



THE COURT OF APPEAL
UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 274
Record Number: 2019/196
High Court Record Number: 2011/5186S

Costello J.

Noonan J.

Ní Raifeartaigh J.

BETWEEN/

WEXFORD COUNTY COUNCIL

PLAINTIFF/RESPONDENT

-AND-

KEVIN KIELTHY

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 22nd day of October, 2021

1. The appellant (the defendant) brings this appeal against the Order of the High Court of 19th March, 2019 granting summary judgment to the respondent (the plaintiff) in the sum of €16,352.81.

Facts

2. The plaintiff is a local authority with responsibility for the provision of harbour services at Kilmore Quay in County Wexford. The defendant is a fisherman and was the owner of a fishing vessel, the “Morgensonne”. The defendant, with two business partners, acquired this vessel in the late 1990s. In order to engage in commercial sea fishing, the vessel had to be registered on the Register of Fishing Boats and have a licence. In separate but linked proceedings, the defendant claims that the Minister for Agriculture, Fisheries and Food failed to correctly register the Morgensonne between July 2000 and July 2005, as a result of which the plaintiff claims to have suffered loss and damage.

3. Thereafter, the defendant sought to decommission the vessel and applied for a grant which was then available for that purpose. This transpired to be quite a lengthy process for reasons which are not relevant to this appeal, but appear in detail in the accompanying judgment of Ni Raifeartaigh J. in *Kielthy v Minister for Agriculture, Fisheries and Food, Ireland and the Attorney General* CA 2019/195. The consequence was that the defendant’s vessel was laid-up in Kilmore Quay harbour for a period of some four years between 2006 and 2009. As a result, the defendant incurred laid-up charges under the provision of the Kilmore Quay Harbour Bye-Laws 2004, which came into force on the 19th April, 2004. These Bye-Laws were made by the plaintiff in the exercise of the powers conferred on it by s. 37 of the Local Government Act, 1994, as extended by s. 89 of the Harbours Act, 1996. No dispute arises in these proceedings concerning the validity of the Bye-Laws.

4. Articles 50 and 51 provide as follows: -

“50. Any vessel normally engaged in trading activities in or coming into the Harbour for non-trading purposes i.e. not engaged in the loading and/or unloading

of passengers and/or livestock and/or goods, shall be deemed to be laid-up after the expiration of five days from the date of arrival of that vessel in the harbour. A vessel normally engaged in trading in the harbour shall be deemed to be laid-up after the expiration of fourteen days from the date of arrival of that vessel in the harbour when not engaged in trading activities.”

51. The master or owner of a vessel which, by virtue of Articles 49 and/or 50 of these Bye-Laws, is deemed to be laid-up in the harbour shall be liable for laid-up harbour fees as follows:

- at a daily rate of €0.63 per metre length of the vessel from the end of the relevant period as set down in Article 50. The daily rate can, under Part III, Article 84 of these bye-laws be changed”.

5. Part III of the Bye-Laws provides (at Article 84(3)): -

“Harbour charges shall be recoverable by the Council from the person or persons on whom they have been imposed as a simple contract debt in any Court of competent jurisdiction.”

6. The Kilmore Quay harbour master, Captain Philip Murphy, was charged with responsibility for raising and collecting fees and charges for harbour services and usage. He wrote to the defendant on the 18th September, 2006 in the following terms: -

“Dear Mr. Kielthy,

I am writing to inform you that your vessel “Morgensonne” has been inactive in the harbour for quite some time now. The vessel was towed in by the Kilmore Quay lifeboat on 5 July, and has only left the harbour for one day since on 3 August.

Under the Kilmore Quay Harbour bye laws, a vessel shall be deemed to be laid up after a period of 14 days and will be billed at €0.70 per metre per day.

From the various conversations I have had with you I understand that you are having a problem sourcing reliable crew to put to sea, and you are also appealing your failed attempt to have the “Morgensonne” scrapped under the decommissioning scheme.

Due to these circumstances I am willing to give you until 1st November 2006, to either have the vessel removed from the harbour, or use her on a regular basis for fishing. (Regular basis is taking that the vessel will spend approximately 1/3 of its time in port and 2/3 at sea.)

Please do not hesitate to contact me should you have any further information.

Yours etc.”

7. It will be noted that the figure referred to in Captain Murphy’s letter for laid-up fees is €0.70 as opposed to €0.63. This increase came about as a result of an order made by the County Manager on 18th January, 2006. A further order made on the 1st January, 2007 by the County Manager increased it from €0.70 to €1.00 from that date. On the 1st July 2007, the charge was increased to €5 per day by further order of 31st May, 2007.
8. Ultimately, from the time that the vessel became laid-up in the harbour and it being scrapped in 2009, Captain Murphy raised invoices, pursuant to the charges levied by the Bye-Laws as amended from time to time, amounting in total to €106,339,85.
9. A summary summons claiming this amount was issued on 22nd December, 2011 and was followed by a motion for summary judgment grounded on Captain Murphy’s affidavit.

