THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 85

Record Number: 2016/543

Whelan J.
Baker J.
Costello J.

BETWEEN/

CHRISTIAN MORRIS

PLAINTIFF/APPELLANT

- AND -

MARINE HOTEL (SUTTON) LIMITED, GRAND HOTEL MALAHIDE LIMITED, ALOYSIUS RYAN, MATTHEW RYAN JUNIOR, IRENE WYSE AND PAULA MCCORRY

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered on the 22nd day of March 2019 by Ms. Justice Máire Whelan

1. This is an appeal against the judgment and orders of Mr. Justice Gilligan made in the High Court on the 27th October, 2016 wherein he ordered that the within action and proceedings be struck out pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the bases that the claims failed to disclose a reasonable cause of action and that they were frivolous and vexatious. The court made a further order, in the alternative, that the action be struck out pursuant to the inherent jurisdiction of the court on the basis that the appellant's claim was entirely devoid of merit and had no reasonable chance of success, being frivolous or vexatious and an abuse of process and based on serious allegations without any or any adequate foundation.

Litigation history

2. On the 7th September, 2015 the appellant instituted the within proceedings before the High Court. The statement of claim was subsequently delivered on the 19th October, 2015. In essence two key reliefs were sought: -

> (a) an order prohibiting the respondents from taking steps to enforce three instalment orders made against the appellant in 2009 in the District Court; and
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> (b) an order directing the respondents to repay to the appellant sums paid by him from time to time on foot of each of the three said instalment orders and in compliance with same.

The instalment orders

3. To understand the ambit of the proposition being advanced in the statement of claim, it is necessary to consider the instalment orders in question. In late 2007 the appellant was an objector to the annual licensing renewal applications made on behalf of the first and second named respondents in relation to the Marine Hotel, Sutton and the Grand Hotel, Malahide in Dublin. His objections were unsuccessful. At the District Court level costs were measured and ordered against him. The appellant appealed the decision of the District Court unsuccessfully resulting in further costs orders being made against him. Ultimately, two orders for costs were made against him in the Circuit Court in 2008 and were duly taxed by the County Registrar. The first and second named respondents took steps to enforce the said costs orders against the appellant resulting in the following orders being made, all of which are extant: -

> (i) On the 12th June, 2009, the first instalment order was made in the sum of €4,848.01 plus costs of €212.78, repayable by 48 monthly instalments of €100 each plus €48.01 as a final instalment to the first named respondent.
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> (ii) The second instalment order is dated 23rd October, 2009 and provides for the payment of €5,600.64 plus €245.29 by 93 monthly instalments of €60.00 each together with one final instalment of €20.64 to the second named respondent.
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> (iii) The third instalment order was also made on the 23rd October, 2009 and provides for the repayment by the appellant of €11,293.85 plus €283.38 by 188 monthly instalments of €60.00 each and one final instalment of €13.85 to the first named respondent.

4. Subsequently, on the 30th October, 2012 the appellant obtained variation orders in the District Court in respect of the said instalment orders, such that, with effect from the 30th October, 2012 his repayment obligations on foot of the three instalment orders was in total €75.00 per month. Up until the 26th June, 2014 the appellant was in substantial compliance with the instalment orders as varied.

5. By letter, 25th July, 2014 the appellant, who had fully engaged with the taxation process in regard to the Circuit Court orders for costs, and by then had been substantially complying with the instalment orders for over 4 years, purported to introduce new conditions as follows: -

> "… before I make any further payment I require from yourselves: -
>
> (1) full statement of all payments made by me to yourselves to date;
> (2) full, itemised and exhaustive inventory of all costs awarded against me."

6. On the 4th September, 2014, Orpen Franks, solicitors for the first and second named respondents, responded outlining the history of the orders, including the instalment orders that were extant, indicating that as of the 25th July, 2014 the balance due and owing by the appellant was €14,903.95. For convenience, a list of the payments made to date and detailing the amounts of same was annexed to the letter. It noted that the respondents were entitled to issue a summons "which may lead to you being arrested or

imprisoned for a period of up to three months." On the 7th September, 2015 the appellant issued the plenary summons.

7. The appellant is self-represented. His statement of claim is dated the 19th October, 2015. It purports to invite some or all of the respondents "to treat of a resolution to and/or settlement of the proceedings herein". It references the letter of demand from the respondents' solicitor dated 1st September, 2015 which pertains to the accrued arrears then outstanding on foot of the instalment orders as varied on the 30th October, 2012. It pleads that the said demands are unreasonable, excessive, punitive and effectively a criminal sanction.

