THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 88
Record Numbers: 2017/191
2017/491

Costello J.

BETWEEN/

ARNAUD D. GAULTIER

PLAINTIFF/
APPELLANT

- AND -

THE REVENUE COMMISSIONERS, THE MINISTER FOR FINANCE, THE COURTS SERVICE, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 7th day of April 2020

1. This is my ruling on a motion issued by the appellant on 3 March 2020 returnable to 13 March 2020 in the Directions List of the Court of Appeal. The motion was issued in response to a motion of the first named respondent ("The Revenue Commissioners") returnable for 6 March 2020 seeking an order striking out the appellant's appeals against the Revenue Commissioners, Court of Appeal Record Numbers 2017/191 and 2017/491 ("the appeals"), for failure to file submissions in compliance with the directions of this court.

2. On 6 March 2020, McGovern J. at the call-over of the list made an order that if the appellant's written submissions on the appeals were not lodged by close of business on 20 March 2020, the appeals would stand dismissed. He adjourned the application of the Revenue Commissioners to strike out the appeals to 13 March 2020, to be heard together with the motion issued by the appellant returnable for that date.

3. The appellant seeks the following reliefs:

   "(1) An Order or direction for the High Court Registrar, the Principal Registrar or the former deputy Master & current CEO of the High Court (sic), to comply with the order of Irvine J. dated 26 July 2018 which released the CD of the audio of the hearing in the High Court before Mr. J. Noonan (sic) on 22 and 23 June 2017;

   (2) Or, in the alternative, an order for attachment and committal for the relevant party(ies) for refusing to provide for the Order of the Court (sic);

(3) An Order for the adjournment of the hearing listed for 03 April 2020 until such time as judges in Ireland can be held accountable before an independent and impartial body as required by the preamble of the Bangalore Principles of Judicial Conduct, upheld by the Supreme Court in O'Driscoll v. Hurley [2016] IESC 32 where Ms. Justice Dunne says: "[the Bangalore Principles] encapsulates at an international level norms of universal application";

(4) An Order for the adjournment of the hearing listed for 3 April 2020 as long as Ms. Justice Whelan and Mr. Justice Noonan are members of this honourable Court pursuant to article 2.5.2 and 2.5.3 of the Bangalore Principles of Judicial Conduct 2002 and the objective test of impartiality upheld by the European Court of Human Rights;

(5) Or, in the alternative: -

a declaration of incompatibility of section 42(1) of the Judicial Council Act 2019, with the European Convention on Human Rights and Fundamental Freedom, pursuant to s.5.1 of the European Convention on Human Rights Act 2003;

b in addition, a declaration of unconstitutionality of section 42(1) of the Judicial Council Act 2019 pursuant to section (sic) 60.1 of the Rules of the Superior Courts;

c in addition, a reference to the European Court of Justice pursuant to Article 267 TFEU for a preliminary ruling on the following question:

> *"Has the Irish judiciary been complying (sic) with Article 47 of the Charter of Fundamental (sic) before the commencement of Part 5 of the Judicial Council Act 2019 in relation to matters concerning a single-member company defined by E.U. Directive 2009/102/EC-Company Law on Single-Member Private Limited Liability Companies replacing Directive 89/667/EEC Single-Member Private Limited Companies and at large?"."*

4. In the Directions List, which is presided over by a single judge sitting alone, the court does not have jurisdiction to deal with the matters raised in para. 5 of the notice of motion and accordingly, these matters were not dealt with at the hearing and are not further discussed in this judgment.

5. The appellant adduced no evidence of service on the parties listed in para. 1 of the notice of motion of the order with a penal endorsement, so the court indicated at the hearing of the motion that the relief sought at para. 2 of the notice of motion was premature and was not pursued further.

6. The balance of the motion, thus, was whether the court should adjourn the appeals which were listed for hearing on 3 April 2020 and secondly, whether there had been compliance

with the order of Irvine J. dated 26 July 2018, in relation to the DAR of the hearing in the High Court before Noonan J. on 22 and 23 June 2017.

The applications for adjournment

7. The appellant's application for an adjournment of the appeals listed for hearing on 3 April 2020 has been overtaken by events giving rise to the virtual cessation of public life during the current Covid-19 pandemic crisis. Nonetheless, I feel it is important to address the points raised by the appellant.

8. The appellant submits that the appeals should be adjourned as Part 5 of the Judicial Council Act 2019 has not yet been commenced. Part 5 concerns the establishment of a Judicial Conduct Committee which will be authorised to deal with allegations of judicial misconduct. It will have jurisdiction to deal with incidents of alleged misconduct occurring after the commencement of the relevant provisions, but not before. The appellant's case is that unless and until Part 5 of the Act of 2019 is commenced, no court may validly decide any cases in Ireland and accordingly his appeals should be adjourned pending the commencement of the crucial statutory provisions. He went so far as to argue that, because the provisions of Article 35.4 of the Constitution, regarding the impeachment of judges, had never been applied, that the Article itself was unconstitutional.

