THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 195

Record No. 2016/55

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

JOHN KEON

APPLICANT/

APPELLANT

- AND -

MARK GIBBS (IN HIS CAPACITY AS RECEIVER OVER CERTAIN ASSETS OF JOE McNAMARA)

- AND -

PRIVATE RESIDENTIAL TENANCIES BOARD

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of July 2017

1. In a reserved judgment delivered on the 21st December 2015 Baker J. refused to extend the time for the purposes of the s. 123(3) of the Residential Tenancies Act 2004 ("the 2004 Act") so as to permit the appellant, Mr. Keon, to appeal on a point of law against the determination order which had been previously made by the Private Residential Tenancies Board on the 23rd June 2015: see *Keon v. Gibbs* [2015] IEHC 812. In her judgment delivered on that day Baker J. refused to extend the time and the appellant has now appealed against that decision of the High Court to this Court.

2. Before considering the legal issues which now arise in this appeal, it is necessary first to set out the factual background. Mr. Keon was the tenant of an apartment premises at 14 Dún na Carraige, Salthill, Co. Galway under a letting agreement made on the 6th June 2012 between Joe McNamara as landlord and himself as tenant for the fixed term of two years from the 6th June 2012. The monthly rent was €400.00, which rent was payable in advance.

3. On the 12th April 2006 the landlord mortgaged the premises to IIB Home Loans Ltd. (now KBC Bank) as a security for the loan which the Bank had advanced to purchase the premises. Following default by the landlord, the Bank appointed the first named respondent, Mr. Gibbs, as receiver over the assets secured by the mortgage, including the apartment at 14 Dún na Carriage. The receiver then notified Mr. Keon of his appointment on the 5th October 2012 and directed that that rent be paid to him from November 2012 onwards. Mr. Keon did in fact make three payments of rent on the 5th November 2012, on the 7th December 2012 and on the 8th February 2013, but he has not paid any rent since that date.

4. In March 2013 the receiver informed Mr. Keon that he intended to sell the premises and required vacant possession for that purpose. Mr. Keon then informed the receiver that the property had been sub-let to some University students and he requested that they be allowed to remain in possession until they had finished their examinations in May. Mr. Keon did not, however, deliver possession in May 2013 as – according to the receiver, at least – he had promised to do so.

5. In January 2014 the receiver served a statutory form claiming that Mr. Keon had failed in his obligations qua tenant by reason of the non-payment of rent and the unlawful subletting of the premises without the consent of the landlord. The receiver then served a fourteen day warning notice demanding rent in accordance with s. 67(3) of the 2004 Act. On the 10th February 2014 he served a notice of termination under s. 34 of the 2004 Act. Following some correspondence with Mr. Keon's solicitor – in which the validity of Mr. Gibbs' appointment as receiver was questioned – it became clear that vacant possession was not going to be delivered up. The receiver then referred the matter to the Board for determination.

6. Following an initial adverse adjudication by an adjudicator on 15th July 2014, Mr. Keon duly appealed by notice under s. 100 under the 2004 Act. A hearing date was set for the 22nd May 2015 at which the parties were legally represented. At that hearing Mr. Keon sought an adjournment, which application was refused. The appeal then proceeded to hearing, and the Tribunal delivered a determination on the 26th June 2105, by which it directed Mr. Keon deliver up vacant possession of the apartment premises within fourteen days and pay the sum of €9,992.50 in respect of arrears of rent and €1,000.00 in damages, such sums to be paid by specified instalments.

7. The Tribunal forwarded a formal determination order dated the 26th June 2015 to the parties. The order contained a recital to the following effect:

> "This determination order shall, on expiry of the period of twenty-one days from the date of issue, become binding on the parties concerned, unless an appeal is made by any of the parties directly to the High Court on a point of law before then, pursuant to s. 123 (3) of the Residential Tenancies Act 2004".

8. By this stage Mr. Keon had retained a new firm of solicitors. By letter dated the 24th July 2015 Mr. Keon, through his new firm of solicitors, purported to lodge a notice of appeal directly with the Board. The Board replied on 29th July 2015 and it pointed out that a finding of the Tribunal could not be appealed other than to the High Court. Some two weeks later his solicitors wrote to the receiver indicating that Mr. Keon intended seeking to appeal the determination order to the High Court, and that he was also considering an

application for judicial review of the decision.

