies the "standard of rational preliminary analysis" advocated by Charleton J. in the Supreme Court in *Esmé*. Faced with the submissions and arguments being advanced by the appellant on his own behalf and on behalf of his co-defendant and wife, Eileen Egan, the County Registrar, having due regard to the rules of the Circuit Court and the relevant legislation, did not have any option but to send the matter forward to the judge of the circuit. Accordingly, the County Registrar acted wholly appropriately and in accordance with the rules of the Circuit Court in making the order which he did. Thus, the application for judicial review as presented before Mr Justice Noonan on the 11th June 2018 was wholly unstateable. The facts averred to in the affidavit of the appellant are wholly insufficient, if proven, to support the application for the forms of relief being sought by way of judicial review. This includes an order of *certiorari*, an order of prohibition and an order quashing and overturning the decision of the County Registrar made on the 20th November 2017 at Roscommon Circuit Court. On the facts and arguments, a case in law is not made out by the appellant that he would be entitled to the reliefs which he seeks.

29. It will be recalled that Mr Justice Charlton in the decision *Esmé v the Minister for Justice* [2015] IESC 26 at para. 15 of his judgment in the Supreme Court stated:

"...any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success."

30. In the instant case the Appellant's claim falls down on analysis at every level. It is simply not stateable.

31. The appellant's contentions are substantially misconceived and are based on a misunderstanding of the procedural purpose of and

the parameters governing the entry of a conditional appearance. The use of a conditional appearance is confined to specific objections by a defendant to jurisdiction or the regularity of the proceedings. Service of a conditional appearance does not shift the burden of proof regarding such a contention. Its primary purpose is to signal to the plaintiff and to the court a defendant's intentions as to the defence of the case. The form of conditional appearance entered by the appellant, when considered in its totality, purported to abrogate to himself an entitlement, in the event that a declaratory order he seeks be refused, to effectively claim thereupon that the court did not have lawful jurisdiction. Such a proposition is wholly fanciful, contrary to reason logic and law and no authority for such a proposition has been identified.

Conclusion

32. For the reasons earlier set out in this judgment the appellant has failed to satisfy this court in a prima facie manner by the facts set out in his affidavit, Statement of Grounds and submissions made in support of his application that the facts averred to would be sufficient, if proven, to support a stateable ground for the various reliefs sought by him by way of judicial review. Neither has he established that on these facts an arguable case in law can be made that he is entitled to the reliefs which he seeks by way of judicial review. The claim does not withstand rational preliminary analysis at any level. I am satisfied that the application for judicial review ought to be refused. It follows that I am satisfied that the order made by Mr Justice Noonan on the 11th June 2018 was correct and should be affirmed.