THE COURT OF APPEAL

Record Number: 2023/318
High Court Record Number: 2020/6478P
Neutral Citation Number [2024] IECA 73

Noonan J.

Binchy J.

Butler J.

BETWEEN/

PROMONTORIA (FINN) LIMITED AND DAMIEN HARPER

PLAINTIFFS/RESPONDENTS

-AND-

NEIL ARMSTRONG

DEFENDANT/APPELLANT

-AND-

LINDA ARMSTRONG

DEFENDANT

JUDGMENT (*ex tempore*) of Mr. Justice Noonan delivered on the 9th day of April 2024

1. The application before the Court today is one brought by the putative appellant, Mr. Armstrong, for an extension of time within which to appeal the judgment and order of the High Court (Roberts J.) made herein on 20th October 2023. The second defendant, Mrs. Armstrong, is not a party to this application.

2. A brief summary of the background to these proceedings will suffice for the purposes of this motion. The first respondent is the owner of a registered charge over the defendant's property in County Kildare which comprises a dwelling house. This was at one time the family home of the defendants. The respondents maintain that it is no longer such family home and neither appellant resides there. On the contrary, the respondents allege that the defendants reside elsewhere and have rented the property for some time. The first defendant disputes this and states that since the breakup of his marriage to the second defendant, he has resided at the property.

3. The charge arose out of a loan advanced to the defendants in 2008 which subsequently fell into arrears and was transferred to the first respondent, who appointed the second respondent as receiver over the property in 2016. The receiver's agents attended at the property some time thereafter when they say they met tenants therein who indicated that they were vacating the property. The receiver's agents thereafter obtained possession of the property and changed the locks. However they say that while present at the property, the appellant attended there and was threatening and abusive towards them so that they had to withdraw. Subsequently, the appellant retook possession by breaking into the property and again changing the locks.

4. Arising from this, the within proceedings were issued in 2020 seeking orders, *inter alia,* directing the defendants to deliver up possession of the property to the receiver and an

injunction restraining them from interfering with his possession or impeding his endeavours to dispose of the property.

5. Following the institution of these proceedings, and the issuing of a motion seeking interlocutory relief, the respondents say that the defendants evaded service so that it was necessary to obtain an order for substituted service from the High Court which was granted on 8th March 2021. Thereafter the proceedings were served in accordance with that order and ultimately came on for hearing before Roberts J. on 29th November 2022. On that date, as recorded in the High Court judgment under appeal herein, the defendants did not appear and the court was satisfied from the evidence that the defendants were properly served in accordance with the terms of the previous order for substituted service.

6. It would appear that all documents which had been served on the defendants by ordinary post, as directed by the order, were returned by them unopened. Following the hearing, the court gave judgment on 20th December 2022 in favour of the respondents. The effect of the judgment was to grant an order for possession to the respondents but with a stay on execution of the order for a period of six months. At the same time, the judge directed that her judgment and order be served on the defendants and they be notified that the matter would be again for mention before the court on 24th January 2023. On the latter date, the court again being satisfied with service, there was no appearance by the defendants.

7. Shortly before the stay was due to expire on 20th June 2023, the defendants issued a motion on 30th May 2023 seeking to set aside the judgment of 20th December 2022. The delay in issuing this motion appears to be unexplained and the respondents suggest that it was calculated to coincide with the expiry of the stay and procure thereby a further delay in execution.

8. By their motion, the defendants sought to set aside the judgment on a number of grounds, but of relevance to today's application, on the basis that Roberts J. ought to have recused herself from hearing the application on the grounds of objective bias. The bias alleged is that the Judge had previously been a partner in, and chair of, A&L Goodbody Solicitors who had allegedly represented the first respondent, not in this litigation, but in a previous matter concerning the transfer of certain loans and securities to the first respondent.

