THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 188
Record No. 2017/5993P
CA 2017/539

Baker J.
Ni Raifeartaigh J.
Murray J.

BETWEEN/

NED MURPHY

PLAINTIFF/
RESPONDENT

- AND–

PADDY MCKEOWN AND ADELAIDE MCCARTHY

DEFENDANTS/
APPELLANTS

JUDGMENT of The Court delivered on the 13th day of July 2020

Background:

1. Murray J. delivered judgment in this matter on 26 March ([2020] IECA 75). Baker J. and Ni Raifeartaigh J. agreed with the judgment and order he proposed. Consequent upon the restrictions arising from the COVID-19 pandemic, the judgment was delivered electronically. Since then, the following submissions have been delivered to the Court:

   (a) A document entitled *'McKeown/McCarthy Issues Arising from Judgment of Murray J. 26 March 2020'*, and dated 29 March 2020.

   (b) Defendants/Appellants' Submission on Costs (filed 9 April).

   (c) Respondent's Submission Pursuant to Covid-19 Notice filed on 8 April.

2. The Court has also been furnished with e-mail communications and correspondence between the parties of 9 April 2020.

3. The submission dated 29 March enumerates what it describes as '*procedural and practice errors*' which, the appellants contend, '*constitute the very heart of the Judgment*'. They present these contending that in the light of the circumstances arising from the pandemic they are '*denied voice in the Court as per conventional delivery methodology*'.

4. The '*procedural and practice errors*' to which they refer are, in summary, as follows:

(a) The appellants object to the reference at paragraph 24 of the judgment to a passage (paragraph 4) from the submissions of the respondent delivered on 10 December 2019. That paragraph of the respondent's submission stated as follows :

> *'The Bank's instructions are that, in the use of the terms "Allied Irish Banks plc" and "Allied Irish Banks, plc" in the Instruments of Appointment of Receiver executed in January 2017, a deliberate decision was not taken to omit a comma between "Allied Irish Banks" and "plc" (or "p.l.c."). The Instruments of Appointment were prepared by solicitors for the Bank, naming the Bank as it was without adverting to the presence or absence of a comma in the Bank's title.'*

(b) This was, it is said by the appellants, outside the scope of what was required by the Court (Baker J.) when submissions were directed on 26 November.

(c) It is said that the contents of paragraph 4 of those submissions are hearsay as no officer of the entity, for example, has sworn an affidavit '*to submit a legal instrument of Declaration/Clarification*' as to the matters referred to there.

(d) It is contended that on the date those submissions were delivered the respondent had no consent or legal authority to communicate with the Bank as he could only be reporting solely and exclusively to Everyday Finance DAC. Emphasis is placed upon the fact that the passage from the respondent's submissions recorded the Bank's instructions in the present tense, not what the Bank's instructions were during the period from January 2017 to August 2018, this being the date (it is said) when the Bank '*vacated the matter*' to Everyday Finance DAC. It is stated that the respondent failed to disclose these matters to the Court, and that he failed to disclose that Everyday Finance DAC were not as of the date of the submission in question plaintiff or co-plaintiff in the Summary Case.

(e) The appellants express concern that their submissions of 12 December 2020 were not addressed in the Court's judgment. This document states as follows:

> *'We then require the same to be addressed/comprised in the judgment to allow us to be able to ascertain the Court's position on same'.*

(f) Reference is made in this regard to one aspect of the appellant's submission of 12 December, as follows :

> *'… any matters in our submissions deemed hearsay, like that the Court may deem it hearsay that the costs in the Summary Case were Adjourned Generally as 'Allied Irish Banks plc' cannot declare its Vat standing to the High Court of Ireland then that enjoys said equal footing as to the hearsay that has been admitted by the Plaintiff to advance his claim.'*

(g) The appellants say that they were legally precluded from entering proofs that the respondent cannot facilitate redemption to the appellants for Everyday Finance DAC

as he ignored multiple demands for redemption, or that as of the date of the appeal he had commandeered circa. €575,000 of their money to meet loan commitments of circa €90,000 and has not serviced their accounts or returned any surplus to them, or that his actions caused them to fall into default on their family home.

(h) It is said that the judgment is in error in stating that the respondent is receiver of certain properties, implying he has the right to sell them when in fact he is at most receiver of the income of the properties. The appellants say that damages in the event of sale at an undervalue or without proper authority are not in question as the respondent is seeking possession in his plenary case and does not enjoy a right of sale over the private properties. It is said that the mortgage deeds upon which he relies do not have a legally defined mortgagee therein and the charges upon which he relies convey no estate legal or equitable estate on any other party outside the appellants.

(i) The submission disputes references in the judgment to the ability of the appellants to pay damages, highlighting the extent of their lawful equity, noting €500,000 which they say the respondent has commandeered over and above the loan account requirements and minus the consideration paid by Everyday Finance DAC. They say that all personal liability lies with the respondent, that it is unknown whether he has insurance, and they observe (in reference to para. 57(c) of the judgment), that the Bank is not a party to the case.