8. The statement of claim further pleads that the demands to comply with the extant instalment orders, as varied, are inequitable, odious, unwarranted, worthy of judicial review and possibly fraudulent. It pleads that any claims by the respondents for any payment should be disqualified because of laches or gross laches on the part of the respondents. It pleads that the appellant was of the opinion that any monies paid by him should be returned to him forthwith with additional payment of interest. In essence, the appellant seeks a permanent prohibition on the continued enforcement of the instalment orders "…in relation to any outstanding debt which the Plaintiff owes, might owe or which the Defendants perceive the Plaintiff to owe them".

9. The formal letter of the 1st September, 2015 from the respondents' solicitors, which appears to have triggered the issuing of the plenary summons on the 7th September, 2015, stemmed from the fact that after the 26th June, 2014 the appellant had failed to make any of the payments due on foot of the operative instalment orders. The appellant's response on the 2nd September, 2015 by letter stated: -

> "I deny your unfounded, false and misleading claim that I have 'failed and refused' to comply with Orders of the Court."

The letter continues: -

> "Your client has inordinately delayed with serving any kind of notice of enforcement upon me, and I do not accept that the aforesaid letter of yesterday is adequate notice of same."

The letter raises a specific query regarding a counsel who had represented the respondents in the District Court and at Circuit Court level in regard to the objections to the renewal of the respondents' licences. He called upon the respondents "to state the precise date of when the barrister, who you cite as 'senior counsel' actually took silk."

10. The appellant issued a notice of motion for judgment in default of defence on the 11th December, 2015. The respondents countered on the 22nd December, 2015, issuing a notice of motion for orders pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plenary summons and the statement of claim, and further, an order pursuant to the inherent jurisdiction of the High Court dismissing the appellant's action on the grounds that same had no prospect of success and constituted an abuse of process. The motion to strike out the proceedings was heard by Mr. Justice Gilligan in the High Court on the 27th October, 2016.

11. Central to consideration at the hearing of the motion was whether the instalment orders held by the respondents were valid and binding or were being disputed by the appellant. Mr. Buttanshaw, counsel for the hotels, indicated to the court that the orders were valid, and that their validity was not in dispute. Mr. Morris confirmed the position, stating, "No, that's not contested" (p. 4, line 10 of the transcript). At page 5, line 34 of the transcript, the appellant confirmed that he was not contesting that there were orders of the court in place, but stated "I wanted to just see everything I was paying for. … and they wrote back to me and they said no. And I wrote back to them and I said 'well, until I know exactly what I am paying for, I am not paying'…" The appellant confirmed to the High Court that he had been present in court when the various orders were made, including the instalment orders.

12. It transpired at the hearing of the motion that a key complaint was whether a fee of €2,500 plus VAT, which formed part of the bill of costs was payable by the appellant in circumstances where the said counsel had been a junior counsel at the date of the hearings when representing the hotels at the District Court and Circuit Court. The appellant offered no evidence as to whether the bill, which had been discharged by the hotels, was in any manner excessive or unreasonable. He appeared to accept that counsel had appeared at both the District Court and Circuit Court. Apart from the characterisation of the counsel as a senior counsel, the appellant offered no evidence as to how the description of counsel came to have the words "SC" annexed, save that it was understood by the time the costs were taxed that the counsel in question had in fact become a senior counsel. The appellant contended at the hearing of the motion to strike out his proceedings that the respondents ought to have delivered a defence rather than seeking to rely on O. 19, r. 28 or the inherent jurisdiction of the High Court at a point prior to the delivery of a defence. The trial judge determined that respondents were perfectly entitled to bring the application prior to the delivery of a defence (p. 16, line 28 of the transcript).

13. The appellant further asserted that the fact that he had brought a motion for judgment in default of a defence at a date prior to the issuing of a motion to strike out pursuant to O. 19, r. 28 entitled him to insist that a defence be delivered prior to the respondents' motion being considered by the court. The court noted that in each case the costs in question were either measured by the court or taxed by the County Registrar, and that the appellant had fully engaged with the process. The appellant confirmed that no other counsel had acted. The judge considered that the characterisation of the barrister as a "senior counsel" in the bill of costs was immaterial, stating: -

> "But it's simplistic that she charged a fee and either on taxation or as certified by the court the view was taken that the fee was reasonable."

The court noted that she may have been a senior counsel at the point when the fee note was submitted, but that it appears she was a junior counsel when she represented the hotel companies in the High Court and Circuit Court hearings. The court concluded:-

> "there is no evidence before me that she charged a fee as a senior counsel."

The court noted that the appellant had had every opportunity at the time to contest the amount of the fee charged by counsel and had not done so. The court reviewed the bill of costs which recorded the nature and extent of the works done and services rendered. The trial judge concluded that he could take judicial knowledge of the fact that: -

> "the fee looks relatively modest for an appearance of the nature of what was involved."

