THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 508 J.R.]

BETWEEN

GORDON SMITH

APPLICANT

AND

RITA CONSIDINE AND KBC BANK IRELAND PLC

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of January, 2017

1. On 1st May, 2014, KBC bank commenced Circuit Court proceedings for possession of the applicant's home. An order for substituted service was made on 5th December, 2014.

2. On 1st May, 2015, the matter came before the county registrar, Ms. Rita Considine, who advised the applicant to enter an appearance and a defence.

3. On 16th November, 2015, the applicant submitted a medical certificate from his GP stating that he was unwell. On foot of that, the matter was adjourned in ease of the applicant.

4. On 29th February, 2016, the applicant's GP issued yet a further medical certificate stating that *"it is my opinion that Mr. Smith will be medically unfit to attend this hearing, or to give instructions, for a period of a further 3 months"*.

5. On 29th April, 2016, in the absence of an appearance or defence having been filed, the county registrar made an order that the bank recover possession of the applicant's family home. The applicant was in attendance and addressed the hearing.

6. The applicant had the remedy of appeal to the Circuit Court but did not invoke that option.

7. Instead he sought leave to apply for judicial review, an application which I directed should proceed on a telescoped basis. While the bank has helpfully assisted the applicant by furnishing the county registrar with papers, and while I deem that she has been duly served, I consider that as a quasi-judicial officer within the court system a county registrar should be dealt with analogously to a judge and is not a proper party to the proceedings. She should be given notice of the proceedings but the appropriate respondent is the other party to the underlying matter, in this case, the bank.

Legality versus merits

8. The rough dividing line between points suitable for judicial review and those suitable for appeal is that between legality and merits, as set out in the Supreme Court decision in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) *per* Clarke J. at paras. 3.8 to 3.15. By way of example, as I pointed out in *Crowley v. A.I.B.* [2016] IEHC 154 at para. 16, any argument that the impugned decision is incorrect on the evidence is one as to merits.

Grounds of challenge

9. Ten grounds are advanced in the statement of grounds.

10. Ground 1 is a generalised lack of fair procedures which lacks appropriate specificity and has not been made out. The applicant claimed in oral submissions that the order could not have been made without his consent but, unfortunately for him, that is not correct.

11. Ground 2 is a failure to take into account the applicant's medical certificate. However a party does not have an indefeasible legal right to an indefinite or repeated adjournment of proceedings because those proceedings are causing him stress, anxiety or depression. The applicant already had the benefit of one adjournment and in the interim he generated documentation and engaged with the proceedings. He also attended at the hearing in April, 2016. The county registrar's order was not outside jurisdiction, particularly where the medical certificate is sparse and general as this one was. The bank also enjoys a right to a hearing without undue delay by virtue of art. 6 of the ECHR. Weighting those rights against those of the applicant was a matter for the county registrar and no basis to disturb her decision to proceed with the matter has been made out.

12. The applicant submitted that he as a citizen was "*mentioned in the Constitution*" but the bank was not. However legal as well as natural persons do enjoy constitutional, EU and ECHR rights in relation to private property and fair procedures, even acknowledging that their rights are not as extensive as those of natural persons, the Constitution being "*a document for the people of Ireland, not an economy*" per Denham J. (as she then was) (dissenting) in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at p. 664 and 666, or as Hardiman J. put it at p. 712, "*the Constitution is not solely or primarily about the economic as opposed to other attributes of the people*".

13. Ground 3 is refusal of permission to file an appearance or defence. However the applicant had already had ample time to do so. The order was not outside jurisdiction on that ground. The applicant has repeatedly said that he wanted to see a judge but the mechanism to see a judge in this context is to put in a defence, which the applicant did not do.

14. Ground 4 alleges a refusal to read and consider the applicant's documents. However these documents are totally misconceived in the sense that they constitute what the applicant has grandiosely termed an "official offer" to make a minor payment in satisfaction of the debt due. There was no error in failing to consider this material. The applicant's contention that this created an estoppel or an amended agreement (relying on *Hirachand Punamchand v. Temple* [1911] 2 K.B. 330) is misconceived because there is no basis for the contention that the bank ever agreed to the applicant's view of the situation. Merely cashing the applicant's cheques could not be treated as acceptance of the applicant's counter-offer by way of conduct or otherwise. In any event this argument classically

goes to the merits of the order rather than its legality and is therefore not a matter for judicial review.

15. Ground 5 is refusal to allow the applicant to respond to the bank's affidavit received the day before the hearing. The affidavit in question is one of Feroda Essack of 21st April, 2016, which only contains one substantive paragraph updating the amount of current arrears. By the nature of things current arrears change and develop from time to time due to ongoing interest, and therefore such an affidavit has to be prepared shortly before any particular hearing. One would be into an infinite cycle of adjournment upon adjournment if provision of an update of interest to the date of a particular adjourned hearing were to trigger a right to a further adjournment, warranting a further update and so on. No unfairness, in not allowing the applicant to reply to this affidavit, is discernible especially having regard to the lack of any stateable ground having been put forward for the proposition that the applicant could legitimately dispute its contents. Any dispute as to those contents is in any event a matter going to merits.

16. Ground 6 is refusal to protect property rights. That goes to the merits not legality.

17. Ground 7 is a generalised plea of non-compliance with the Constitution. Again that lacks sufficient particularity to be a possible basis for relief. The applicant has relied on his rights under Article 40.5 of the Constitution and has referred to academic analysis of that provision going back to Professor J.M. Kelly's *Fundamental Rights in the Irish Law and Constitution* (2nd ed.) (Dublin, 1967). If one were to construe the plea in the most favourable sense to the applicant, who has placed reliance on Article 40.5 in submissions, that provision requires "*notice, foreseeability and independent determination of the objective necessity for yielding up possession*" of one's dwelling, *per* Hogan J. in *Irish Life & Permanent Plc. v. Duff* [2013] 4 I.R. 96 at para. 44 (followed by McDermott J. in *Fagan v. ACC Loan Management Ltd* [2016] IEHC 233 (Unreported, High Court, 10th May, 2016)). But those procedures have been afforded here. There is no constitutional challenge to the provisions (s. 34 of the Courts and Court Officers Act 1995 and para. 1(xxxiv) of the Second Schedule to that Act as inserted by s. 22 of the Courts and Court Officers Act 2002) whereby power to make an order in the absence of a defence has been assigned to a county registrar.

18. Grounds 8 and 10 rely on a direct plea of breach of international instruments which are not part of Irish law.

19. Ground 9 relies on art. 6 of the ECHR which is only incorporated in the law through the European Convention on Human Rights Act 2003 which is not pleaded, and not directly. In any event the ECHR claim is again only a generalised allegation of an unfair trial which has not been made out.

20. If I am wrong in any of the foregoing, an appeal (which lies under s. 34(2) of the 1995 Act) would have been the appropriate remedy because the thrust of the complaint goes to merits: see e.g., *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 I.R. 669; *Sweeney v. District Judge Fahy* [2014] IESC 50 (Unreported, Supreme Court (Clarke J.), 31st July, 2014). The objections relating to the legality of the process are generalised and misconceived. The applicant says that to appeal would have been to "*accept the ruling of the registrar*" (para. 4 of supplemental affidavit filed on 28th November, 2016) but that is not the case insofar as the merits of that decision are concerned.

Order

21. I commend the applicant for the effort he took with his submissions and of course I sympathise with him on the loss of his home. However for the reasons set out above I will order:

(i) that the first named respondent be struck out lest the matter go further; and

(ii) that substantive relief be refused.