9. On the 19th August 2015 this application was brought by motion to extend time for service of a notice of appeal. On the 3rd September 2015 Binchy J. refused Mr. Keon leave to apply for judicial review of the decision of the Tribunal.

The decision of the High Court

10. In her judgment Baker J. considered that the application to extend time fell to be considered under Ord. 84C of the Rules of the Superior Courts, the provisions of which govern the procedures to be adopted for appeals from decisions of statutory bodies. She noted that Ord. 84C r. 2(5)(a) prescribes a notice period of 21 days, subject to any provision to the contrary in the relevant enactment. Section 123(3) of the 2004 Act provides, however, in relation to a determination order issued by the PRTB that:

> "any of the parties concerned may appeal to the High Court within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law."

11. Section 123(8) of the 2004 defines the "relevant period" as 21 days beginning on the date of issue of the determination order to the parties.

12. Baker J. noted, however, that the provisions of Ord. 84C r. 5(b) provide as follows:

> "within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

13. Baker J. then went on to consider whether (i) Mr. Keon had established the existence of a good and sufficient reason and (ii) whether such an extension of time would result in an injustice to a third party. In this regard Baker J. applied the well known *Éire Continental test (Éire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170) where the Supreme Court identified a three stage test that requires an applicant to show, first, that he or she had a *bona fide* intention to appeal within the relevant time period; second, that there was an element of mistake, and, third, the existence of an arguable ground for appeal.

14. Baker J. also pointed to the comments of Hardiman J. in *G.K. v. Minister for Justice* [2002] 2 I.R. 418, 423 where he stated:

> "If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in particular circumstances. The statute does not say that the time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of fourteen days'. A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used 'good and sufficient reason for extending the period' does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case.
>
> On the hearing of the application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

15. Baker J. next noted that application was grounded on the affidavit of Mr. John Geary, the solicitor for the applicant, although Mr. Keon had not himself personally sworn an affidavit explaining the delay. Mr. Geary did not act for the tenant before the Tribunal, but he stated that after the Board issued its determination order on 23rd June 2015, he was "later" instructed by the appellant. As Baker J. observed, Mr. Geary does not identify a date when this happened, and whether he was, for example, instructed within the twenty one day period. It is, however, clear that on 24th July 2015, after the expiration of the twenty one day period, he attempted to lodge an appeal directly to the Board instead of the High Court.

16. Baker J. then examined the explanations for the delay, but she did not think that any of these explanations were satisfactory.

17. So as the merits of the application itself were concerned, Baker J. noted that the majority of the grounds related to an alleged want of fair procedures. Much of this objection appears to have been directed towards the Tribunal's decision to admit documents establishing the appointment of the receiver and the entitlement of the Bank to appoint a receiver over the assets of the landlord.

18. Baker J. then concluded:

> "That aspect of the matter was argued for some time before the Tribunal which, having risen to consider the matter, determined that it was satisfied that it had sufficient evidence to satisfy itself that the Receiver was validly appointed. The Tribunal had previously been referred to s. 110 of the Act of 2004 that issues of title are outside the remit of the Tribunal. Note might also be had of s. 108(5) of the Land and Conveyancing Law Reform Act 2009 which provides protection to any person dealing with the receiver such that a person is not required to look behind that appointment.
>
> It is noteworthy and highly significant in my view that the tenant did pay rent to the Receiver for a period of three months, that his landlord, Mr. McNamara had shown him a letter wherein it was stated that Mr. Gibbs had been appointed as Receiver and that his landlord had "openly questioned" how this might have occurred, but the doubt was not particularised in the pleadings or hearing before me. The Tribunal noted that no evidence was adduced by Mr. McNamara, the landlord, and rejected the attempt by the tenant to adduce hearsay evidence of any conversations with him. This was an entirely correct approach. It must be noted also in that context that the appeal to the High Court from a decision of the Tribunal is an appeal on a point of law, and the High Court may not engage with the factual questions raised by the tenant in his application, and the Tribunal having expressed the view that it had sufficient evidence to conclude that the Receiver was properly appointed, and noting the statutory provisions in the Act outlined above, that point of appeal cannot succeed as no point of law is engaged.
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> I consider the tenant could not succeed in the argument that the receiver was not validly appointed, and no stateable argument on that ground was identified."

19. Baker J. then observed that the landlord's interests would be prejudicially affected if time were extended. She concluded thus:

> "Accordingly, I consider that the intended appellant has not made out any good and sufficient reason why he should be permitted to now appeal the decision of the Tribunal and that the interests of the landlord far outweigh those of the tenant to now seek to prosecute an appeal which I consider has no stateable basis at law."