14. The judge reviewed the litigation and considered the plenary summons and statement of claim in some detail, noting the contents of the letter from the respondents' solicitors of the 1st September, 2015 and the appellant's strong view that any payments should be

disqualified because of gross laches on the part of the respondents.

15. The court noted that no defence had been delivered by the respondents prior to issuing the motion to strike out the proceedings.

16. The court noted that as of early September 2015, a sum of €1,155 was due and owing by way of arrears of unpaid instalments which had accrued from the 26th June, 2014. The court noted that, by letter of the 1st September, 2015, the appellant was put on notice that steps would be taken by means of the issuance of a summons for failure to comply with an instalment order.

17. The court characterised the litigation as being directed to achieve an outcome whereby the various instalment orders would be reduced, in effect, to nil, and that all monies which he had paid on foot of the three instalment orders would be repaid to him. He concluded:-

> "I don't see that it's any function of this court to interfere with orders that have been made. It doesn't appear that the orders themselves are actually being challenged. They are legitimate orders of the District Court both in the first instance and in the second instance when the amounts were settled by way of the instalment orders and in the third instance where the amounts were formalised and reduced in ease of Mr. Morris' position."

The court concluded that the claims in the plenary summons and statement of claim were frivolous and vexatious and further pursuant to the inherent jurisdiction of the court he was satisfied that the appellant had no prospect, as a matter of law, of succeeding in his claim, and accordingly made an order dismissing the proceedings and bringing them to an end.

Notice of Appeal

18. The notice of appeal essentially identifies two grounds. First, that the respondents' motion to strike out should not have been entertained by the High Court until after their defence had been delivered and arguably until after the pleadings were closed. Second, that delays on the part of the respondents in delivering a defence precluded them from moving the application to dismiss.

The Law

19. As is clear from the landmark judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 306 a jurisdiction to strike out proceedings exists both under O. 19, r. 28 and under the inherent jurisdiction of the court. Costello J.'s exposition on the parameters of the inherent jurisdiction has been followed ever since;

> "This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."

20. A distinction exists between the jurisdiction which arises under the inherent jurisdiction of the court and that which arises pursuant to O. 19, r. 28.

21. Where the latter provision in the Rules is invoked, the court is obliged to accept the facts as asserted in the appellant's claim, since if the facts so asserted and pleaded are such that they would, if established to be true, give rise to a cause of action then the proceedings disclose a potentially valid claim. The analysis of the facts tends to be more cursory where the inherent jurisdiction of the court is invoked. As was noted by Clarke J. (as he then was) in *Salthill Properties Limited & Anor. v. Royal Bank of Scotland Plc & Ors.* [2009] I.E.H.C. 207 at para. 3.12:-

> "The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim."

The court emphasised that the extent to which it is appropriate for a court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited.

22. The relationship between these two alternative bases for striking out proceedings was considered in the judgment of Clarke J., as he then was, in *Lopes v. Minister for Justice* [2014] 2 I.R. 301. As observed by him, the inherent jurisdiction of the court should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law, since otherwise procedural law risks being debased or undermined. The distinction between the two categories of application is adumbrated at para. 17 of the judgment: -

> "An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v. Buckley [1981] I.R. 306, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked."

23. *In Fay v. Tegral Pipes Ltd* [2005] 2 I.R. 261, at 266, McCracken J. explained that the true purpose of this jurisdiction is to prevent an abuse of the process of the courts:-

> "Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying

process of being asked to defend a claim which cannot succeed."

24. As stated above, the respondent's motion to strike out the proceedings is based on (i) O. 19, r. 28 of the RSC and (ii) the inherent jurisdiction of the Court. Counsel for the respondent correctly pointed out that the court's inherent jurisdiction to restrain abuses of process by dismissing proceedings had been identified and exercised in *Barry v. Buckley* [1981] 1 I.R. 306 and the said judgment has been cited as the foundation stone of practically every subsequent application to dismiss. It is apparent from the law report that in that case the motion to dismiss was issued prior even to the defendant entering an appearance.

25. In the textbook *Delany & McGrath on Civil Procedure* (4th ed.) the authors state at para. 16-16: -

> "This inherent jurisdiction is one which has been stated to be 'at least in principle capable of being exercised in virtually any type of case'. … Given that an order striking out proceedings will only be made in very clear cases where there is no dispute as to the relevant facts, in practice, an application will only succeed where there are very few issues of fact or where the relevant facts are not reasonably disputable as in certain cases regarding the conclusion of contracts or the interpretation of contractual documents. So, while the court can engage with the facts of the case, there are 'significant limitations' on the extent to which this is appropriate."

