THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 32

Kelly J.
Irvine J.
Hogan J.

No. 2015 17

Between

Thomas Kearney

Plaintiff

and
Bank of Scotland plc and Patrick Horkan

Defendant

Judgment of Mr. Justice Kelly delivered ex tempore on the 23rd day of February 2015

1. There is before the court this morning a motion which has been brought by Mr. Kearney in which he seeks an extension of time within which to appeal against an order of the President of the High Court of the 18th November, 2014. His motion was issued on the 12th January, 2015 and originally came before the court on the 6th February when directions were given and the matter was listed for hearing today.

2. That motion was grounded on Mr. Kearney's own affidavit and in due course the second named defendant in the proceedings Mr. Horkan swore an affidavit in response.

3. Objection is now taken to the admissibility of that affidavit by Mr. Kearney. He makes his objection on two bases. First, he says that the affidavit contains material which Mr. Horkan would not have known of and could not have known of at first hand. Second, he says that there has a been failure to comply with the rules of court in that in swearing the affidavit, Mr. Horkan gave his address as Dock Gate, Dock Road, Galway and that is not his place of abode. He says that under the relevant rules of the court, the deponent of an affidavit must give his place of residence and not his place of business.

4. Two rules of the court are relevant to these objections. Order 40, r. 4 provides:

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."*

5. Order 40, r. 9 reads:

> *"Every affidavit shall state the description and true place of abode of the deponent; and every affidavit of service shall state when, where, and how, and by whom, such service was effected and in the case of delivery to any person, shall state that the deponent was at the time of such delivery acquainted with the appearance of such person."*

6. They are two relevant provisions of O. 40 which encompass both the objections which Mr. Kearney has mooted to the court this morning. I will deal with the second of them first.

7. Mr. Kearney is quite correct when he says that the rules of court we operate under are those which were published and promulgated in 1986. They constitute a revision of the rules of court which pertained until that time. He asks us to apply a literal interpretation of what is contained at O. 40, r. 9 which I have just read out. He says that because the affidavit did not show the place of residence of Mr. Horkan that it should be ruled out.

8. Unfortunately, like many lay litigants, he fails to take into consideration that the rules of court, just like any other piece of legislation, fall to be interpreted from time to time by the courts. The objection which he takes today is nothing new. It is a form to objection which has been taken in the past and the courts have had to rule on it. When I say the past, I go right back to the beginning of the 19th century, because Ms. Tighe's researches have been able to produce to a series of authorities which considered this question throughout that century. These are some of the cases where this question has been considered.

9. In *Haslope v. Thorne* [1813] 1 M & S 102, Lord Ellenborough C.J. is reported in relation to this form of objection as follows:- ". . . the words 'place of abode' did not necessarily mean the place where the deponent sleeps, that the object of the rule was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he is employed during the greater part of the day and not the place where he would retire for the purpose of rest". So there, as far back as 1813, one finds a common sense approach being taken to the interpretation of the rule. The court asked itself "what is the purpose of this rule"? The purpose of the rule is to apprise the reader of the affidavit as to where the deponent of the affidavit may be found. For most people in business life, they are much more likely to be found at their place of business during ordinary business hours than they are at their homes.

10. Again one finds the topic being considered by Lord Campbell C.J. in *Blackwell v. England* [1857] 8 EL & BL 540. He said in the course of that decision:

> *"I am of opinion that in this Act also the object of the legislature is better attained by giving as a description of the residence of the solicitor's clerk the office where he attends all day then if it gave the place where he passes the night. The object of the legislature was to secure means of identifying and tracing the attesting witness, this is the description which best fulfils that object and such I think is the object of the legislature when it requires a statement of his residence and occupation."*

Again a purposive approach was taken to a similar statutory requirement.

11. Coming then to the Irish authorities, my attention has been drawn to the decision in *Harte v McCullagh* IR 5 CL 537. That is authority for the proposition that an affidavit made in an action by one of the parties who was described in the affidavit as plaintiff or defendant need not contain the residence of the deponent. In that case the affidavit described the deponent as "the defendant in this action" but did not give his address. Chief Baron Pigot determined that to be sufficient. So, there is a line of authority going back to over many, many years indicating that although the rule speaks of a "place of abode", it is not be taken literally as meaning the place where one resides. It can be one's place of business.

12. In this case, Mr. Horkan, who is a defendant in the proceedings, swore the affidavit giving his place of business as his "place of abode". That, to my mind, conforms completely with what is required under the rules. It did so under the pre 1986 rules, where the same expression "place of abode" was used and does so under the current rules of court.

13. But if I am wrong in all that and even if all of these authorities are wrong, I draw Mr. Kearney's attention to O. 40, r. 15, which provides as follows:

> *"The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."*

14. So, even if Mr. Kearney is correct and all of those judges going back through the 19th century were wrong and I am wrong in what I say today, nonetheless the provisions O. 40, r. 15 have to be taken into account. In my view that is a rule which the court ought to apply if it were necessary to do so, because frankly, it would be absurd to rule out this affidavit simply because the deponent gave as his place of abode his place of business. I do not believe it is necessary to rely upon the provisions of O. 40, r. 15, but if it were I would have no hesitation in applying it and overruling this objection on that basis.

15. The answer to the second leg of objection finds its genesis in the provisions of O. 40, r. 4, which I recited at the outset. It is perfectly permissible for a deponent of an affidavit in an interlocutory application to swear as to matters of hearsay. It is specifically sanctioned under the provisions of that rule and this is an interlocutory application. The fact that an affidavit may contain hearsay does not mean that it is inadmissible. It is quite another question as to the weight which is to be attached to such an affidavit. But the fact that it contains material which the deponent does not swear to as a matter of first hand knowledge does not make it inadmissible as a matter of evidence as is clear from the very text of O. 40, r. 4. I believe that Mr. Horkan was perfectly entitled to swear this affidavit. Indeed it was proper that he should do so, so as to apprise the court of all that had taken place from a procedural point of view, having regard in particular to the fact that at no stage did Mr. Kearney give any explanation as to why he failed to appear before the President of the High Court in November of last year in respect of the specially fixed hearing of the motion that was determined on that occasion.

16. In my view both objections made by Mr. Horkan are without foundation. I am prepared to admit the affidavit of Mr. Horkan for consideration on the hearing of this motion.

Note: Irvine and Hogan JJ., agreed with this judgment.