THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 594 J.R.]

BETWEEN

JOHN CROWLEY

APPLICANT

AND

ALLIED IRISH BANKS PLC T/A AIB CREDIT CARD SERVICES

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of March, 2016

1. In or about July 1989, the applicant made an application to the respondent bank for an AIB credit card. His original application form or agreement has been lost with the passage of time.

2. As of October 2008, the balance on the credit card was €160.74. However, in the period following that date, a substantial balance was built up.

3. On 29th February, 2012, the bank's solicitors wrote to the applicant seeking the balance of €17,955.88, which they stated was due at that time. On 23rd March, 2012, an ordinary civil bill was issued seeking an order for payment in this amount. The civil bill was issued to an incorrect address, although the applicant did, in fact, receive it, which one can be confident about because he entered an appearance on 5th April, 2012.

4. On 16th October, 2014, a motion was issued seeking summary judgment.

5. On 17th November, 2014, the applicant made an application under the Data Protection Act 1988 for his data as held by the bank.

6. On 6th January, 2015, he was told this documentation was available for collection. On 18th February, 2015, he attended at AIB Patrick Street, Cork and collected the material.

7. On 9th March, 2015, the Cork County Registrar made an order for substituted service to allow the applicant to be served by ordinary post. On 16th April, 2015, a notice of motion seeking summary judgment was served on the applicant. In response to this, the applicant issued his own motion for various reliefs including the production or discovery of documents, dated 15th May, 2015.

8. That motion was the subject of an order of His Honour Judge David Riordan on 19th May, 2015, favourable to the applicant. The order provided, *inter alia*, that documents be sent by the bank to AIB College Road, Cork, for collection by the applicant. It is not clear to me that all participants in that process were fully aware that such material as the bank in fact had had already been furnished. Such omissions as existed in the applicant's data pack as previously furnished appear to have arisen more from the non-existence or non-availability of documents, in particular the original agreement, rather than from a failure to disclose them. Following the making of that order, the bank did not immediately take any particular steps to implement it.

9. On 20th July, 2015, the applicant brought a motion seeking to strike out the proceedings for failure to furnish documentation in accordance with the order of Judge Riordan.

10. Perhaps stimulated by this motion, the bank then wrote to the applicant on 24th July, 2015, stating that documents would be available for collection.

11. On 28th July, 2015, His Honour Judge Seán Ó Donnabháin dealt with both of the motions, refusing the applicant's motion to strike out the proceedings and granting summary judgment on the bank's motion.

12. An execution order was issued dated 3rd September, 2015. The applicant then brought a motion in Cork Circuit Court dated 28th September, 2015, seeking to set aside the order of 28th July, 2015. This motion was heard and refused by Judge Riordan on 6th October, 2015.

13. The applicant now seeks leave to apply by way of judicial review for reliefs challenging the orders of the Circuit Court.

Should time be extended for bringing the leave application?

14. The present *ex parte* application for leave to seek judicial review was commenced on 2nd November, 2015, slightly out of time as regard the order of Judge Ó Donnabháin, but in relation to that the applicant says on affidavit that he was not given a copy of the order when he sought it (para. 32 of his affidavit of 22nd February, 2016) which I would accept as a sufficient explanation of the delay (combined with his effort to set aside the order, which was not altogether unreasonable given that the key point being made was that the court had not been given full information at that hearing or that there was a want of fair procedures) for the purposes of O. 84, r. 21(3) that there be good and sufficient reason for extending time and the circumstances that resulted in failure to make the application within time were either outside the control of the applicant or could not reasonably have been anticipated by the applicant. I would therefore extend time for the present application. As I have said in a judgment in *F.G. v. Child and Family Agency* (unreported, 18th March, 2016), being delivered today, an order extending time made *inter partes* is very different to such an order made *ex parte*, and is intended to enure to the benefit of the applicant as a *res judicata* at the substantive hearing rather than being open to renegotiation at the suit of a respondent at that stage for the reasons outlined in that judgment.

Is an appeal the appropriate remedy?
15. Where an applicant is dissatisfied with a decision that is subject to both appeal and judicial review, as in this case, the court is entitled at the leave stage to ask whether judicial review is, in fact, the most appropriate remedy. (See *G. v. D.P.P.* [1994] 1 I.R. 374 *per* Finlay C.J. at pp. 377 to 378).