5. The Court has delivered its judgment in this matter. In the State's constitutional order, that decision is final and conclusive, subject only to the possibility of an appeal to the Supreme Court. It is not appropriate for litigants by way of submission following judgment to engage in a dialogue with the Court in order to express their disagreement with the judgment, whether as '*issues arising from*' it, or otherwise (see *Permanent TSB Group Holdings plc. v. Skoczylas* [2020] IECA 152 at para. 31 and 51).

6. The Court does enjoy a jurisdiction to revisit its own final judgment in the circumstances defined by the decision of the Supreme Court in *Greendale Developments Ltd. (No.3)* [2002] 2 IR 514. The parameters of that jurisdiction have been described recently in *Launcestown Property Co. v. Wright* [2020] IECA 146 at para. 7, noting that it:

(i) is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

(iii) requires the applicant to discharge a very heavy onus;

(iv) is not for the purpose of revisiting the merits of the decision;

(v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) cannot be invoked on the basis of the discovery of new evidence;

(vii) *requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;*

(viii) *cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;*

(ix) *is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome.'*

7. The propositions advanced by the appellants in their document of 29 March do not meet these criteria. In that connection, the Court would observe as follows.

8. First, when the hearing on Tuesday 26 November concluded – at approximately 15.55 pm – Baker J. indicated that the Court would rise and consider what it was going to do. After a period of approximately ten minutes, it sat again. The DAR records the directions and exchanges regarding the submissions invited by the Court (between 16.03 and 16.06). These are as follows:

> ***BAKER J.:*** *Mr. McCarthy, Mr. McKeown, Mr. Doherty: We are aware that judgment is to be delivered on Thursday of this week in the Summary Summons Application. This issue is there alive in those proceedings as well as I understand it. So we thought that to assist us and in case anything arises in that judgment that we might give you two weeks after the delivery of that judgment for each of you to prepare very short submissions if you wish as to what transpires in the Court of Appeal Judgment on Thursday. So, two weeks from Thursday.* ***Mr. Doherty, it also occurs to us that perhaps in that you might give some consideration as to what precisely your instructions are regarding the question of whether this was a mistake or a deliberate omission of the 'comma'****. We won't say anything more than that now, I think, but perhaps if Thursday – I don't know what date is Thursday – but if somebody could give us what is Thursday fortnight, the date of Thursday fortnight, must be around the 11th or something.*
>
> ***COUNSEL:*** *It is the 12th December.*
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> ***BAKER J.:*** *The 12th December by 5 o'clock. Yes, my colleague correctly says that we don't want to reinvent this wheel, your submissions – maximum five pages - transmitted by e-mail by 5.00 that day by simple exchange or whatever way you want to do it and transmit it to the Registrar at the same time. Yes, my other colleague reminds me that those submissions if you want to put in* ***those submissions should be confined to anything that arises from the Judgment that will be delivered on Thursday except for the fact that Mr. Doherty seems to be arguing two propositions and he may or may not have only one fact that he wishes to assert. That is a matter for him to now decide.*** *So, we will contact the parties if we wish further oral submissions in the light of those written submissions. Now, I presume everybody, Mr. McCarthy, Mr.*

McKeown, you do exchange e-mails with the solicitors generally so that is not going to cause any problem. You can send them early but you can't send them late on that day. I think that is the sensible thing to do. Thank you.

(Emphasis Added.)

9. It is clear from those directions that while neither party was required to deliver further submissions, each had the opportunity to do so. It was furthermore clear from what was said that it was open to the respondent to the appeal – if he chose to do so – to address in those submissions both the effect of the then anticipated judgment of this Court in Summary Summons proceedings and the issue of whether the omission of the comma was a mistake or was deliberate. There can be no doubt from the transcript that the respondent was being afforded this opportunity. As the transcript makes clear, this was stated twice by Baker J. It is also to be noted that Baker J. was clear that the submissions the parties were free to deliver were limited to two and only two issues – the forthcoming judgment in the Summary Summons proceedings and, if the respondent chose to do so, the question of whether the comma had or had not been deliberately omitted from the name of the Bank in the relevant documents. The appellants voiced no objection of any kind to this. The submission having been thus directed, the Court was fully entitled to take account of it and to characterise the respondent's case as it did. The purpose of the exercise was to identify what case was being advanced by the respondent for the purposes of determining the arguability of his case. This was in the context of an appeal against interlocutory relief, in which, it should be observed hearsay evidence is admissible. It follows that the objections recorded at paragraph 4(a), (b), (c) and (d) above are based on a false premise and misconceived.

10. Second, the appellants quote from and rely upon an e-mail they received from the Court of Appeal Office on December 2 2019. That e-mail, sent in response to a query from the appellants in relation to the submissions, stated '*the submission should be no more than 5 pages confined to matters relating to Thursday's judgment*'. Of course, insofar as the appellants dispute the entitlement of the Court to have regard to a submission, that objection must be judged by reference to the submission the Court requested, and what it requested is clear from the comments of the Court. Clearly, the e-mail from the court office was an accurate record of what the appellants' submissions were to contain. By definition, it was only the respondent who could advise what position he was adopting as regards the name of the Bank. If the appellants believed the submission of the respondent strayed outside that parameter, it was open to them to raise an objection on receipt of it. This they did not do.