26. The jurisdiction to strike out proceedings must be exercised sparingly, with great caution, and only in the clearest of cases. This is so irrespective of whether of an order to strike out is sought pursuant to the inherent jurisdiction of the court or pursuant to the procedures under O. 19, r. 28. An application by way of motion pursuant to O. 19, r. 28 is decided on the assumption that the statements in the statement of claim are true and will be proved at the trial. Such a motion relates to and is grounded upon the statement of claim as delivered by the plaintiff.

Application of principles

27. In the instant case the following facts are germane: -

> (a) The appellant had conceded the validity of the relevant court orders as to costs, both at the District Court and Circuit Court level.
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> (b) He did not seek to vary/challenge/appeal the order/s of the County Registrar which taxed the costs in question.
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> (c) The appellant engaged fully with the taxation process.
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> (d) He further acknowledges the validity of the orders in respect of the taxation of costs.
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> (e) He engaged fully with the making of the 3 instalment orders in 2009.
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> (f) He invoked the jurisdiction of the District Court on the 30th October, 2012 to effect a variation on the three separate instalment orders.
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> (g) He did not appeal the variation orders.
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> (h) The appellant seeks to rely on the bare assertion that the description of "SC" ascribed to counsel in the bill of costs when in fact counsel was a junior counsel at the dates of hearing of the District Court and Circuit Court applications entitled him to repudiate his liability in respect of the entirety of the unpaid costs. There is no suggestion that the fees were unreasonable for the work done in both courts by the counsel in question. The appellant accepts that counsel did provide the services in question and acted for the respondents both at the District Court licencing hearing and in the appeal. The trial judge concluded that the fees were reasonable. I concur with that view.
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> (i) It is specious to suggest that the misdescription of counsel could annul the appellant's clear liability to discharge the costs.

28. The appellant's contention that the delay in time between the last instalment payment made by him on or about the 26th June, 2014 and the service on him of a formal letter on the 1st September, 2015 indicating that the judgment creditor intended to take further steps to enforce the instalment orders amounts to delay or laches is a further redundant proposition.

29. There is a separate contention with regard to delay to the effect that the respondents delayed in bringing their motion between the delivery of the statement of claim on or about 19th October, 2015 to the 22nd December, 2015 when the notice of motion to strike out issued. I am satisfied that this lapse of time is not material and does not constitute a delay in the circumstances of this case.

30. The question is whether the facts as pleaded in the statement of claim delivered are capable of discharging the onus of proof. Taking the plaintiff's case at its highest does not involve disregarding either that onus or the necessary elements for such an action as pleaded to succeed. I am accordingly satisfied that the statement of claim – even taking the plaintiff's case at its height – discloses no reasonable cause of action.

31. As such, accordingly, the pleadings are "frivolous and vexatious" since they are doomed not to succeed.

32. Looking beyond the statement of claim, having regard to the inherent jurisdiction of the court and the alternative basis successfully invoked by the respondents, I have regard to the concessions and acknowledgements fairly made by the appellant in the High Court and in the course of the hearing of the appeal in this court. I also have regard to the affidavit sworn by the appellant opposing this application. It is demonstrable that in substance the entire proceedings have been brought by the appellant for the purposes of operating a collateral attack on the certificates of taxation of the County Registrar which were adjudicated upon and determined upon notice to the appellant and where all reasonable opportunities had been afforded him to be heard. Further, it

constitutes a collateral attack on the three instalment orders made by the District Court and which continue in full force and effect.

33. I am further satisfied that the grounds of appeal are not well founded for the following additional reasons: -

(i) The appellant has failed to identify any authority for the proposition that it is a necessary prerequisite to jurisdiction that a defendant has delivered a defence before they can apply to court to have a plaintiff's claim dismissed by reason that it discloses no reasonable cause of action, and/or that such proceedings are frivolous and vexatious, or has no prospect of success.

(ii) The power of the court to dismiss a plaintiff's claim whether pursuant to its own inherent jurisdiction or pursuant to the Rules of the Superior Courts is long established.

(iii) The court has an inherent power to prevent the misuse of its procedures which would be unfair to a party to litigation or which would bring the administration of justice into disrepute.

(iv) The lapse of a period of nine weeks between the delivery of the statement of claim on or about the 19th October, 2015 and the issuing by the respondents of a notice of motion on the 22nd December, 2015 does not amount to an inordinate delay or such as would in and of itself warrant refusal to grant orders striking out the proceedings pursuant to O. 19, r. 28 of the Rules of the Superior Courts or, in the alternative, pursuant to the inherent jurisdiction of the court.

(v) The appellant's proceedings constitute an impermissible collateral attack on the three instalment orders made by the District Court and thereafter varied by orders of the District Court made on the 30th October, 2012.

Conclusion

34. The determination and orders of the High Court is correct and ought not to be interfered with. The proceedings disclose no reasonable cause of action. I would dismiss this appeal.