16. The rough dividing line between points suitable for judicial review and those suitable for appeal is that between legality and merits (see *Sweeney v. Fahy* [2014] IESC 50 (31st July, 2014) *per* Clarke J. at paras. 3.8 to 3.15). Any argument that the impugned decision is incorrect on the evidence is one as to merits. For the matter to be appropriate for judicial review, it must raise a ground going to legality, such as a breach of natural justice.

17. In the present case, the applicant did not appeal the order of 28th July, 2015, either within time or at all, or apply for an extension of time in that regard. During the hearing of the leave application, given the history of the proceedings and the nature of the complaints made, as well as the question of whether finality of the matter could be achieved, I suggested to the parties that consideration might be given to facilitating an extension of time for appeal, rather than pursuing the present application. Commendably, by letter dated 19th February, 2016, the bank made an open offer in this regard. The applicant however has insisted on his right to pursue his complaints by way of judicial review.

18. In written submissions, Mr. Daniel Donnelly, B.L. for the respondent argued that "*the applicant's failure to seek [to appeal] cannot have the effect of making judicial review appropriate where it would not otherwise be so"* (para. 25). That formulation has a powerful economy and force which reflects the correctness of the proposition it embodies. But it seems to follow that the other side of that coin is that an applicant's failure to pursue an option of appeal that is made available to him does not mean that a point that is genuinely appropriate for judicial review ceases to be so.

19. On that basis, it seems to me, that even if the applicant's failure to take up the bank's offer could be viewed as unreasonable, that is not automatically a ground to refuse leave if a point genuinely appropriate for judicial review is made out. However, that refusal may be relevant to the question of costs, because in that context, the court can always have regard to the conduct of the parties in relation to the litigation in terms of reasonableness or otherwise. However, that is not a matter that arises at this stage.

20. The applicant, who appears in person, has set out ten grounds in an amended statement dated 22nd February, 2016. The first ground, which is numbered "1" (as is the second ground), is simply a statement of fact. The last ground, numbered "9", is merely a prayer for relief. The position in relation to the remaining eight grounds, in terms of whether they deal with merits or legality, is as follows:-

> (i) Complaint is made about papers being sent to the wrong address. This is potentially a matter of legality rather than merits and I address it separately below.
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> (ii) It is suggested that the absence of the original instrument created a defect in the bank's proofs, compounded by what the applicant says is a failure to comply with the order of Judge Riordan. Insofar as this is framed as an evidential challenge, it goes to merits rather than legality.
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> (iii) The absence of the original credit card agreement is also pleaded as a matter of "injustice", and I will deal with this separately below.
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> (iv) Complaint is made that the affidavits of the bank are in breach of O. 40, r. 6 of the Rules of the Superior Courts which provides that "*the time when and the place where*" the affidavit was taken must be specified. In relation to this point, it is the Circuit Court Rules, rather than the Rules of the Superior Courts, that apply, and O. 25, r. 5(a) of the former states that it is "*the date*" and place of taking that is to be specified. A similar provision is made by the Commissioner for Oaths Act 1889, s. 5. The Rules of the Superior Courts are irrelevant to this case, but the word "*time*" in O. 40, r. 6 means date. In any event, a complaint that an affidavit should not have been admitted on grounds such as these is an evidential complaint that goes to the correctness of the decision rather than its legality.
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> (v) Complaint is made about failure to comply with the order of Judge Riordan and access to the applicant's "*data pack*". Whether such a ground engages the legality of the decision can only be determined by reference to the nature of the relief sought and I address it separately below.
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> (vi) The applicant also complains that there is an error of law on the face of the record. When asked what this plea means, he stated that it is intended to convey that the order complained of should not have been made. This is a complaint as to merits and is not appropriate for judicial review.
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> (vii) The same point arises in relation to the next plea which is that the order made was unreasonable.
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> (viii) The final plea is that there was no jurisdiction to make an order in the circumstances either at all or on foot of a notice of motion. This is an argument as to legality and again I address it separately below.

Is the order arguably invalid because papers were sent to the wrong address?
21. While in principle if an order was made without notice to a party who should have been on notice of it, a question of breach of natural justice and of legal requirements could arise, that is not the case here. The applicant received the pleadings and was present in court when the impugned order was made. There is no basis for this complaint, even if papers did not have his correct address.

Is the order arguably invalid because of the alleged failure to comply with the order of Judge Riordan?
22. As mentioned above, complaint is made about failure to comply with the order of Judge Riordan and access to the applicant's "*data pack*". However this is not a matter that can be pursued in the proceedings having regard to the limited nature of the reliefs sought, being an attack on the ultimate order of Judge Ó Donnabháin. Insofar as the complaint made is that the latter order should not have been made in the light of the alleged failure to comply with the earlier order, that is a complaint as to merits. Insofar as issue is taken with the non-compliance in and of itself, that does not seem to arise within the reliefs sought and in any event would seem more properly to be the subject of an application to the judge who made the order rather than to the High Court in the first instance.