20. As I have already indicated, the appellant has sought to appeal this decision on its merits. But before considering this question, it is, however, necessary to examine at least in passing a jurisdictional issue which was not directly addressed in the High Court. This was in large part because as counsel for the receiver, Mr. Mooney, informed us, his client wanted that Court to consider simply the merits of the application to extend time rather than address a jurisdictional question which – depending on the way it was resolved - might, in turn, raise a separate constitutional issue.

21. It was on this basis, therefore, that the Court determined at the outset of the appeal in an *ex tempore* ruling delivered by Finlay Geoghegan J. to proceed with the merits of the appeal to extend time and that it would only finally determine the jurisdictional issue in the event that it proved necessary to do so. In view of the clear conclusions which I have reached (and which I will detail presently) that the appellant has not presented any arguable grounds of appeal so that it would, in any event, be inappropriate to extend time, it is unnecessary to reach any concluded view on this jurisdictional issue. I feel nonetheless that it is important to draw attention to this jurisdictional issue as it may assume an importance in any subsequent case.

The jurisdictional issue: does the High Court have any power to extent time under s. 123 of the 2004 Act?
22. Section 123(3) of the 2004 Act provides:

> "Any of the parties concerned may appeal to the High Court, within the relevant period, from a determination of the Tribunal (as embodied in a determination order) on a point of law."

23. The phrase "relevant period" is then defined by s. 123(8) of the 2004 Act as meaning "the period of 21 days beginning on the date that the determination order concerned is issued to the parties."

24. Perhaps the first thing to note is that there is nothing in s. 123 of the 2004 Act which indicates that this statutory time limit might be extended under any circumstances. It is true that in *Law Society of Ireland v. Tobin* [2016] IECA 26 this Court held that it enjoys an inherent jurisdiction to extend time where the relevant statutory provision permitting an appeal did not expressly provide for such a power. This, however, was in the context of an appeal from the High Court to this Court, where the right of appeal is constitutionally guaranteed by Article 34.4.1 unless regulated or excepted by law. As Finlay Geoghegan J. said in that case:

> "For the reasons outlined above, our view is that s. 12 of the [Solicitors (Amendment) Act 1960], as amended is not a section which clearly and unambiguously precludes a person at least applying to exercise his constitutional right of appeal after 21 days or the jurisdiction of this Court to consider such an application. Section 12 by the words used does not expressly exclude the bringing of an appeal after the specified time as do the provisions of the statute of limitations and other statutory provisions with time limits to which we were referred.
>
> Unless excluded by s.12 the Court has an inherent jurisdiction to consider an application to extend time to pursue an appeal to which s.12 of the 1960 Act applies. Such jurisdiction derives from the implied constitutional principles of basic fairness of procedures which underlie the well known decisions in relation to the court's inherent jurisdiction to dismiss for delay. In this instance, the jurisdiction exists in order that a party who by mistake or other justifiable reason misses the 21 day period , may not be unfairly precluded from pursuing a constitutional right of appeal against an order of the High Court of the type to which s. 12 of the 1960 Act applies."

25. The present case is quite different, since - unlike the position in *Tobin* - the right of appeal to the High Court from the Tribunal is entirely dependent on statutory vesture. If, however, the Oireachtas has not provided for a power to extend time in this particular context, an issue must arise as to whether there is such a power at all under any circumstances, no matter what good reason for the delay may be advanced by any putative appellant.

26. The second thing to note is that the High Court proceeded on the basis that Ord. 84C independently conferred a power to extend time. I am not, with respect, convinced, however, that this premise is altogether correct. It is true that Ord. 84C, r. 5(b) does provide for a power to extend time, but this is expressed to be contingent on "any provision to the contrary in any relevant enactment." If the proper construction of s. 123(3) of the 2004 Act is that it provides for a strict 21 day time limit which is not capable of extension, then this would amount to a "provision to the contrary" such as would negative the potential operation of Ord. 84C, r. 5(b). Certainly, if this is the proper construction of s. 123(3), then the scope of that appellate jurisdiction could not be changed or enlarged by Rules of Court: see, *e.g.*, *The State (O'Flaherty) v. Ó Floinn* [1954] I.R. 295; *Rainey v. Delap* [1988] I.R. 470. A further consideration is that in view of the provisions of Article 15.2.1 of the Constitution (which vests exclusive legislative power in the Oireachtas) then, as I observed in *Gokul v. Aer Lingus plc* [2013] IEHC 432:

> "any such change could only be brought by primary legislation enacted by the Oireachtas and could not be done not simply by Rule of Court…."