9. The motion came on for hearing before Roberts J. on 20th October 2023 when, having heard the matter, she delivered an *ex tempore* judgment on the same day. In the course of dealing with the various issues raised by the defendants, the Judge said with regard to the allegation of objective bias the following:-

> *"Mr Armstrong has raised an issue of objective bias, seeking to impugn the interlocutory order that I made. Having heard his concerns, they relate to the fact that I was chair of A&L Goodbody and that another partner in my firm lists the plaintiff group as a corporate client. I am fully satisfied in this case that my former firm, which has over one hundred partners, had no involvement whatsoever with this case at any time. Other firms I have no connection with had acted in this matter at all stages. Also, to be clear on the matter, at no time have I personally acted for the plaintiffs or either of them. I do not believe the concerns raised by Mr. Armstrong raise an issue of objective bias that would have required me to recuse myself from hearing the interlocutory hearing, or otherwise offend the Bangalore Principles. I therefore refuse the relief sought at paragraph 1 of the notice of motion."*

10. The Judge's order was perfected on the same day, 20th October 2023, so that from that date, time began to run for the bringing of any appeal to this Court. The time for such appeal is 28 days so that in the present case, the last date for filing of a Notice of Appeal was 16th

November 2023. The within motion seeking an extension of time within which to appeal was issued on 18th December 2023, over a month later.

The evidence on this application

11. The motion is grounded on the affidavit of the appellant, which is very brief, and accordingly I propose to quote the two relevant paragraphs:-

> *"3. I say it is necessary to make this application for an extension of time within which to issue and serve a notice of appeal in circumstances wherein due to ill health and financial constraints since the making of the Order by Her Honour Judge Roberts on 20th October 2023 I was unable to file and issue the notice of ordinary appeal.*
>
> *4. I say I had the intention to appeal and requested my appointed third party mediator Mr. Paul Scannell write to the respondents' solicitors on or about the 9th day of November 2023 setting out my intentions to appeal Judge Robert's refusal of the reliefs sought in my motion, in that respect I beg to refer to a copy of the correspondence annexed hereto, no reply was received."*

12. Despite a replying affidavit sworn by the solicitor for the respondents challenging the fact that no explanation of the alleged ill health or financial constraints is given by the appellant, no further affidavit was sworn in response by the appellant. It is also relevant to set out the terms of the letter relied on by the appellant in his affidavit from Mr. Scannell. Mr. Scannell has notably not sworn an affidavit. The letter is addressed to the respondents' solicitor and is in the following terms:-

> *"9th November 2023*

By Post.

Re: Intention to appeal of Neil Armstrong.

Raphoe A Chara,

I refer to the hearing of Neil's application and refusal of same on the 20th October 2023 in front of Judge Roberts.

Neil has been unwell and had intended to appeal the refusal of his motion but it is unlikely he can do so within the 28 days as required by the Rules of Court so may at a later stage if matters can't be resolved submit an application to extend the time to appeal.

Neil may wish to use this correspondence in support of that application.

Is mise le meas
Paul Scannell"

Legal principles

13. The law in this regard is by now so well settled that no detailed exposition is called for. The *locus classicus* remains *Eire Continental v. Clonmel Foods Limited* [1955] 1 IR 170 as considered in a plethora of subsequent decisions, most notably *Seniors Money Management v. Gately* [2020] IESC 3. In general, for a court to extend the time for bringing an appeal in the appellant's favour, the appellant should satisfy the *Eire Continental* criteria which are:

(i) A *bona fide* intention to appeal within the permitted time;

(ii) the existence of something like a mistake and, in that respect, a mistake as to procedure, in particular the mistake of counsel or solicitor as to the meaning of the relevant rule, is insufficient and,

(iii) an arguable ground of appeal.

14. These are not absolute rules as has been emphasised many times but will in the majority of cases inform the exercise of the court's discretion. Some of the more recent authorities place emphasis on the fact that the most important of the criteria is that the appellant demonstrate an arguable ground of appeal and in the absence of that, the others become irrelevant. I propose to consider each in turn.

Arguable ground of appeal

15. The appellant's draft notice of appeal sets out five separate grounds but they are in reality one, namely that of objective bias on the part of Roberts J. The grounds are those to which I have already alluded and the Judge's response has been set out.

16. One of the leading authorities on the question of objective bias is *Bula Limited & Others v. Tara Mines Limited & Others (No.6)* [2000] 4 IR 412. In that case, there was an application before the Supreme Court to set aside its earlier judgment on the basis that two members of the court who had delivered the earlier judgment had acted for, and advised, two of the parties to the appeal some considerable number of years earlier. In her judgment, Denham J. (as she then was), said (at p. 441):

> *"However, there is no need to go further than this jurisdiction where it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issues. The test does not invoke the*

apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test that invokes the apprehension of a reasonable person."