9. In my judgment, this argument is without merit. It is predicated on an untenable premise: that there may be no valid decisions of a court unless there exists a formal complaints procedure to an independent and impartial body in respect of alleged judicial misconduct.

10. The appellant relied upon the decision of the CJEU in *Minister for Justice and Equality v. LM* (Case C-216/18 PPU) at para. 66, which he said supported his argument. It states:-

> *"Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds of abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition* ***regarding the independence of the body concerned*** *as met, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions…".* (emphasis added)

11. The appellant's reliance on this passage is misplaced. The paragraph (and the case) addresses the issue of judicial independence. The particular passage requires that bodies which have a responsibility, inter alia, for disciplining judges should operate pursuant to rules, and that judges should only be dismissed pursuant to express legislative provisions. It does not support the proposition, advanced by the appellant, that there is a mandatory requirement of EU law that there be in force statutory provisions providing for, and governing, the dismissal of judges, and that, in the absence of such provision, there can be no valid decisions of the courts in Ireland.

12. The appellant also relied upon the provisions of the Bangalore Principles of Judicial Conduct 2002. These principles have been recognised by the Supreme Court in *O'Driscoll v. Hurley* as encapsulating norms of universal application and thus, by implication, applying to judges in Ireland. The preamble states that the principles are intended to establish standards for ethical conduct of judges and that:-

> *"These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge."*

13. The appellant approached this international code of judicial conduct as if it were part of our domestic law. It is not. While the courts may have regard to the principles enshrined in the code, the absence of any specific provision governing complaints in respect of allegations of judicial misconduct does not deprive the courts of jurisdiction. The code does not require Ireland to establish any institution to maintain judicial standards. Further, the code does not deprive the courts in Ireland of jurisdiction in the alleged absence of any such institution.

14. In addition, the appellant adduced no evidence nor advanced any argument of any possible engagement of any of the Bangalore Principles in his appeal. The courts do not decide cases on a hypothetical basis. This is fatal to his argument.

15. Fundamentally, the courts are established under Article 34 of the Constitution and derive their authority therefrom. The absence of a formal complaints process or disciplinary procedures cannot alter this, nor deprive the courts of jurisdiction generally or in any particular case. The appellant's arguments are misconceived.

16. For all these reasons, I reject the appellant's first ground for an adjournment.

17. There is also no basis to adjourn the appeals on the grounds that two judges, validly appointed under the Constitution, are members of the Court of Appeal. The President of the court will assign cases in the usual way. In the case of one of the judges, he could not sit on the appeals, as one of the appeals is against an order of that judge, when he was a judge of the High Court. In relation to the second judge named in the notice of motion, it is a matter for the President whether she is assigned to hear the appeals. If she is not, then her presence on the court can have no relevance to the appeals. If she is, then her duty is to hear the cases listed before her unless there is a *bona fide* reason why she should recuse herself. That is a matter which will be considered by the court assigned to hear the appeals. I cannot adjourn the appeals on the basis that the court will misconduct itself at some future date, which is the essence of this argument of the appellant. It is not a reason to adjourn the hearing.

18. For these reasons, I refuse the adjournment sought in paragraphs 3 and 4 of the notice of motion.

19. The final issue remaining for decision on the appellant's motion concerns the DAR of the hearing in the High Court. On 26 July 2018, Irvine J. gave directions on the appeals and ordered that "*a CD of the audio of **the hearing** in the High Court before Noonan J. on 22 and 23 days of June 2017 recorded on the Digital Audio Recording System be released to the parties.*" (emphasis added). The appellant sought leave to appeal this order (including other directions) to the Supreme Court and by determination [2019] IESC DET 6, it refused the appellant leave to appeal to the Supreme Court. Thus, her order is final and binding upon the parties.

20. The order directs that the audio of the hearing in the High Court be released. This has been done. The order speaks for itself. The order did not provide that the audio recording of the call-over of the list or the subsequent assignment of cases to any individual judge be released to the parties. The correspondence of the parties does not alter the terms of the order. If the appellant had been in any doubt as to the scope of the order he had approximately eighteen months in which to apply to Irvine J. for clarification of the order. It is clear from the express, unambiguous terms of the order that he is not entitled to the DAR, whether in transcript or as an audio recording, of events in court preceding the commencement of the hearing before Noonan J. at 2pm on 22 June 2017.

