THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 146

Record Number: 2017/480
High Court Record No. 2017/494S
[2017 101 Com]

Irvine J.
McCarthy J.
Costello J.

BETWEEN/

LAUNCESTON PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

-AND-

DAVID WRIGHT

DEFENDANT/APPELLANT

JUDGMENT of the Court delivered on the 3rd day of June 2020

Introduction

1. On the 18th of December, 2019, Mr. Justice McCarthy gave judgment on the appellant's (Mr. Wright) appeal against the judgment of Kelly P. of the 5th October, 2017 with which Irvine and Costello JJ. agreed. The Court affirmed the judgment of the High Court which granted the respondent summary judgment in the sum of €1,742,842.27 and remitted the balance of the claim to plenary hearing. This supplemental judgment must be read with that of the 18th December, 2019 ("the substantive judgment"). By motion of the 20th January, 2020, Mr. Wright has

sought to "review" the substantive judgment and this judgment deals with that motion.

The Jurisdiction to Review a Judgment of the Court

2. The jurisdiction to review or set aside a judgment now invoked is an exceptional one. Judgments are otherwise final (subject, in the case of this court, to the acceptance by the Supreme Court of an application for leave to appeal to it).

3. This jurisdiction to revisit an earlier decision was first recognised by Denham J. in the decision of the Supreme Court in *Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514, where, at p. 44 she said:-

> *"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."*

4. Subsequently, in *DPP v. McKevitt* [2009] IESC 29, the Supreme Court held that:-

> "***Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such***. *Secondly, the grounds of the application must* ***objectively demonstrate that***

there is a substantive issue concerning a denial of justice *in the proceedings in question consistent with the onus of proof on an applicant.*" (emphasis added).

5. This Court also addressed the scope of the jurisdiction in *Friends First Managed Pension Funds Limited v. Paul Smithwick* [2019] IECA 197 whereby Whelan J. said:-

"*15. The court retains a power to vary or reverse its decision at any time until the order consequential upon its judgment has been perfected. The power to review is to be exercised in accordance with the overriding objectives of the Constitution. It is incumbent on the parties to assist the court in ensuring that the matter is dealt with justly and at a proportionate cost.*

16. Implicit in the jurisprudence is the importance of proportionality and finality. ***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****. In particular, the jurisdiction cannot appropriately be used as a vehicle to present further other or new arguments after judgment on material that was before the court which could have been deployed or availed of at the original appeal hearing for the proposition later advanced.*" (emphasis added).

6. In *Bailey v. The Commissioner of An Garda Síochána* [2018] IECA 63, the Court of Appeal emphasised that only a *fundamental error* which has a *significance or a consequence for the result* could amount to a denial of justice within the meaning of

the case law on this issue (emphasis added). Further, the Supreme Court in *Tassan Din v. Banco Ambrossiano S.P.A* [1991]1 I.R. 569, held that the discovery of new evidence, even if it would have affected the result if available at the time of the original hearing, is not a basis for setting aside a final order or judgment. This statement of principle was reaffirmed as being undoubtedly the law in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 by Fennelly J. speaking for the Supreme Court.

7. In summary, the jurisdiction:-

(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.

The Jurisdiction to Grant Summary Judgment in Respect of Part of the Sum Claimed

8. In the recent decision of the Supreme Court *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, the Chief Justice addressed the common practice of entering summary judgment in respect of part of the sum claimed while adjourning the balance of the proceedings to plenary hearing. The court does so where it is satisfied that the defendant has established an arguable defence to part only of the claim and therefore adjourns to plenary hearing that portion of the claim in respect of which the defendant has raised an issue for trial. The Chief Justice held (at para. 6.10) that:-

> "*... Where there is prima facie evidence of the precise amount said to be due but where the defendant puts forward an arguable case which could only go so far as providing a defence to a portion of the claim ... it is common practice for a court to award judgment for a lesser sum than that claimed, reflecting the outer extent of any possible defence.* ***The analysis which leads to such a result does not depend on any failure of the plaintiff to have put forward prima facie evidence of an entitlement to a specific sum but rather stems from the possibility that a defence might successfully be mounted, although the extent of that defence may not be absolutely clear.*** **"** (emphasis added).