Was the order arguably made without jurisdiction?

23. It is pleaded that there was no jurisdiction to make an order in the circumstances either at all or on foot of a notice of motion. This is incorrect. The Circuit Court clearly had jurisdiction to grant judgment for a contractual or quasi-contractual debt (see Courts (Supplemental Provisions) Act 1961, sch. 3, para. 1). Summary judgment for a debt can be applied for by notice of motion (O. 28 r. 3 of the Circuit Court Rules 2001).

Was there an arguable unfairness in the Circuit Court proceedings?
24. The position on 28th July, 2015, when the bank's application for summary judgment was heard, was that the applicant had in fact received his data pack in February, 2015, and had received it again on foot of the order of Judge Riordan. Missing from either copy of that data pack, however, was the credit card application form dating from 1989 (see affidavits of Fergus Hurley, 14th December, 2015, para. 5, and 10th February, 2016, paras. 3 and 4).

25. The applicant viewed that matter, understandably, as non-compliance with the order of Judge Riordan in relation to disclosure. What he did not understand, because he had not been told, was that the agreement had not been furnished because it could not be located.

26. That fact was not brought to the attention of the court either but only came to light after judgment had been entered for the claim and for costs.

27. Mr. Donnelly submits that the absence of the agreement did not matter because firstly the court would have had jurisdiction anyway, and secondly, viewing the matter from a different point of view, the applicant owed the money anyway, agreement or no agreement.

28. As regards the first point, it may be that the court would have had jurisdiction to make the order, but a slightly different question arises as to whether the court should have been asked to make the order without being made aware that the agreement was not available. In general there is no obligation in *inter partes* proceedings to point out glaring gaps in one's own proofs, but such an obligation can arise in special circumstances, in particular if the way the party has presented its case would be misleading without making reference to the matter in question (see *Meek v Fleming* [1961] 2 Q.B. 366; Re J [2003] 2 F.L.R. 522; *Myers v Elman* [1940] A.C. 282, [1939] 4 All E.R. 484; and *Philp v. Ryan* [2004] IESC 105 [2004] 4 I.R. 241 *per* Fennelly J., Murray C.J. concurring, at p. 248).

29. As regards the second point made, the question arises as to whether pleadings for debt should distinguish between the sum allegedly due as principal and that due as interest. The judgment of Butler J. in *Allied Irish Banks Ltd. v. The George Ltd*. (Unreported, High Court, 21st July, 1975) might suggest that such distinction should be drawn. On the other side of the ledger, the recent judgment of Hogan J. (Kelly and Mahon JJ. concurring) for the Court of Appeal in *A.I.B. v. Pierce* [2015] IECA 87 (22nd April, 2015) suggests normally not. It is not necessary to decide this matter because even assuming for the sake of argument that there is no obligation to distinguish in any way in the pleadings between principal and interest, and even on the basis that the applicant would have been liable to repay the principal, seeing as he actually obtained value for the use of the card, the position remains that his precise liability to interest could arguably be dependent on proof of agreement in that regard which might not necessarily be properly inferred from unilateral statements on behalf of the bank in various communications and credit card statements over the years.

30. There are two features of the present case that lends support to the proposition that it is arguable that some unfairness occurred. The first is that the applicant had, unusually, succeeded in obtaining an order for disclosure of the material, prior to the critical hearing. This arguably could give rise to an obligation to positively disclose the inability to comply with that order. Secondly, the court was affirmatively told on behalf of the bank that the applicant had received the data pack without also being told that the pack did not include the original application, or indeed that the reason for this was that the original application was not available to be produced to the applicant, or in evidence, or at all.

31. In para. 5 of the affidavit of Fergus Hurley of 14th December, 2015, a submission made on behalf of the bank on 28th July, 2015, by Ms. Helen O'Driscoll, B.L., is recorded, as follows: "*Ms. O'Driscoll stated that, on 19th May, 2015, the applicant had told the court that he had not received any information from the respondent. She stated to Judge Ó Donnabháin that this was not correct because the applicant had received his data protection pack in February 2015*."