The defendant swore a replying affidavit on the 25th February, 2014. In this affidavit, the defendant does not contest the validity of the Bye-Laws or the fact that he is liable to pay harbour charges to the plaintiff. Rather his complaint is in the main concerned with objections to the increases in the charges made by the County Manager from 2006 onwards.

10. He avers that the plaintiff has no right to charge him more than the rate set out in the 2004 Bye-Laws themselves. Further, he complains that he was treated unfairly by the plaintiff in circumstances where, he alleged, the owners of other laid-up boats were not levied with similar amounts to him and in some cases, not at all. He also sets out the background to how the boat came to be laid-up in the harbour as I have described it above.

11. Both these summary proceedings and the related claim for damages against the Minister came before O'Connor J. in the High Court who heard them in tandem and gave two separate judgments.

Judgment of the High Court

12. The trial judge identified the main issues pleaded in the defence that became the focus of the plenary hearing before the High Court. These included: that the fees had not been charged in accordance with the Bye-Laws and the purported increases were not carried out in accordance with the Bye-Laws; that the defendant was not treated in a fair and reasonable manner or in a like manner to other boat owners and users who owed harbour charges; and that the defendant was prevented from scrapping his boat by the wrongful actions of the Minister. It should be noted that the claim for harbour charges herein was included as part of the defendant's damages claim against the Minister in the linked proceedings.

13. The judge noted the issues in the case as being first, what was the correct rate applicable for the charges *i.e.* were the increases in the rate for laid-up charges permissible and secondly, was the Harbour Master entitled to impose the laid-up charges. With regard to the first issue, the net point was whether the increases in the laid-up charges originally imposed by the Bye-Laws, constituted an amendment to the Bye-Laws or simply a change in the rate permitted by the Bye-Laws without necessity of amendment of the Bye-Laws themselves. The defendant submitted in that regard that the County Manager had unlawfully usurped the functions of the elected members of the Council in altering the charges as he did.

14. Having analysed the relevant legislation, the judge concluded that the amendment to Article 51 of the Bye-Laws in respect of the daily rate applicable to laid-up vessels was an amendment of the Bye-Laws and accordingly, a “reserved function” as opposed to an executive function. The judge’s ultimate conclusion on this point was that the enabling legislation did not confer on the County Manager the power to increase the charges set out in the Bye-Laws.

15. The second issue was not concerned with the power of the Harbour Master to levy the charges, but rather with whether he had done so fairly and reasonably. The trial judge noted that the defendant had readily admitted that he was “quite prepared to pay the normal harbour charges of a fishing boat” while the vessel remained in Kilmore Quay.

16. The court did not accept the defendant’s submission in this regard and considered that the charges were legitimately raised by the Harbour Master, but that the rate of those charges was confined to the original rates stipulated by the Bye-Laws, namely €0.63 per metre per day. A recalculation of the charges based on this rate reduced the claim to

€16,353.81 and accordingly, judgment for that amount was given together with costs on the Circuit Court scale and a certificate for senior counsel.

The Appeal

17. The essential complaint of the defendant in his notice of appeal is that the trial judge found him liable for a sum never claimed or pleaded by the plaintiff. Since this was not the basis on which the proceedings were instituted, they should have been dismissed. In its respondent's notice, the plaintiff does not seek to cross-appeal the trial judge's determination, which it accepts, and disputes that any error of law was made by the trial judge in finding as he did.

Discussion

18. The first and most obvious point to note in relation to the defendant's notice of appeal is that he places sole reliance on a ground of appeal never raised or argued in the High Court. In general, such an approach is impermissible. There are exceptions as the judgment of the Supreme Court in *Lough Swilly Shellfish Growers Co-op Society Ltd. v. Bradley & Ors* [2013] 1 IR 227 makes clear. More recently, the Supreme Court considered the admissibility of new evidence and arguments on appeal in cases tried on affidavit in *Ennis v. Allied Irish Banks plc* [2021] IESC 12. The judgment of MacMenamin J. in the latter case suggests that a less strict approach may be taken to the introduction of new evidence and/or argument in summary proceedings heard on affidavit, although of course the present case, while it commenced life as a summary claim, was ultimately determined at plenary hearing with a full suite of pleadings.

