UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 128

Record Number: 2019/179

High Court Record Number: 2008/7621P

Noonan J.

Haughton J.

Collins J.

BETWEEN/

HARRY McHUGH

PLAINTIFF/APPELLANT

- AND -

THE MINISTER FOR ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

Judgment (*ex tempore*) of Mr. Justice Noonan delivered on the 9th day of March 2020

1. The within appeal is brought from two Orders of the High Court (Reynolds J.) made on 26 March 2019 which dealt with three motions brought by Mr. McHugh which came before the Court on that date.

2. It is not necessary to dwell in any detail on the complex nature of the disputes raised in these proceedings. I would not purport to summarise those issues but merely to say that they concern lands owned by Mr. McHugh in County Donegal which he alleges have been the subject matter of unlawful actions by the defendants. The case is of considerable antiquity in that it concerns events as far back as 2003. The proceedings themselves were issued on 17 September 2008 and have pursued a somewhat tortuous course since that time. Mr. McHugh was originally professionally represented at the time the proceedings issued but now represents himself as a litigant in person.

3. Mr. McHugh has sought to amend his Statement of Claim in these proceedings on multiple occasions, many of which were attempted without any leave of the Court. Ultimately, Mr. McHugh did bring an application before the Court for leave to amend which was dealt with by an Order made by Barniville J. on 11 June 2018. By that Order, the plaintiff was given liberty to amend his Statement of Claim in the terms of a draft amended Statement of Claim exhibited in his grounding affidavit and the Order then goes on to provide:

> *"Strictly on condition that such amendments are being permitted without prejudice to any objections or defences the defendant may have in response to the claim sought to be made immediately prior to the amendment of the Statement of Claim and that nothing in this Order shall have the effect of depriving the defendant of any objection or defence it may have of the date hereof."*

4. On the same date, a separate motion for judgment in default of defence came before the same judge and was adjourned to 16 July 2018. On the latter date, the Court made an

Order that the defendant deliver its defence within a period of eight weeks or by 17 September 2018.

5. There is no dispute about the fact that the defence was not delivered within that timeframe but it was in the course of being drafted and correspondence ensued from the Chief State Solicitor's office on behalf of the defendant seeking extensions of time for that purpose.

6. There is a dispute between the parties regarding when the defence was in fact delivered. An affidavit was sworn by Mr. Martin Hayes on behalf of the defendants on 13 November 2018 averred that the defence was served by e-mail and post on Mr. McHugh on 28 September 2018. Mr. McHugh in fact says he only got it on 15 October 2018 when he was before the Court and the judge directed it be served on him there and then. In any event, a second motion for judgment in default of defence was issued by Mr. McHugh on 2 October 2018 returnable to 3 December 2018. Depending on which date one accepts for service, the defence was either served before the motion issued or before it was heard. Little turns on this.

7. When the motion came before Reynolds J. on 26 March 2019, she refused to grant judgment to Mr. McHugh and extended the time for delivering of the defence until the following day, 27 March 2019, the defence having in fact already been delivered at that stage. Mr. McHugh argued before the High Court, and again as part of his Grounds of Appeal herein that he was entitled to judgment pursuant to the terms of O.27, r.8(1) of the Rules of the Superior Courts as considered by this Court in *McNamara v. Sunday Newspapers* [2016] IECA 140. The Rule provides as follows:

> "8(1) In all other actions than those in the preceding rules of this Order mentioned, if a defendant being bound to deliver a defence, does not do so within the time allowed, the plaintiff may, subject to the provisions of rule 9, set down the action on motion

for judgment; and on the hearing of the first such application the court may give to the plaintiff such judgement as upon the statement of claim it considers the plaintiff to be entitled to, or may make such other order on such terms as the court shall think just; and on the hearing of any subsequent application, the court shall give to the plaintiff such judgment as upon the statement of claim it considers the plaintiff to be entitled to, unless the court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure and, where it is so satisfied, the court shall make an order:-

(a) extending the time for delivery of a defence,

(b) adjourning the motion for such period as is necessary to enable a defence to be delivered within the extended time etc."