The Issues Raised by Mr. Wright

9. The following issues were raised by Mr. Wright which he said engaged this wholly exceptional jurisdiction of the Court to review a final judgment:-

(i) He submits that certain "additional" legal submissions were not dealt with in the substantive judgment, consisting of criticisms of the manner in which

the trial judge conducted the hearing, the calculation of interest, a supposed failure to "deal adequately with the material presented" and that he acted outside jurisdiction;

(ii) He complains that the court did not abide by an assurance by the members of the court that, if he did not address a point in his oral submissions, that all of his written submissions would be considered by the court, as all of his points were not expressly addressed in the substantive judgment;

(iii) He says the court breached the principle of *audi alteram partem*;

(iv) He submits that the court ought to have applied the standard of proof applicable in criminal proceedings rather than which applies in civil claims;

(v) He submits that the court erred in determining that certain documents (referred to in paragraphs 9 and 10 of the substantive judgment) had been furnished by or on behalf of Launceston when, according to Mr. Wright, they were not;

(vi) He refers to a report of an Oireachtas Committee to support his argument that the judgment sum is incorrect and that his appeal ought to have been allowed;

(vii) He says that the trial judge was incorrect in "allowing for summary judgment in the case where the identifying features of the transfer documents do not relate to me";

(viii) He contends that this Court erred in holding that the trial judge was obliged to decide whether he had demonstrated a *bona fide* defence to the claim advanced. He argues that, following the decision in *Bank of Ireland Mortgage Bank v. O'Malley*, before considering the issue of the defence of the defendant, the court must determine whether the "plaintiff had proved

their figures and how they were calculated and if this was not done …. the plaintiffs… could not move to the second stage of summary judgment which is the defence" and this was not done in his case;

(ix) Separately, he relies on *O'Malley* to argue that the sum claimed was not sufficiently particularised nor the calculation of the sum claimed properly explained in the summary summons.

(x) He contests the lawfulness of the approach of the court to Launceston's admitted error of €299.27 in the total sum claimed. He submits, in light of this accepted error, he was entitled to have the entire claim referred to plenary hearing on the grounds that the error casts doubt as to the accuracy of all the proofs adduced by Launceston;

(xi) He argues that the error identified at (x) above might assist him substantiate or corroborate his further complaint that Launceston has not credited his account with rent collected from secured properties by the receiver appointed over those properties;

(xii) He argues that he is a party to four sets of proceedings "involving the same legal team for both Launceston and Ken Tyrrell" [Mr. Tyrrell being the receiver appointed to the secured properties] and that this fact afforded him a defence to the claim in these proceedings which was not addressed in the substantive judgment;

(xiii) He relies on the alleged commission of supposed criminal offences, without substantiation and contacts he has with the Gardaí, in connection with the receivership, sales figures and costs in respect of properties at 1A Chapelizod Road, Dublin 8 and 1 Summercove, Rosslare Strand, Co. Wexford;

(xiv) He alleges that Launceston has "withheld important evidential material" from the Court;

(xv) He submits that allegedly improper conduct by the solicitors for Launceston affords him a defence;

(xvi) He alleges that an incomplete "Global Deed of Transfer" was produced in the course of these proceedings and that it was dealt with in an erroneous manner such as to undermine the validity of the judgment obtained in reliance on the redacted deed;

(xvii) He says that the court erred in relying upon the affidavits of Neil Hogan and John Burke in relation to the issue of the transfer of the loan to Launceston;

(xviii) He submits that Launceston's treatment of the gross sale price achieved for certain premises and its failure to provide him with information in respect of the sale of secured properties were wrong and afforded him a defence or at least the right to have the entire claim remitted to plenary hearing;

(xix) He says the Court erred in its treatment of the calculation of interest by Launceston;

(xx) He says that there were errors in relation to the treatment of VAT;

(xxi) He raises issues which allegedly give rise to proceedings against IBRC;

(xxii) He says he was not afforded credit for rent collected by the receiver appointed over the secured properties;

