Neutral Citation: [2015] IEHC 737

THE HIGH COURT

[2015 No. 575 J.R.]

BETWEEN

RAY HALL AND SUSAN HALL

APPLICANTS

AND

STEPSTONE MORTGAGE FUNDING LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of November, 2015

1. This application for leave to apply for judicial review came before me originally as an *ex parte* application moved by the first named applicant, Mr. Ray Hall, in person, on behalf of himself and the second named applicant. In that application, Mr. Hall sought an order quashing an order of possession of his family home made by Her Honour Judge Leonie Reynolds in the Circuit Court in Trim on 16th July, 2015.

2. I directed that the respondent, who was the applicant for the possession order, be put on notice of the leave application.

3. When the matter came back before me on 9th November, 2015, Mr. Michael O'Sullivan, B.L., appeared for the respondent and requested me to decide as a preliminary point, prior to addressing the question of whether Mr. Hall should be granted leave, the issue of whether he had simply joined the wrong respondent.

4. Mr. O'Sullivan submitted that Stepstone Mortgage Funding Limited was an entirely private entity and did not carry out any public law functions such as would bring it within the purview of judicial review in accordance with decisions such as *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482 and *Bloxham (In Liquidation) v. Irish Stock Exchange* [2013] IEHC 301.

5. While Mr. Hall did not formally consent to this point being decided as a preliminary issue, I did not take him to be strenuously opposing the application either. It appeared to me from what he said to the court that, at this stage, his major objective was to achieve clarification of whether he had followed the correct procedure; and the respondent's application to have this question determined as a preliminary point would seem to facilitate his objective. In view of that fact, and despite the consideration that the determination of a preliminary point in a mere leave application is not something I would normally view as expedient, I was, therefore, minded in this particular case to accede to the application. In the present judgment I consider whether the objection of the respondent is well founded.

6. Mr. O'Sullivan says that, before the Rules of the Superior Courts (Judicial Review) 2015 (S.I. No. 345 of 2015), the appropriate respondent would have been the learned Circuit Court judge, although he concedes that his client would *"very possibly"* have been named as a notice party.

7. However, he objects to now being named as a respondent because he says there is no decision of his being impugned.

8. As a fallback argument he says that in the present case, the judge still should have been named as a respondent instead, by virtue of O. 84, r. 22(2A)(a) because Mr. Hall is *"calling into question the manner in which the judge carried out the office of judge of the Circuit Court".*

Can private law entities be named as respondents in judicial review?

9. While the naming of a purely private entity as a respondent in a judicial review proceeding might be hitherto unfamiliar, that is precisely what the 2015 rules require, in the event that such an entity is the other party to judicial proceedings which are being challenged in the judicial review. Order 84, rule 22(2A)(b) requires that:-

> *"The other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents."*

10. This rule applies in a case where:-

> *"the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein".*

11. A judicial review action must relate to an underlying public law function being carried out by somebody, but not necessarily by the respondent. It is not the law that the respondent must itself be a public law entity. In the present case, the action clearly relates to a public law function, namely an order made by a judge of the Circuit Court. Order 84, r. 22(2A)(a) says expressly that *"the judge of the court concerned shall not be named in the title of the proceedings"*. However some entity should normally be a *legitimus contradictor*, and in a case where the action relates to a challenge to a judicial proceeding, that entity is the other party to the underlying proceeding. The onus falls on such a party to defend the decision made by the court, if it wishes to do so, and that is what Mr. Hall is giving Stepstone Mortgage Funding Limited the opportunity to do. In doing so, he is acting entirely within the rules. The preliminary objection is, for that reason, misconceived. Such a respondent can adopt the stance that it does not wish to defend the decision, in which case the question becomes a matter between the applicant and the court, whereby the applicant must satisfy the court to the appropriate standard that the underlying decision was flawed. If, on the contrary, the other party does wish to defend the underlying decision, then it is entirely at liberty to do so, with all of the rights and liabilities that attach to any respondent.

12. I also have given consideration to whether the State should have been named as a respondent to take on the role of defending the conduct of the hearing by a judge in such circumstances. In my view this would not generally be practicable and is clearly not what the rules require.

13. In the present case, the only parties before the Circuit Court at the material time were the applicants and the respondent. The Attorney General was not a party. The State in its widest sense was not involved in the hearing save in the person of the learned Circuit Court judge, and in terms of the presence of court staff and Garda members.

14. It is true that, apart from his complaints regarding the decisions of the learned Circuit Court judge, and as distinct from a perhaps more straightforward case where the complaint is simply a failure by the court to ensure that fair procedures were afforded, the applicant has complained of the actions of at least one Garda member. If, which of course I have not yet considered, leave were to be granted, this might militate in favour of directing service on the State at that point, at most as a notice party. However that does not arise at this juncture, and even if it did arise, it would not have the effect of displacing the respondent from that position but merely of adding a further notice party or possibly simply of directing service on the State without making them a notice party. The application made to me was not for directions as to service of a notice party but essentially to release the respondent from its position as such.