11. Third, a court in delivering judgment is not required to advert to every argument made or submission delivered to it or to address every point advanced by each party. A judgment must engage with the key elements of the case made by each side and explain why one side has won the case or appeal as the case may be (*Launcestown v. Wright* at para. 12). In an appeal, the issues which must be so addressed are defined by the grounds of appeal. This does not mean that the court must itemise each and every ground of appeal and address it. It is entitled to direct itself to the substance of the issues. Here the Court

did in fact expressly categorise and address every one of the twelve grounds of appeal raised by the appellants explaining –in some detail by reference to each– why the appellants failed in their appeal.

12. Fourth, the submissions delivered by the appellants on December 11 address a range of matters. They include the following :

    (i) The contention that the solicitors on record in the Summary Summons proceedings were not in court instructing Counsel on that date, the solicitors present instead being the solicitors for Everyday Finance DAC, the appellants not having been given any notification of any transfer of the receivership.

    (ii) The claim that the Taxing Master has adjourned generally the determination of costs because the Bank was unable to give him a status of their VAT standing.

    (iii) In a part of the submission headed '*judgement of the Court of Appeal relative to Ned Murphy in possession of excessive assets as to borrowings*' it is argued *inter alia* that the respondent's appointment is proven to be unjustified and excessive and that the Bank had obtained control of all the appellants loans and mortgages by the false registration of one property, falsely laying claim to their mortgage deeds and using the High Court Order to put a burden and judgment mortgage on their properties that did not form part of the summary claim.

    (iv) In a section in the submission headed '*the order of Costello J. confirming our honour*' it is said that the appellants are under a Court order to do what they were actually doing and observed that they are ordered to perform to Allied Irish Banks PLC, not to Allied Irish Banks, plc.

    (v) In a further section headed '*redemption does not exist and thus dishonour is confirmed*', the appellants record that they sought redemption in 2005 saying this was not possible and observing that the respondent is not able to furnish the appellants with redemption figures.

    (vi) In a further section they outline that that their narrative has been consistent for almost three years, referencing the issue around the name of the Bank appointing the respondent.

    (vii) They further claim that Costello J. was misled in respect of the doctrine of election (again referring to the identity of the appointer and of the party before her court).

    (viii) The appellants say that the respondent has no intention to advance his case against the appellants and has used the injunction as a cause of action and not a remedy.

13. This Court cannot see how it can be contended that the judgment has failed to address such of this submission as is relevant to the grounds of appeal as pleaded. The appellants have not presented any argument on the basis of which it could otherwise

conclude. The issues as described at para. 4(e) and (f) above therefore do not afford any basis for revisiting the decision of the Court.

14. In *Friends First Managed Pension Funds Limited v. Paul Smithwick* [2019] IECA 197 Whelan J. explained (para. 16) of the Greendale jurisdiction:

> *'The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect.'*

15. The issues raised at para. 4(g), (h) and (i) seek to revisit the merits of the judgement on the basis that the appellants believe it to be wrong. This is precisely what the Court may *not* do after delivering final judgment.

16. Nor does the contention recorded at para. 12(viii) above affect the decision of the Court. To be clear, however, the respondent is not entitled to issue proceedings for the purposes of seeking an interlocutory injunction and to leave them lie. The appellants have an entitlement to apply to court where there has been a default of pleading, and a failure by the respondent to comply with directions made by the court following such application may result in his proceedings being dismissed and injunction vacated. It is a matter for the respondents to pursue such an application in the appropriate forum should they believe that there is a basis for so doing.

17. It follows that the Court will order that the appeal be dismissed and the Order of the High Court perfected on 16 November 2017 be affirmed. In circumstances where the appellants have unsuccessfully resisted at first instance the respondent's application for interlocutory relief and thereafter unsuccessfully appealed that decision, costs should follow the event unless the Court is given reason to order otherwise. The contentions advanced by the appellants in their submission of 9 April do not afford a basis for ordering otherwise. In particular, the respondent was under no obligation to respond to the submission of 29 March. The respondent was fully entitled to inquire from the Bank as to what its position would be if at trial it was necessary to address the issue of whether its name was recorded in a particular manner for a particular reason in the relevant documentation and to communicate that position to the Court. While it is the case that at during the hearing the respondent's counsel referred to the omission of the comma from the Bank's name being both accidental and deliberate, the fact is that the issue around the Bank's name was but one of a large number of questions raised by the appellants at hearing. For the avoidance of doubt the role of this Court at the interlocutory hearing was not to determine finally what the Bank's name was or was not or how it came to be recorded as it was on the relevant documentation. These are issues for the full trial. The Court in this case was, insofar as that issue arose, concerned only with whether the plaintiff had established an arguable case.

18. In circumstances where the appellants have advanced no good reason to depart from the rule reflected in s.169 of the Legal Services Regulation Act 2015 and the law pre-existing that provision, that having failed in their application costs should be awarded against

them, the Court will order that the respondent recover from the appellants the costs of the hearing in the High Court and of this appeal.