(xxiii) He says that the statements of account produced to the court have been "altered and [are] unreliable";

(xxiv) He says that the affidavits filed by Launceston do not comply with the provisions of The Bankers Books Evidence Act and accordingly he says

that Launceston ought to have been required to adduce oral evidence to prove its claim;

(xxv) He asserts that he was at a disadvantage by the conduct of the proceedings in the High Court because they were determined by way of summary procedure rather than following upon a plenary hearing;

(xxvi) He relies on two letters dated 18th April 2019 and 27th August 2019 which were not before this Court when the appeal was heard on 30th July 2019.

(a) The first letter dated April 18th, 2019 informs Mr. Wright of the transfer of the legal ownership of his loan to Pepper Finance Corporation (Ireland) DAC;

(b) The second latter dated August 27th, 2019 says that says that following a review of interest charged by IBRC, Mr. Wright was overcharged interest on his accounts both before and after liquidation. This resulted in an amount of €1,699.58 owing to him by IBRC in respect of the pre-liquidation period, (including what is defined in that letter as "Unsecured Creditor Interest"; the amount actually overcharged being €1625.51), and the sum of €468.64 in respect of such overcharging for the post-liquidation period.

On the basis of the first letter he argues that the transfer of the loan is legally invalid or unproved, and on the basis of the second letter he argues that the judgment sum is incorrect because there is a provable error in the calculation of the interest claimed and the entire claim should now be referred to plenary hearing.

10. Mr. Jeremy Erwin swore a replying affidavit on January 29th, 2020 to this motion and thereafter a replying affidavit thereto was filed by Mr. Wright on February 13th, 2020 purporting to dispute the former and revisit the arguments set out above.

Discussion

11. As is apparent from the list of Mr. Wright's submissions on this application, he seeks to revisit the merits of the decision of this court in the substantive judgment. In effect, he asks the Court to rehear the appeal. He repeats arguments which he made at the hearing of the appeal and which were considered and subsequently rejected by this Court. Insofar as he raises arguments which were not raised at the hearing of the appeal, this is too late and impermissible. Parties are required to present their full case when they come to court and the court will rule on the basis that they have presented their full case. To proceed otherwise would lead to unending litigation, would squander the scarce public resources of the courts and deny successful parties of the fruits of judgments issued in their favour. It is wholly inimical to the proper administration of justice. Further, the sums referred to by Mr. Wright in the letter, dated August 27th, 2019 could not have any impact on the amount due pursuant to the judgment. Even if it could, it is clear from *Tassan Din,* that the discovery of new evidence after final judgment (subject to any appeal to the Supreme Court) does not entitle this court to revisit its judgment. There is no basis for giving any consideration to matters of alleged criminality or Garda involvement

12. There is no obligation on a court to address each and every point advanced by each party. In *Doyle v. Banville* [2018] 1 I.R. 505, speaking for the Supreme Court, Clarke J. (as he then was) held that it was important that the judgment engage with the *key elements* of the case made by both sides and explained why one side was

preferred and won the case or appeal as the case may be (emphasis added). Thus, a court is required to address the substantive points central to the case raised by each of the parties, but this does not mean that a party has a legitimate grievance where wholly peripheral, irrelevant or unstateable points are not specifically addressed in the judgment of the court. The failure of the judgment expressly to address each unmeritorious point advanced by a losing party cannot form the basis for an application to review the judgment and comes nowhere near satisfying the high bar which a litigant must clear in order to engage this exceptional jurisdiction. Thus the failure of the substantive judgment to address the unstateable proposition that an application for summary judgment should be subject to the criminal level of proof or the irrelevant argument that the affidavits of Launceston did not satisfy the requirements of the Bankers' Books Evidence Act, when no reliance was placed on any of the provisions of the Act or the attempt to rely upon allegedly relevant evidence which Mr. Wright did not seek to adduce or which was created after the hearing of the appeal or arguments relating to the conduct of separate litigation which was not relevant to the outcome of these proceedings or issues which could have no bearing on the question of his liability to repay a debt to Launceston are of no avail to Mr. Wright.