15. The exercise of the discretion to put a respondent on notice is a mechanism to assist the court with particular types or instances of *ex parte* applications, or particular elements of an individual application, and is not meant to give rise to a mini-trial. Such an exercise does not have to involve hearing from every party that might conceivably be added as a notice party at some future point or even necessarily from every party that is named as a respondent in the papers as submitted by an applicant. If leave is granted against any particular parties, those parties will in any event have the opportunity to be heard at a later stage.

16. In any event, if leave were to be granted in a particular case, the applicant is required to serve the District Court Clerk or County Registrar with a copy of the judicial review papers, essentially for information (r. 22(2A)(c)), which provides a channel from the Clerk or Registrar to the Chief State Solicitor if it is thought for any reason that there is anything further that can be contributed by the State to any particular judicial review proceedings. If so, it would be open to the Attorney General to intervene in proceedings of which she is thus made aware, but that is a matter for her. No discernible purpose would be furthered by directing service in this type of case upon the State as a matter of routine, and I see no such purpose in this case at this point, prior to a decision on whether to grant leave. The approach of joining the State as a matter of routine would also tend to increase the costs of such applications. In any event this is clearly not the approach envisaged by the the Rules of the Superior Courts (Judicial Review) 2015. The new rules postulate that it will be for the other party to the underlying action to defend the fairness of the hearing, and, given that such a party was actually present, and has the most tangible stake in the outcome, this makes practical sense.

Does an allegation of mala fides remove the obligation to name the other party to the litigation as respondent?

17. As noted above, Mr. O'Sullivan suggested that the learned Circuit Court judge should have been named as a respondent because rule 22(2A)(a) goes on to say that a judge should be named if there is *"an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit".* Such an allegation must, by definition, be made by the applicant. Mr Hall, as an applicant, made no such suggestion in his amended papers (having made clear that he was no longer relying on scandalous material in his original papers). What these applicants are actually alleging is in essence that the learned Circuit Court judge should not have made the order she did, and are suggesting that aspects of the hearing unduly curtailed their rights to fair procedures. That sort of allegation is absolutely not at the level of gravity as would engage the exception set out in Order 84, rule 22(2A)(a). Merely because it is suggested that a particular hearing did not in some way or for some reason, whether outside the control of the court or otherwise, fully observe all of the stipulations of fair procedures does not, in any way, make it appropriate to name the judge as a respondent. Something much more flagrant and deliberate would be required to reach the level required to sustain an allegation of *mala fides*, and the applicants here have made no such allegation in their amended papers. I, therefore, find that the learned Circuit Court judge in the present case was quite properly excluded from the title of the proceedings by the applicants.

18. In any event, even if such an allegation had been made, and it were proper in a particular case to name a judge as respondent, that does not seem to me to remove the requirement in r. 22(2A)(b) to also name the other party to the proceedings as a respondent, which is set out in the rules as a separate obligation on an applicant.

Other issues canvassed

19. A number of other points were canvassed in the course of the hearing. Mr. O'Sullivan suggested that there were what he referred to as *"mistruths"* on the applicants' affidavit, and issues in relation to the *bona fides* of the leave application. He also made a point in relation to alternative remedies, stating that Mr. Hall could have appealed the Circuit Court decision to the High Court but did not do so, despite flagging the question of an appeal with the learned Circuit Court judge at the conclusion of proceedings. However, given that I have been asked to decide a net preliminary point, these are not matters that I can address in the present ruling.

20. Finally, Mr. Hall asked for permission to withdraw his first affidavit (which I understood him to say had been drafted to some extent *"in anger"*) and said he was not relying on it. Mr. O'Sullivan said that it should not be withdrawn as he had already replied to it and he would be relying on some of the averments in that affidavit. I would refuse the application to *"withdraw"* the affidavit because it seems to me that once an affidavit is put forward, it is fair game for comment and criticism even if a party subsequently wishes to adopt a more nuanced position. Having said that, insofar as Mr. Hall may now be adopting a more focused approach to the issues, by way of any subsequent affidavit, that is probably something that will assist the court ultimately, and Mr. Hall is certainly at liberty to inform the court that he is not relying on his original affidavit.

Order

21. In the light of the foregoing considerations, I will order as follows:-

> (i) that the preliminary objection of the respondents be dismissed and the issue be determined on the basis that the applicants were correct (a) in naming Stepstone Mortgage Funding Limited as the respondent to this application and (b) in not naming the learned Circuit Court judge as a respondent;
>
> (ii) that the question of whether the State should be joined as a notice party be left over to the determination of the leave application;
>
> (iii) that the application by the applicants to withdraw the grounding affidavit be refused, without prejudice to their right to inform the court that they are no longer relying on it and without prejudice to any right to rely on any subsequent affidavit;

(iv) that costs and expenses of this issue will be reserved to the determination of the leave application; and

(v) I will hear the parties further in order to bring the leave application to finality.