



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 319

Record Numbers: 2014/1314

Irvine J.

BETWEEN

DOUGLAS KELLY

PLAINTIFF/

RESPONDENT

- AND -

PETER McNICHOLAS AND NANCY McNICHOLAS

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 12th of October 2018

1. This ruling relates to the first named defendant appellant's motion, under Ord. 86A, r. 4 of the Rules of the Superior Courts, seeking liberty to adduce new evidence as contained in an affidavit sworn by him on the 27th March 2018 on the hearing of his appeal from an order of the High Court made on the 17th July 2014. He also seeks an order permitting his son-in-law, Mr. Alan Lynskey, to speak on his behalf at the hearing of his appeal.

Background

2. The background to the order under appeal is that on the 20th March 2012 the plaintiff, Mr. Douglas Kelly, who is a solicitor, issued summary summons proceedings against Mr. and Mrs. McNicholas for the purposes of recovering fees in respect of professional services provided to them in respect of proceedings which they brought against Mayo County Council and SIAC Wills J.V. Limited (Record Number 2007/6160P). Those proceedings concerned the construction of the Charlestown N5 bypass, the compulsory purchase of certain lands and, in particular, issues concerning access to their property under the proposed development. They lost those proceedings which were heard by McGovern J. in the High Court and their appeal to the Supreme Court was also unsuccessful.

3. Mr. Kelly, in the summary summons proceedings which are the subject matter of Mr. McNicholas's appeal before this court, sought to recover a sum of €245,016.94 on account of work undertaken by his firm for the period 2001 to 2009. Following an exchange of affidavits between the parties wherein Mr. McNicholas contended for the mismanagement of his proceedings against Mayo County Council, Kearns P. granted judgment in favour of Mr. Kelly for the lesser sum of €150,000 together with costs and remitted the balance of the claim to plenary hearing. The Supreme Court placed a stay on that order pending appeal on condition that Mr. McNicholas lodge a sum of €50,000 into an ESCROW account and furnish a registered lease over thirty acres of forestry in County Mayo, within a period of four weeks, which he duly did.

4. It is not necessary to engage with much of the detail contained in Mr. McNicholas's grounding affidavit concerning the issues the subject matter of the proceedings determined by the High Court and Supreme Court in his litigation against Mayo County Council. Suffice to state that his main complaint is that in the course of the High Court proceedings the evidence of Mayo County Council to the effect that there was an accommodation road to plot 112 in the proposed road development was not challenged under cross examination. The case proceeded on the basis that such an accommodation road was part of the proposed development. Mr. McNicholas maintains that his solicitor was negligent not to challenge that assertion in circumstances where his own planning consultant had earlier given evidence to the effect that there was no accommodation road in the proposed development. He also complains that when his solicitors discovered there was no accommodation road in March 2009 they did not seek to amend the pleadings notwithstanding the fact that their own planning consultant, Ms. Geraldine Fahey, gave evidence to the effect that there was no accommodation road in the proposed development.

5. Mr. McNicholas also maintains that Mr. Kelly was negligent in not reviewing the Environmental Impact Statement (hereafter "EIS") to verify the claims made by Mayo County Council regarding the existence or otherwise of the accommodation road and had ignored the advices of counsel that he should do so on two occasions. He states that had Mr. Kelly reviewed the EIS and had his case been properly pleaded and conducted to reflect what was contained in the EIS the Supreme Court would not have incorrectly found, as they ultimately did, that there was an accommodation road in the proposed development but instead would have found that the accommodation road built by Mayo County Council had not been approved of by An Bord Pleanála.

6. In conclusion Mr. McNicholas submits that if he is not permitted to introduce this evidence on the appeal against the order for summary judgment he will have lost the only avenue open to him to set right the injustice and consequential financial loss visited upon him, both in the High Court and Supreme Court, as a result of Mr. Kelly's negligence.

7. In his replying affidavit Mr. Kelly maintains that the present application to admit new evidence is an impermissible attempt to re-argue the appeal which he lost in the Supreme Court. He further relies upon the fact that all of the evidence which Mr. McNicholas wishes to introduce on this appeal was readily available to him at the time the application for summary judgment was heard in the High Court on 17th July 2014. Finally, he points to the fact that if this court was to admit the affidavit and documentary evidence proposed by Mr. McNicholas the result would be a *de novo* hearing of the application for summary judgement rather than a review by the appellate court of the correctness or otherwise of the High Court judgment.

The relevant principles

8. Order 86A, rule 4(c) of the rules of the Superior Courts provides that:-

"on any appeal from a final judgment order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the

special grounds.”

9. From the aforementioned rule it is clear that the burden of proof on the present application requires Mr. McNicholas to establish the existence of special grounds to justify the relief which he seeks. Relevant in this regard is the decision of Finlay C.J. in *Murphy v. The Minister for Defence* [1991] 2 I.R. 161 wherein he specified the nature of the test to be applied by a court when seeking to determine whether the grounds advanced by a party seeking to admit new evidence should be considered “special grounds” for the purposes of such an application. The court should be satisfied:-

(i) that the evidence sought to be adduced was in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

(ii) that the evidence is such that if given would probably have an important influence on the result of the case though it need not be decisive; and

(iii) it must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be on incontrovertible.

