

THE HIGH COURT

Judicial Review

Record Number: 2011 No. 548 JR

Between:

Walter Evans

Applicant

And

Judge Sean Ó DonnabhÁin

Respondent

THE HIGH COURT

Judicial Review

Record Number: 2011 No. 549 JR

Between:

Eugene O'Sullivan

Applicant

And

Judge Sean Ó DonnabhÁin

Respondent

Judgment of Mr Justice Michael Peart delivered on the 30th day of March 2012:

1. Each applicant is a director of a limited liability company, Skylink and Company Limited (Skylink). In an earlier application for leave to seek reliefs by way of Judicial Review (Record Number: 2011 No. 417JR) Skylink was named as the applicant, but as no solicitor was acting for the company, Mr Evans seems to have been substituted as applicant, as the company cannot be represented in Court by one of its directors. It is unnecessary to refer in particular to those proceedings, as all matters in controversy are contained in the Statement of Grounds and grounding affidavits filed in the present two proceedings. There is a complicated background to the present applications which seek declarations that no valid orders were made in Cork Circuit Court on the 17th October 2005, 13th August 2007 and 15th August 2007 by the respondent judge after he had heard evidence in ejectment proceedings brought by Coillte Teoranta against Skylink, and also when he had heard evidence in other proceedings brought by Coillte Teoranta against Mr Evans and Mr O'Sullivan personally.

2. Whether or not an order was made on the 6th October 2005 in the ejectment proceedings, or whether the respondent's determination of matters on that date was not made the subject of any order until the 17th October 2005 is also something which has given rise to difficulty and controversy since that date.

General Background:

3. Skylink took a 25 year lease of certain lands from Coillte by lease dated 12th May 1993 at an annual rent reviewable every five years. Thereafter, Skylink granted a 20 year sub-lease of part of the lands to Radio County Sound on the 7th August 1990, and a further 10 year sub-lease to Esat Digifone on the 1st September 1998. It appears that in 1997 certain unauthorised works were being carried on in relation to the lands sub-leased to Radio County Sound. Apparently Esat were trespassing on those lands. These difficulties were discussed and overcome. However, Esat having obtained certain planning permission for the erection of a mast, failed to comply with the conditions of that permission, and also breached the terms of its sub-lease. It appears that Skylink informed Coillte of the unlawful activity of Esat, but according to Mr Evans, Coillte failed to deal with the matter adequately or at all. It appears that Esat had erected a mast in an incorrect location, and this had a damaging effect on the broadcasting ability of Skylink and caused damage to its business. Difficulties continued, and Skylink instructed a solicitor to have Esat removed from the site. Mr Evans states that his solicitor let him down in this regard. Another solicitor was engaged, but again with no success. Because of its ongoing difficulties with Coillte in relation to Esat, Skylink decided to withhold rent payable to Coillte under its lease, because of (as Skylink saw it) the breach of their covenant for quiet enjoyment of the lands and trespass thereon by third parties with the acquiescence of Coillte. However, Skylink informed Coillte that it was willing to bring the rent up to date if and when Coillte would cease to support the unlawful activities of Esat. I have provided only a brief summary of the background to the proceedings brought by Coillte against Skylink for ejectment for non-payment of rent ("the ejectment proceedings"), which is the genesis of all the difficulties about which these applicants now complain, and for which they seek at this very late stage leave to seek reliefs by way of judicial review.

4. The differences between Coillte and Skylink had led to the issue by Coillte of an Equity Civil Bill against Mr O'Sullivan and Mr Evans on the 22nd August 2003(Record Number: 239/2003) ("the equity proceedings") in which it appears to have sought certain reliefs regarding rights of way and ownership of land. I have not seen that Equity Civil Bill and therefore cannot recite in detail the reliefs sought, but they are not really relevant for the purposes of what I have to decide in these proceedings. Those proceedings were first

listed for hearing before the respondent judge on the 6th July 2005. However, having heard some of the evidence he decided that he should adjourn the balance of the hearing until after he had heard the ejectment proceedings which had issued on the 4th June 2005 and were listed for hearing on the 6th October 2005.

The Ejectment proceedings:

5. Coillte issued an Ejectment Civil Bill (Record No. P43/2005) on the 4th June 2005 having served a Notice of Termination on the 10th May 2004. On the 28th July 2005 Skylink filed its Defence and Counterclaim. These ejectment proceedings came on for hearing on the 6th October 2005. Having heard the possession should be made, that relief against forfeiture should be refused (even though the defendant had indicated to the judge that it was in a position to discharge all arrears of rent), and that mesne rates in the sum of €16,600 should be paid by the defendant. However, according to the defendants the learned judge indicated that he would not draw up any order in that regard until after the equity proceedings had been heard and so that submissions could be made to him as to how the ejectment order he was minded to make would impact on the equity proceedings. Both matters were listed for the 17th October 2005.

6. There is some dispute as to whether an order was in fact made in the ejectment proceedings on the 6th October 2005, rather than on the 17th October 2005. There seems no doubt that the respondent did not want to make a final ejectment order on the 6th October 2005 and wanted to delay the final order until the outcome of the equity proceedings. But he appears to have granted a stay on the ejectment order until the 17th October 2005, and that would not be necessary unless he had actually made an order on the 6th October 2005. That particular point had some relevance thereafter because it affected the date by which a Notice of Appeal ought to have been filed and served against the order. I will come back to that.