17. Of note in the context of this case, Denham J. further observed (at p. 445):-

"Indeed, it was quite rightly accepted by the applicant that the mere fact that a judge when a practicing barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal advisor and client."

She went on the same page to refer to the Australian authority of *Re Polites* (1991) 173 CLR 78:-

"I agree with the analysis of Merkel J. in Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd. [1996] 135 ALR 75 *where he stated:*

> *'55. In my view, as with the cases considering personal, family and financial interests, the decision of the cases dealing with professional association between an adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case.*

In the absence of such a link it is difficult to see how the test for disqualification as stated in Livesey can be satisfied.'

124. If a judge has acted for or against a person previously as a legal advisor or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant."

18. These authorities were considered and followed in *Harrison v. Charleton* [2020] IECA 168 where, speaking for this Court, I said:-

"As these cases show, mere professional contact, even those involving a lawyer/client relationship are in themselves and without more, insufficient to raise an apprehension of bias."

19. Accordingly, in the present case, even were it the case that the High Court judge had acted in a professional capacity at some time in the past for the first respondent, that, without more, would be insufficient to raise a real apprehension of objective bias. However, as the Judge herself explained, the link here is even more tenuous. I am accordingly satisfied that there is no conceivable basis on which this could give rise to a real apprehension of bias and thus, the appellant has demonstrated no arguable ground of appeal. While that is dispositive of this application, for completeness I propose to briefly consider the other two strands of the *Eire Continental* test.

***Bona fide* intention to appeal**

20. As reliance is placed by the appellant on the letter from Mr. Scannell to satisfy this limb of the test, I shall briefly comment upon it. There are a number of features to this letter that are of significance. The first is the date, which is comfortably within the time for appealing. The second is that it is stated to be sent "*by post*" which, given the importance which the appellant attaches to it, is perhaps surprising. One might have reasonably expected such a letter to be sent by registered post, or indeed by email where in the event of dispute, proof that it had been received would be available. This is precisely the difficulty that arises here because the respondents' solicitors say they never received it. Notwithstanding that this was averred to on affidavit by the respondent's solicitor, neither the appellant nor the author of the letter have replied on affidavit confirming the circumstances in which the letter was purportedly sent.

21. Further, the letter offers absolutely no credible explanation as to the reason that the appellant, who was still within time to appeal, could not in fact appeal beyond saying he was "*unwell*". As with the appellant's own affidavit, no detail of any description whatever is given as to the nature of the ill health allegedly involved. Nor is it explained why Mr. Scannell, who is apparently acting in some sort of intermediary capacity for the appellants, could not himself deliver the notice of appeal if the appellant could not do so.

22. The language of Mr. Scannell's letter is quite telling in that it refers to the fact that the first appellant "*had*" intended to appeal, going on to say that he might do so at a later stage "*if matters can't be resolved*". This is tantamount to saying that at the time of writing the letter, the appellant had no current intention to appeal but might do so in the future if he was unable to resolve matters with the respondents. That appears to me to be very far from establishing that the appellant intended to appeal within time, rather the opposite seems to be the case.

Mistake

23. It is notable that in the affidavit grounding this application, the appellant makes no reference to there being any sort of mistake involved. On the contrary, his intermediary's letter makes it clear that he was well aware that he had 28 days to appeal and that time ran from 20th October 2023. However, in his written submissions, the appellant raises for the first time a new alleged mistake, namely, that he was waiting for the Judge to issue a written judgment.

24. Accordingly I am satisfied that nothing in the nature of a mistake has been advanced in this case.

Conclusion

25. It is thus clear that the appellant has failed by a wide margin to satisfy any of the normal criteria applicable to applications for an extension of time to appeal. First and foremost amongst these, and fundamental to this application, is the failure of the appellant to demonstrate anything approaching an arguable ground of appeal and this application must accordingly fail.

Binchy J.: I have listened to the judgment just delivered by Judge Noonan and I agree with it. I have nothing to add.

Butler J.: I also agree with the judgment that has been delivered.