27. Given, however, the clear views which I have formed regarding the underlying merits of any application for an extension of time (assuming for this purpose in the appellant's favour that such a jurisdiction exists), then beyond drawing attention to these issues, it is unnecessary to express any concluded view on these jurisdictional questions.

Whether time should be extended
28. Even if it were to be supposed that the High Court did in fact enjoy a jurisdiction to extend time for the purposes of s. 123(3) of the 2004 Act, it is plain that this is a case where such a jurisdiction should not be exercised. It is not even necessary for present purposes to pronounce on whether Baker J. was correct in respect of all the various indicia she indicated should be taken into account as guiding the Court in determining whether to extend time. It is sufficient simply to focus on a critical factor so far as the present appeal is concerned, namely, whether the appellant can point to the existence of even arguable grounds.

29. Since at least the decision of the Supreme Court in *Éire Continental* in 1952 the courts have consistently insisted – irrespective of the precise statutory context - that any appellant seeking an extension of time within which to appeal must demonstrate the existence of arguable grounds. The reason for this requirement is obvious and scarcely needs elucidation, because in the absence of arguable grounds any such appeal will prove to be futile. As Hardiman J. pointed out in *GK*, there is simply no point, therefore, in granting an extension of time where any such appeal has no reasonable prospect of success.

Can the appellant point to the existence of arguable grounds?

30. As I have already noted, the scope of the appeal under s. 123(3) of the 2004 Act is confined to a point of law. What, then, is the point of law which has been identified so far as the present appeal is concerned?

31. It must be recalled that the appellant's failure to pay rent and to have sub-let the premises is not in dispute. It is true that the fundamental complaint before the Tribunal appears to relate to the validity of the appointment of the receiver, but the Tribunal found that the receiver had been validly appointed. Besides, the appellant did pay rent on no less than three separate occasions to the receiver, a factor which Baker J. quite understandably found to be highly relevant. In any event, as Baker J. pointed out, it is not clear how that issue as to the validity of the appointment of the receiver would really be relevant given that s. 108(5) of the Land and Conveyancing Law Reform Act 2009 "provides protection to any person dealing with the receiver such that a person is not required to look behind that appointment."

32. Beyond this there were a series of rather generalised complaints that the Tribunal had breached fair procedures, not least in the manner by which it had received evidence in relation to the receiver's appointment. It may be that in an appropriate case a failure to observe fair procedures could amount to a point of law which could be raised in the course of a statutory appeal as opposed to an application for judicial review: see, *e.g.*, *Teehan v. Minister for Communications* [2008] IEHC 194 and *Koczan v. Financial Services Ombudsman* [2010] IEHC 407. It is not necessary for present purposes to express any views on this issue. But even if this were so, the appellant has not advanced any ground of substance – beyond that, with respect, which amounts to purely generalised complaints – in relation to the hearing before the Tribunal.

33. It follows, therefore, that no arguable ground of appeal for the purposes of s. 123(3) has been advanced in relation to this issue either.

Conclusions

34. In summary, therefore, I am of the view that even if the High Court has in fact a jurisdiction to extend time, the wording of s. 123(3) of the 2004 Act notwithstanding, this is not a case where such a jurisdiction should be exercised. Before time could be extended, it would be necessary for the appellant to demonstrate at least that he had arguable grounds of appeal, as there is no point in extending time to enable an appellant to pursue an otherwise hopeless appeal.

35. In my view, however, the appellant cannot advance such grounds. Beyond generalised complaints as to the validity of the appointment of the receiver and the procedures followed by the Tribunal, the appellant cannot point to the existence of any arguable grounds of appeal that might otherwise qualify as a point or points of law for the purposes of s. 123(3) of the 2004 Act.

36. It is thus clear that Baker J. correctly refused to grant the appellant an extension of time by reason of the fact that no arguable grounds of appeal had been advanced before her. It is, accordingly, unnecessary to express a view on any of the other factors to which Baker J. had regard for this purpose or, indeed, for that matter to determine whether in view of the wording of s. 123(3) of the 2004 Act there is a jurisdiction to extend time at all under any circumstances.

37. It follows, therefore, that for these reasons I would dismiss the appeal.