7. On the 17th October 2005, the equity proceedings were heard by the respondent in which certain orders were made declaring that Mr Evans had no right of way over certain of the lands in question, and also that Coillte did not have ownership by virtue of adverse possession in respect of certain lands in the ownership of Mr O'Sullivan, but had a right of way over those lands.

8. It appears that following the making of those orders in the equity proceedings, the respondent then lifted the stay on the order in the ejectment proceedings, and refused any further stay pending an anticipated appeal by Skylink against the order for possession.

9. Order in both the ejectment proceedings and the equity proceedings were prepared and made available.

Notice of Appeal:

The Ejectment proceedings- Coillte v. Skylink & Company Limited:

10. On the 25th October 2005 Skylink issued a Notice of Motion in the High Court wherein it sought to appeal against the refusal on the 17th October 2005 of the grant of a stay on the order for possession. There is no evidence that Skylink had in fact filed or even served a Notice of Appeal against the Order for Possession itself, although the applicants state that at all times they had intended to appeal against the order for possession. That Notice of Motion came before Mr Justice Budd on the 28th November 2005 and on that date the application was adjourned to the 12th December 2005 and the learned judge granted a stay on the order for possession until that date only. On the 12th December 2005 the application by way of appeal against the refusal of a stay came before Mr Justice DeValera when he vacated the stay granted by Mr Justice Budd up to that date, but he went on to make an order refusing an extension of time to appeal. Skylink make the point that in fact there was no application for such an extension of time to appeal the order for possession before the Court on that date.

11. To address that situation Skyline appear to have made an application to the Master of the High Court who granted an extension of time for the filing and service of such a Notice of Appeal up to the 29th April 2006. However, Coillte appealed that order, and that appeal came before Mr Justice DeValera on the 11th July 2006, and he allowed the appeal and vacated the order which had been made by the Master of the High Court.

The Equity proceedings- Coillte v. O'Sullivan and Evans:

12. Following the making of the respondent's order in the equity proceedings on the 17th October 2005, the applicants' solicitor served a Notice of Appeal on the 24th October 2005 (within time) and while the Notice of Appeal was filed in the High Court as well, it was not, as it ought to have under the Rules, file the Notice of Appeal in the Cork Circuit Court. Hence the appeal was not validly filed and served within the prescribed time. This led to an application for an extension of time to file and serve the Notice of Appeal which came before Mr Justice Johnson on the 15th May 2006. He granted an extension of time for fourteen days. From the papers with which I have been furnished it does not appear that this opportunity was availed of.

13. It will be seen therefore that by the middle of July 2006 no Notice of Appeal was filed in either the ejectment proceedings or the equity proceedings.

14. On the 30th July 2007 an application to commit Mr Evans was brought against Mr Evans because he had erected a fence which was a breach of the order made in the equity proceedings. This led to the imprisonment of Mr Evans on the 13th August 2007. He purged his contempt and was released on the 15th August 2007 having given certain undertakings to the Court.

15. I should refer to a couple of other matters which are not particularly relevant but they are part of the narrative. It appears that after the ejectment order issued it bore the date 17th October 2005, whereas Coillte contended in correspondence with the County Registrar that the order itself was made on the 6th October 2005, albeit that the respondent granted a stay on it until the 17th October 2005. The County Registrar recalled the order dated 6th October 2005 and she replaced it with an order bearing the date 17th October 2005. At this stage nothing much turns on that occurrence. The other matter I should refer to is that the applicants herein encountered difficulties with their solicitor. Another solicitor was instructed, and they ran into difficulties there as well. But one way or another the situation is that no appeals were properly filed and served, despite an apparent intention following the 17th October 2005 that appeals be lodged against both orders made.

16. On the 11th May 2010 applications by Skylink and the applicants came before Mr Justice Feeney. In those applications Skyline sought a reinstatement and hearing of an appeal in the ejectment proceedings against the order which they say was made on the 17th October 2005 but which was recalled and re-dated 6th October 2005. The applicants for their part sought a reinstatement and hearing of an appeal in the equity proceedings. Having heard those applications, Feeney J. refused same, including any extension of time within which to lodge appeals.

17. Nevertheless, the applicants now seek leave to pursue reliefs by way of judicial review in respect of the two orders made by the respondent on the 6th October 2005 and 17th October 2005. They complain about how these matters were heard. They state also that on the 17th October 2005 there was for some reason no Court Registrar in Court during the hearing. They make complaint about

how the respondent conducted the hearing and submit that in all the circumstances which they have outlined an injustice was done to them. I do not propose to set out their complaints in any detail, as the present application must be refused simply on the basis that whatever the complicated sequence of events whereby appeals were not lodged and applications for extensions of time to do so were refused, the time within which challenges by way of judicial review may be commenced under Order 84 RSC has long since passed, and in my view there are no sufficient grounds upon which this Court could be satisfied that an extension of time should be granted now some six years and more since the orders were made. Any difficulties which were encountered with their solicitors are not such as to explain why judicial review applications were not considered or launched at any earlier date. I appreciate that the applicants intended in October 2005 to appeal the orders made, but there is no evidence that any consideration was given to challenging the orders by way of judicial review.

18. I must therefore refuse to grant leave as sought on this application, and I will so order.