32. Following the matter of the missing documentation being discussed before me, this averment was supplemented by Mr. Hurley in a further affidavit of 10th February, 2016, in which he says that *"[i]mmediately after Ms. O'Driscoll told the judge about the applicant's previous receipt of the document pack, the judge turned to the applicant and addressed him (effectively cutting Ms. O'Driscoll off). The applicant told Judge Ó Donnabháin that the credit card agreement was not in the documents that he received"* (para. 3).

33. Mr. Hurley goes on to say that *"[w]hile it is correct that Ms. O'Driscoll did not say to Judge O'Donnabháin that the credit card application was not contained in the data protection pack, the applicant made Judge Ó Donnabháin aware that the respondent had not provided him with the credit card application form"* (para. 4).

34. Without wishing to be taken as making any comment critical of the bank or its lawyers at this stage, I do not think that the bank can rely on the denial, by the applicant, of its own submission as being something that "*made Judge Ó Donnabháin aware*" of the correct position. For the court to have been made aware of the correct position, it would have required the bank to reply to the applicant's submission by saying something like "yes, Mr. Crowley is correct about that".

35. In the absence of such confirmation, it is arguably possible that the learned judge may simply have been under the impression that there was a conflict between the parties as to what was furnished, and may simply have preferred the information offered by the bank.

36. Obviously, this situation would have been avoided if the bank had actually informed the court that the document pack ordered by the court to be produced did not include the application, and that this was for the reason that it could not be located. All I have to decide at this stage is whether that omission arguably gives rise to grounds for judicial review of the decision on grounds of breach of fairness or natural justice, and I consider in the circumstances that it does.

Is leave for declaratory relief appropriate?
37. The primary order sought is an order of *certiorari* quashing the orders of 28th July, 2015 and 3rd September, 2015 (relief A). Relief B is a declaration in relation to the order of 28th July, 2015, which is unnecessary if leave to seek relief A is granted and inappropriate if that leave is refused.

Is leave to seek damages appropriate?

38. Damages are also sought (relief C), but as the order has not been enforced, and no other relevant circumstances are apparent giving rise to an arguable claim for damages, this is not something that I would propose to give leave to pursue in these proceedings.

Is leave to seek an order in relation to prohibitively high costs of the proceedings appropriate?
39. Finally, at relief D, the applicant seeks an order "*not to be exposed to prohibitively high costs of court proceedings*". That does not appear to be an order that I can give leave to pursue in an application of this kind, even if I were minded to do so. Insofar as the prohibitively high cost of proceedings is concerned, that appears to me to be something that would have to be pursued against the State in some form of wider public law challenge.

Should a stay on execution of the be granted?
40. While the issue in relation to the unavailability of the original agreement is not in principle fatal to any claim in contract or quasi-contract for the actual monies advanced (as opposed to interest), importantly in this context the proceedings brought by the bank did not distinguish between the amounts due as principal and those due by way of interest. In those circumstances I consider that it is appropriate to stay enforcement of the judgment as a whole pending the determination of these proceedings rather than seek to impose a partial stay with all of the procedural complexity that such an approach would unleash in the circumstances.

Order
41. For the foregoing reasons I will order as follows:-

(i) that pursuant to O. 84 r. 21(3), time be extended for bringing the application for leave up to the date on which it was made;

(ii) that the applicant have liberty to further amend the statement grounding the application to seek as the sole reliefs:

(a) an order of *certiorari* removing for the purposes of being quashed the orders of His Honour Judge Ó Donnabháin of 28th July, 2015, and 3rd September, 2015,

(b) further other relief and

(c) costs,

(iii) that the applicant have liberty to further amend the statement grounding the application to seek those reliefs on the sole grounds that the orders were made in circumstances of unfairness and/or breach of natural justice (contrary to law, Article 40.3 of the Constitution and/or art. 6 of the ECHR) in that the respondent informed Judge Ó Donnabháin that the applicant had received the data protection pack ordered by Judge Riordan and/or failed to inform Judge Ó Donnabháin that the pack did not include the original credit card application and/or failed to inform Judge Ó Donnabháin that the original credit card application was not available to be produced to the applicant, or in evidence, or at all;

(iv) that the applicant have leave to apply for judicial review in accordance with the statement of grounds, as so amended, and that leave for any of the other reliefs or on any of the other grounds be refused;

(v) that the applicant have three weeks to file and serve the amended statement and an originating notice of motion, to be made returnable for a date to be fixed;

(vi) that the orders of His Honour Judge Ó Donnabháin of 28th July, 2015 and 3rd September, 2015 be stayed until the final determination of these proceedings; and

(vii) that costs be reserved.