



THE COURT OF APPEAL

UNAPPROVED

**High Court Record No. 2017/6204P
Court of Appeal Record No. 2022/3**

Neutral Citation No. [2022] IECA 90

**Whelan J.
Ní Raifeartaigh J.
Binchy J.**

BETWEEN/

TOM KAVANAGH AND Tanager DESIGNATED ACTIVITY COMPANY

**PLAINTIFFS/
RESPONDENTS**

- AND -

**JAMES LARKIN (SOLE APPELLANT) AND CATHERINE (OTHERWISE
QUINN) LARKIN**

DEFENDANTS

JUDGMENT of the Court delivered on the 7th day of April 2022

1. The Court heard two appeals in these proceedings. In these appeals, the first named defendant only is the appellant, and each appeal is from a decision, that is to say two separate decisions, handed down by Allen J. in the High Court on 13th December last. It is not clear to the Court whether the second named defendant participated in these proceedings in the High Court. The first named defendant appeared before this Court as a litigant in person. Where appropriate, we will refer to the first named defendant as the “appellant”, and both defendants collectively as the “defendants”. The respondents will be referred to either as the “respondents”, or, where necessary, as the “first respondent” and the “second respondent”.

2. Each of the decisions under appeal relates to an earlier decision of the trial judge handed down on 26th April 2021. That decision, which we address in more detail below, gave rise to an order which was perfected the following day, 27th April 2021, which order was not appealed by either party.
3. However, each of the parties issued a motion arising out of the decision of the trial judge of 26th April 2021, which gave rise to the decisions of 13th December 2021, being the decisions now under appeal.
4. Before proceeding further, it is helpful to set out very briefly the background giving rise to these proceedings. The first named respondent is a receiver appointed by the second named respondent over a property at Clonsilla, Dublin 15 (the “property”), which at the time of the issue of the proceedings herein on 10th July 2017 was owned by the defendants. The respondents claim that the defendants fell into arrears with repayment of a loan originally taken out by the defendants with Bank of Scotland Ireland, which loan was secured over the property. The respondents claim that that loan, and the security over the property became vested in the second named respondent. The respondents further claim that as a result of the defendants falling into arrears in repayment of the loan, the second named respondent appointed the first named respondent as receiver over the property.
5. The respondents further claim that the defendants failed to deliver up the property to the respondents, upon being requested to do so, and interfered with the first named respondent in the conduct of the receivership. As a result, the respondents issued the within proceedings claiming certain reliefs, including an order restraining the defendants from interfering with the functions of the first named respondent as receiver over the property, an order restraining the defendants from trespassing upon the property, an order to cease occupancy of the property, and related orders. On 10th July 2017, the respondents caused the issue of a motion seeking interlocutory reliefs in those terms.

6. For reasons with which this Court is not concerned, that motion was adjourned on numerous occasions, but was ultimately made returnable before the High Court on 6th May 2021. However, when another motion in the proceedings was before the court (being a motion issued by the defendants) on 26th April 2021, the respondents applied to strike out both their own motion and the substantive proceedings by reason of the respondents having taken possession of and having disposed of the property.

7. The defendants had issued a motion in the proceedings on 25th January 2021, and it was this motion that was listed before the court on 26th April 2021. By this motion the defendants sought, *inter alia*, the attachment and committal of the respondents on grounds that they were in contempt of court, as well as the attachment and committal of a company called BRG Gibson Auctions Belfast and Dublin, and the directors of that company. It was only that motion which was formally before the court on 26th April 2021.

8. However, as mentioned above, the motion issued by the respondents in July 2017, which had been adjourned on numerous occasions, was re-entered by the respondents and made returnable before the court during the week following, on 6th May 2021. The respondents considered it appropriate to inform the court, on 26th April, of their wish to discontinue their motion and the proceedings generally in light of the sale of the property, to the intent of having the entire proceedings discontinued immediately, and thereby avoiding an unnecessary hearing on 6th May. Although the respondents did not serve a notice of discontinuance of the proceedings, they had informed the defendants of their intention to apply to court to discontinue the proceedings. At the hearing of this appeal counsel for the respondents informed the Court that their solicitors had written to the defendants on 9th April 2021 informing them of their intention to make such an application. While not accepting that he had received any such correspondence, the appellant confirmed to the Court that he was fully aware of their intention to discontinue the proceedings, but he was not consenting to

the application and he had expected to be able to address the court the following week, on 6th May 2021, and on that date to contest the entitlement of the respondents to sell the property.