10. The aforementioned principles are well established and have been applied consistently by the courts in many cases over the years. (see for example *In re Greendale Developments Ltd (In Liquidation) (No. 2)* [1998] 1 I.R. 8 and *O'Dwyer v. Daughters of Charity of St. Vincent de Paul & Ors* [2015] I.R. 328).

11. Having considered the submissions of the parties, I am satisfied that Mr. McNicholas's application fails at the first hurdle of the test identified by Finlay C.J. in *Murphy*. The evidence which he wishes to have admitted on the hearing of this appeal was clearly available to him many years before the within proceedings were commenced in March 2012. More importantly, it is manifest that all of the evidence which he now wishes to put before the court on the hearing of the appeal could have been obtained by him with reasonable diligence prior to the hearing of the application before the President of the High Court on the 17th July 2014. There is simply no reason why all of the allegations of negligence and the supporting documentation upon which she would now wish to rely, and which are referred to in his affidavit of the 27th March 2018, were not put before the court on the hearing of the application for summary judgment.

12. Of particular importance is the fact that all of the evidence upon which he would now wish to rely was actually known to him long before the application for summary judgment was heard in the High Court. This was not evidence which he had to track down. Relevant in this regard is the fact that his daughter, Ms. Marilyn McNicholas, then a solicitor in Douglas Kelly and Son, was not only the solicitor principally involved in his litigation against Mayo County Council, but her firm, Marilyn McNicholas & Company, came on record on his behalf for the purposes of pursuing his appeal to the Supreme Court. And, as we know, her husband, Mr. Lynskey, has been assisting Mr. McNicholas in the course of the current proceedings. Thus, Mr. McNicholas was in a much stronger position than most litigants to consider and understand why it was that he lost his High Court case and also his Supreme Court appeal. Also, he would have had ready access to all of the documents on his solicitors file for such purpose.

13. Accordingly, if Mr. McNicholas wished to defend Mr. Kelly's claim in respect of fees claimed in respect of legal services there is no reason why, when filing his replying affidavit to the application for summary judgment, he did not swear to the facts deposed to in this affidavit of the 27th March 2018.

14. Even though it is the case that the first leg of the test in *Murphy* is fatal to the present application, for completeness I would observe that many unrepresented litigants do not appear to appreciate the nature of the appellate jurisdiction enjoyed by the Court of Appeal. An appeal from the High Court is not a re-hearing. Save in exceptional circumstances the role of the court is limited to providing a review of the decision made by the High Court judge on the basis of the evidence before them. What Mr. McNicholas is asking this court to do is to conduct a de novo hearing of Mr. Kelly's application for summary judgment on different evidence to that which was before Kearns P when he made his decision. That is not permissible where the evidence sought to be introduced on the appeal could, with reasonable diligence, have been put before the High Court judge.

15. I would also observe that unsuccessful parties to litigation, when they come to consider why they lost their case, invariably believe that they would have won their case had it been handled differently. With the benefit of hindsight, they may regret not producing certain documents or calling certain witnesses. However, it is for parties to High Court litigation to make their best case and put forward all of the evidence they consider might advance their position at the first instance hearing because if they fail in their litigation they are not, for the reasons already stated, entitled to introduce new evidence on the appeal.

16. As already stated, there are, in my view, no special circumstances that would warrant granting the relief now sought and for that reason I would refuse Mr. McNicholas's application to introduce new evidence.

17. As to Mr. McNicholas's application to have Mr. Lynskey speak on his behalf at the hearing of the appeal, I am satisfied, on the basis of medical evidence, that I should grant that relief. In so deciding I take into account that Mr. Kelly has not established that he has been in any way prejudiced to date by the fact that Mr. Lynskey has assisted Mr. McNicholas in the defence of the within proceedings.

18. I would also observe that at the time of the hearing of the proceedings in the High Court, Kearns P. permitted Mr. Lynskey to assist Mr. McNicholas, as a McKenzie friend. He did so on the basis that Mr. McNicholas suffers from a myriad of serious medical conditions including Multiple Sclerosis which make it difficult, if not impossible, for him to present his own case. It is true to say that it is indeed unusual that Mr. Lynskey should be acting for Mr. McNicholas as a McKenzie friend having regard to the fact that he is the husband of Ms. Marilyn McNicholas who, as already stated, is the daughter of Mr. McNicholas and acted as his solicitor in the High Court proceedings which he now maintains were managed negligently on his behalf. However, those facts alone do not, in my view, constitute good reason for refusing this part of Mr. McNicholas's application.

19. Not only did Mr. Lynskey assist Mr. McNicholas in advocating on his behalf when these proceedings were before the High Court but he was also given leave by the Supreme Court to represent his father-in-law's interests in the appeal in the proceedings against Mayo County Council. Of significant importance also is the fact that at all stages Mr. Lynskey would appear to have conducted himself in a thoroughly professional and straightforward manner as he has done on every application before this court.

20. In the aforementioned circumstances, but in particular by reason of the fact that it is not contested that Mr. McNicholas's health is such that he is physically incapable of presenting his own appeal, I am satisfied that the justice of the case would require this court make an order permitting Mr. Lynskey to speak on behalf of Mr. McNicholas for the purposes of assisting him in his present appeal.