8. Mr. McHugh complains that under the terms of this Order, he was entitled to judgment and there were no special circumstances explaining and justifying the failure to deliver the defence. Furthermore, no such circumstances are recited in the Order.

9. It is accepted by the defendants that they were late delivering their defence but they did deliver it and did so before the matter came before the Court. It seems to me that it would be extraordinarily harsh and unjust if despite those facts, the Court was then to give judgment against the defendants. However, the critical feature here was that between the time of the first motion for judgment and the second, Mr. McHugh sought and obtained leave to deliver an entirely new and very substantially different Statement of Claim to that originally served including dozens of paragraphs raising new issues. It seems to me clear that the Order envisages that the Statement of Claim to which it refers as grounding the first motion for judgment is the same as that grounding the second.

10. Even if the defendants had delivered a defence to the original Statement of Claim they would plainly have been entitled to deliver an amended defence to the amended

Statement of Claim when they got it. Even if the defendants had been on the point of delivering a defence when the first motion for judgment came before the court, they would have had to go back to the drawing board as a result of having to plead to a substantially expanded and new claim in the amended statement of claim. It seems to me that the rule is intended to penalise a dilatory defendant who does nothing following a first motion leading to a second motion on the same grounds. That is not this case. I am therefore satisfied that the trial judge was perfectly correct in exercising her discretion in favour of extending the time for delivering of the defence and Mr. McHugh's appeal in that respect should be dismissed.

11. Turning to the second motion, this is a motion to strike out the defence for alleged non-compliance with the Rules. In essence, Mr. McHugh's complaint is that because the defence does not expressly address every matter that he raises in his extensive amended statement of claim as he sees it, it is non-complaint with the Rules and should be struck out for that reason. This is a fundamental misconception by Mr. McHugh. A defence does not have to be a serial engagement with every matter pleaded in a Statement of Claim. A defendant is entitled to elect how he will plead his defence and if he fails to join issue with any particular relevant allegation, he runs the risk of finding himself at trial having admitted a fact by virtue of his failure to deny it.

12. The pleadings exist to define the issues at trial and if evidence is sought to be led by one or other party in respect of matters not pleaded, that may give rise to a legitimate objection by the opposing party. However, there is no obligation under the Rules for a party to plead its case in any particular way and I cannot see any basis for the suggestion that the defence as pleaded is non-compliant with the Rules. O. 19 rr. 17 and 19 require a defendant to engage with any plea in the statement of claim with which he takes issue and not to do so evasively. That is demonstrated by the example referred to in r. 19. That is

not to say however that a defendant is not entitled to simply deny a fact alleged without more and thereby put the plaintiff on proof. It seems to me that the substance of the defence here addresses all of the substantive pleas made by the plaintiff. If it fails to do so, that is a matter for the trial and does not give rise to a right to have it struck out. A failure to plead some matter in the defence cannot prejudice the plaintiff and insofar as amendment might be necessary to deal with a perceived shortcoming, that may sound in costs.

13. Even if it was in any particular respect non-compliant that does not form a basis for striking out the entire defence. The Court does of course have a jurisdiction to strike matters out of a pleading on a limited basis, for example, if scandalous matter is included in such pleading. Or if a pleading fails to disclose a cause of action on its face, that may permit a court to strike the claim out if it cannot be saved by amendment. That does not arise here and I am therefore satisfied that Mr. McHugh has failed to demonstrate any error in the Order of the High Court.

14. Turning finally to the third motion brought by Mr. McHugh, this is a motion to "estop" the defendants from pleading the Statute of Limitations against him in their defence. This motion was brought before Mr. McHugh actually received the defence. There is no basis in law or under the Rules for the bringing of such an application. The Rules do not provide for the bringing of pre-emptive applications to prevent parties pleading their case as they wish in advance of them doing so. Like the trial judge, I have never come across a motion such as this and am satisfied that it is entirely misconceived. It is in any event quite clearly contrary to the terms of the Order of Barniville J. to which I have already referred and it would be extraordinary indeed if, having been allowed to amend his Statement of Claim on strict terms, the defendants were not to be allowed to plead to that amended claim.

15. For these reasons I would dismiss these appeals.