19. Both of these decisions were recently considered by this Court in *Promontoria (Arrow) Limited v. Mallon & Anor* [2021] IECA 130 where I noted (at para. 31): -

“However, lest it be thought that the *Ennis* decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the *K.D.* principle remained ‘the general principle’ i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be ‘clearly required in the interests of justice’. McMenamin J. viewed the *Ennis* case as falling within the category of ‘truly exceptional’.”

20. I also noted in that case (at para. 23) that if the new arguments sought to be advanced on appeal had been made in the High Court, the other side may well have been able to answer them by either delivering further particulars, amending their pleadings if necessary and swearing further affidavits to address the point. Similar considerations appear to me to arise in this case.

21. Not only was this argument not made by the defendant in the High Court but as I have said already, the trial judge expressly noted that the defendant admitted that he was quite prepared to pay the normal harbour charges of a fishing boat. That has been the tenor of his defence throughout. Thus, in his first affidavit the defendant never contended that charges were not due by him to the plaintiff, but rather, that what he owed was what was stipulated in the 2004 Bye-Laws. The judge agreed with that proposition but now the defendant seeks to say, *de novo* on appeal, that despite that admission, it is a case of “all or nothing” for the plaintiff and therefore, the claim must be dismissed.

22. That is, in many ways, a surprising contention to the extent that it suggests that if a plaintiff in a liquidated claim does not establish that the precise sum claimed is due, the court, having found a different (lesser) amount due, cannot give judgment for that different amount. That proposition is in my view quite untenable. Courts on a daily basis when dealing with liquidated claims give judgment for amounts different from the amount claimed for any number of reasons.

23. Had this argument been advanced in the High Court, the plaintiff, had it thought it necessary to do so, could have applied to amend its pleadings to claim alternative amounts depending on the court's determination as to the validity of the increased charges, and would have been likely to have succeeded in its application.

24. As for the suggestion that the amount awarded was never demanded, again, the same considerations apply as this point was never taken in the High Court and if it had been, argument might, for example, have been addressed to whether a formal demand prior to proceedings was necessary where a statutory charge arose.

25. This is not a case within the less onerous end of the "spectrum" of new evidence/arguments discussed in *Lough Swilly* where the argument on appeal supplements or follows on from an argument made in the High Court and does not call for any additional or new evidence. On the contrary, the argument now sought to be made by the defendant on appeal is one that is directly contrary to the position he adopted in the High Court. The observations of O'Donnell J. in *Lough Swilly* are pertinent:

“ At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K.D.* for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in *Movie News*); or, for

example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal” (my emphasis).

In his first replying affidavit, the defendant made clear that he did not cavil with the original rate payable under the Bye-Laws but was solely concerned with the increases. Thus, at para. 5 of his first replying affidavit, the defendant averred: -

“I tried to come to an agreement with the plaintiff to pay at the old rates as others have done but agreement could not be reached.”

26. The argument on appeal is also inconsistent with the fact that, in the linked proceedings claiming damages against the Minister, as part of his special damages the defendant claimed the amount sought by the plaintiff in these proceedings on the basis that it was due by him.

27. The raising of arguments on appeal that are contrary to concessions made at first instance was recently considered by this court in *Leech v Independent Newspapers* [2021] IECA 203. In her judgment, with which the other members of the court agreed, Ni Raifeartaigh J. said (at p.35):

“As Murray C.J. said at paragraph 20 of *Keating v Crowley* [2010] IESC 29, “*it is difficult to contemplate circumstances in which a party would be permitted, in an appeal or otherwise, to impugn a determination by the High Court of an issue, such as liability, which had been expressly conceded by the party concerned.*” Of course, the U-turn on the liability issue which the State wished to make in the *Keating* case

was particularly dramatic, but the principle also applies to smaller, more mundane concessions made at trial. The ban on raising point on appeal which were conceded at trial was reiterated in *Koger v O'Donnell* [2013] IESC 28.”

28. The defendant also sought to suggest that the claim was determined on a *quantum meruit* basis by the trial judge and this was never pleaded or claimed. I do not accept that contention. It is clear in my view that the trial judge determined the claim solely on the basis of the rate provided for in the original Bye-Laws without regard to the subsequent increases and on no other basis.

Conclusion

29. For these reasons, I am satisfied that the conclusions of the trial judge were correct and I would accordingly dismiss this appeal.

30. My provisional view with regard to costs is that, as the plaintiff has been entirely successful, it is entitled to the costs of the appeal. If the defendant wishes to contend for an alternative order, he will have liberty to notify the Court of Appeal Office accordingly within fourteen days of the date of this judgment and a short supplemental hearing on costs will be arranged. If such application is made by the defendant and results in the order proposed herein, the defendant may be additionally liable for the costs of such supplemental hearing.

31. As this judgment is delivered electronically, Costello and Ní Raifeartaigh JJ. have indicated their agreement with it.