13. The constitutional imperative to administer justice is the basis and the rationale for the exceptional jurisprudence invoked in this application. The party invoking the jurisdiction must identify an issue of constitutional justice. If no such issue is *credibly* identified – and by that is meant that a mere formulaic reference to or a bare assertion of alleged breaches of constitutional justice do not suffice-then this court may not even engage in consideration of the issues raised. In *McKevitt* the Supreme Court held that the mere assertion of a breach of constitutional rights is

not sufficient basis for seeking to set aside a final order. Under the constitution the decisions of this court are final subject only to the supreme court accepting an appeal for this court. It is not open to this court in the constitutional order to review or revisit its final decisions, save in the circumstances discussed above.

14. Mr. Wright comes nowhere near satisfying the very high threshold he is required to meet. He does not even attempt to do so. While acknowledging the fact that he is representing himself in this application, most unusually for a lay litigant he is particularly well versed in this area of law as he has brought at least one similar such application in the past. This underscores the stark failure by him to engage with relevant jurisprudence or to attempt to identify any issue of constitutional justice arising from alleged errors in the substantive judgment.

15. Accordingly, this Court is satisfied that it is not entitled to review its substantive judgment on any of the grounds advanced by Mr. Wright in this application.

Slip Rule Amendment

16. The court may correct an error in a judgment which would not have any impact on the substantive or ultimate decision reached without difficulty under the so-called Slip Rule (O. 28, r. 11 of the Rules of the Superior Courts). Judgments are ordinarily issued in the first instance in an unapproved form so that any errors of this kind, which have no bearing upon the substance, can be identified. Such irrelevant or inconsequential errors are regularly corrected by courts. A typographical error of this nature occurred in the substantive judgment. The sum of €299.27 is referred to at one point in the judgment as €297 in error. It is obvious that this is a typographical error and the figure €297 should read €299.27. The judgment will be corrected accordingly.

17. A second, entirely irrelevant error will likewise be corrected in the interests of accuracy. Paragraph. 23 of the substantive judgment reads:-

> "*At para 29(f) of that affidavit [the affidavit of Mr. Jeremy Irwin of the 11th of April 2019] Mr. Irwin deposes to the fact 'and it is not controverted' that the rental income [of certain property] was credited against Mr. Wright's liabilities and that he was notified of this fact on the 25th of May 2017]*"

18. In fact, this was controverted in the affidavit of Mr. Wright of the 24th May, 2017 but this fact has no bearing on the result. However, for the avoidance of any factual inaccuracy, the phrase "*and it is not controverted*" will be excluded and replaced with the phrase "*controverted in Mr. Wright's affidavit of the 24th of May 2017".*

Conclusion

19. The Court is satisfied that the present application, even though it is cast as an application to set aside the substantive judgment of this court, is one which can only be categorised as an attempt on the part of Mr. Wright to have a second appeal against judgment of the High Court, in circumstances where his Constitutional entitlement is confined to one appeal. In so doing, he has impermissibly sought to argue points rejected by this Court in its substantive judgment and equally impermissibly sought to advanced issues and arguments which he might have, but did not, pursue on the substantive appeal.

20. It is important to state that the fact that Mr. Wright is conducting this litigation in person does not relieve him of the need to comply with the rules that govern litigation of this nature nor the proofs required to justify this court revisiting its own judgment. Neither does it exempt him from his obligation to comply with the

judgment of this court following the dismissal of his appeal. As each and every one of the points raised by Mr. Wright in fact goes to the merits of the case or are unstateable or irrelevant to the question whether the trial judge was correct to enter judgment against him in the judgment amount, the threshold required to be satisfied to give rise to the jurisdiction so to do has not been met and accordingly it is not open to this Court to review the main judgment. No issue of constitutional justice has been raised by Mr. Wright in the myriad of points argued and thus the application must fail.

21. For all of the aforementioned reasons the court rejects Mr. Wright's application to revisit the substantive judgment. He has failed to meet the threshold required for the court to consider setting aside the judgment or any part thereof either on the facts or as a matter of law or both.