21. The appellant has wrongly persisted in seeking the audio recording of the initial call-over of the Non-Jury List, and then the subsequent assignment of the case to Noonan J. for hearing, on the grounds that this was within the scope of Irvine J.'s order, so that he may prepare his written submissions on the appeal. In so far as this application is based upon the order of Irvine J., it is misconceived, and I refuse it.

22. Insofar as it is, in effect, an application to vary the directions previously made, I have considered the merits of the application and whether it is required to enable the appellant properly to present his appeals. I do not accept that the appellant requires the audio of the call-over of the list and the subsequent assignment of the case to Noonan J. in order to prepare his written submissions on the appeals. The appellant said that he sought the recording on the basis that the judge had apparently wrongfully assigned the case to himself for hearing. It was subsequently clarified in correspondence that, in fact, it was the registrar who informed the parties that Noonan J. had become free and would be able to take the matter up at 2pm on 22 June 2017. As the registrar was sitting in the absence of the judge, the DAR was not recording and so it is simply not possible to get a recording of the DAR of the assignment of the case to Noonan J. Furthermore, Noonan J. did not assign the case to himself, so the basis upon which the appellant sought the recording falls away.

23. Faced with this information, the appellant then sought the DAR of the call-over of the Non-Jury List in order, he said, to show Noonan J.'s alleged "partiality", by which I infer the appellant means that the trial judge did not, in some unspecified manner afford him fair procedures or otherwise treat him fairly. This was not the basis upon which the appellant sought the DAR originally, and he cannot, nearly three years later, raise fresh grounds of complaint never previously articulated. The conduct of the call-over of the

Non-Jury List is not relevant to the issues on appeal. He did not ask Noonan J. to recuse himself before he heard the cases and so the manner in which Noonan J. handled the call-over is both entirely irrelevant and a matter which it is no longer open to the appellant to raise.

24. In my judgment, the DAR of the call-over of the Non-Jury List on the morning of 22 June 2017 is not necessary in order for the appellant to present his submissions on the appeals. It is not a ***bona fide*** reason for him to fail to file his submissions, in accordance with the directions of the court. I am satisfied that there has been compliance with the order of Irvine J. of 26 July 2018, and I refuse the relief sought by the appellant in para. 1 of the notice of motion.

25. Finally, while not a matter which was properly before the court, the appellant urged that this court should vacant, or vary, the Unless Order made at the call-over by McGovern J. on 6 March 2020. The court has jurisdiction to vary directions previously given, but it normally only does so in circumstances where there have been developments since the giving of the directions relevant to the progress of the appeal, such as to the ability of a party to comply with the directions previously given or other good reason. Where the directions have been given at the call-over, which is held about three weeks before an appeal is listed for hearing, the court would be very slow indeed to vacate, or vary, any such directions designed to secure the fair disposal of the appeal on the assigned date. It does not simply revisit and rehear the decision of one judge dealing with the directions list and substitute that of another. When dealing with the motions on 13 March 2020, this court was not rehearing or reviewing the directions applications dealt with on 6 March 2020.

26. The sole basis advanced to vacate the Unless Order of 6 March 2020 was the alleged want of jurisdiction which I have discussed above, and which logically applies equally to myself and McGovern J. Insofar as the appellant argues that McGovern J. ought to have recused himself, that is a matter for an appeal to the Supreme Court, if the Supreme Court grants leave to appeal. It is not a matter on which a judge of equal standing may intervene.

27. For these reasons, I refuse to vary the order of McGovern J.

Conclusion

28. In the exercise of my discretion, I refuse the application to adjourn the hearing of the appeals based upon the lack of competence of all judges in Ireland unless and until Part 5 of the Judicial Council Act 2019, and in particular s.42, is commenced. I refuse to adjourn the appeals to allow the appellant to take up the DAR of the call-over of the list on the morning of 22 June 2017 before Noonan J. I refuse to vary the order of McGovern J. at the call-over on 6 March 2020 on the basis that he lacked jurisdiction or that he ought to have recused himself.

29. The motion of the Revenue Commissioners in seeking to strike out the appeals, on the basis of the appellant's failure to comply with the directions of the court to file submissions, was adjourned to 13 March 2020. Counsel for the Revenue Commissioners

indicated that they were satisfied with the terms of the Unless Order made on 6 March 2020 by McGovern J. in the call-over, and indicated that they were not proceeding with the motion. Had the Revenue Commissioners wished to pursue the relief sought in their motion, it would require to be heard by a court of three judges. As the moving party was no longer proceeding, no date was assigned to the motion.

30. Accordingly, I refuse the relief sought in each of the motions listed for hearing on 13 March 2020 and the parties may make submission in relation to the costs of the motions.