9. The Court has the benefit of a transcript of the proceedings before Mr. Justice Allen on 26th April 2021. It is apparent that the court heard the defendants' motion first on that date, and declined the reliefs sought. The trial judge did so because he could find no basis for the grounds relied upon by the defendants in support of their motion. Having found against the defendants on their motion, the trial judge awarded the respondents their costs incurred in relation to that motion, against the defendants. The defendants did not appeal the decision of the trial judge in this regard (i.e. either the order dismissing their application or the order for costs against them) and we mention this motion only by way of background. The court then proceeded to address the application advanced by the respondents to strike out both their own motion of July 2017 and the substantive proceedings.

10. As regards the application of the respondents to strike out the proceedings, the trial judge stated:

“When the plaintiffs abandon the actions against him [referring to the appellant], it follows as a matter of law if they did it as a matter of discontinuance, it would follow that the plaintiffs are liable for his expenses or, if they do it by way of an application to the court, they are liable for Mr. Larkin's expenses in connection with the proceedings but that's as far as it goes.”

The trial judge also stated that there would be no point in bringing everybody back again the following week (on 6th May) to make the same application again. Accordingly, in the context of costs the trial judge made an order in favour of the defendants, directing payment of their outlay incurred in connection with the proceedings, by the respondents. The trial judge further ordered that the respondents should be entitled to set off any liabilities to the

defendants in respect of their expenses, against the liabilities of the defendants to the respondents, arising out of the costs order made against the defendants consequent upon the dismissal of their motion. The trial judge expressly ordered that both the respondents' motion of 10th July 2017 and their action against the defendants should be struck out. For that purpose, he brought forward to 26th April the proceedings that were listed before the court for the following week, on 6th May. While the appellant suggested that he might appeal the order of the trial judge (striking out the proceedings and the motion), he did not in fact do so.

11. Although the DAR transcript makes clear that the trial judge struck out both the respondents' motion of 10th July 2017, and the substantive proceedings, the order drawn and perfected to the following day recorded only that the motion was struck out. As a result, the respondents caused the issue of a motion, on 14th October 2021 seeking relief pursuant to O.28, r.11 of the Rules of the Superior Court – the slip rule – and an order to correct the order of 26th April 2021 so as to reflect the fact that the substantive proceedings had been struck out by the judge on the latter date, together with a consequential amendment to the order to reflect that the legitimate expenses of the defendants incurred in connection with the proceedings should be paid by the respondents to the defendants. That motion was made returnable for 13th December 2021.

12. However, before the issue of that motion, the defendants had issued a motion of their own, or at least the appellant had, because it was signed only by the appellant. However, since the trial judge appears to have dealt with it as a motion issued by both defendants, it is appropriate that this Court should also do so, subject to what we say about the costs order made in the High Court at the conclusion of this judgment. That motion was filed on 11th June 2021, and while the precise orders sought by the motion are unclear, it appears the defendants were seeking an order from the court to “perfect the orders” referred to therein

in the terms referred to in the motion and specifically so that the order would state that the trial judge had, on hearing the motion, acted improperly and interfered with and perverted the course of justice. The motion then quotes verbatim the orders sought by the defendants' original motion. The defendants also sought an order in connection with an earlier motion of the defendants of 27th May 2019, which was not before the court at all on 26th April 2021, and they further sought ancillary reliefs such as an order for the DAR transcript of the proceedings, and costs.

13. Both motions came before the trial judge on 13th December 2021. He dealt with the defendants' motion first, being the first motion in time. He noted that to the extent that the defendants wanted the order of 26th April to provide the reasons for the decision of the trial judge on that date, that he had given those reasons orally on that date, and that an order of the court does not set out the reasons for the judgment of the court. In so far as the defendants asked the court to amend its order to record that the court had, on hearing the motion, acted improperly and interfered with and perverted the course of justice, the trial judge observed that a High Court order would never say such a thing, and to that extent he found the defendants' motion to be misconceived.

14. Insofar as the defendants' motion sought to deal with an earlier motion of 27th May 2019, he noted that that particular motion had been dealt with previously, and had been struck out and accordingly the defendants' application in that regard was plainly misconceived also.

15. Finally, the trial judge noted that if the defendants were dissatisfied with the orders made by the High Court, their remedy was to appeal to the Court of Appeal, and not to come back to the High Court asking it to revisit decisions already made. He therefore refused the reliefs sought by the defendants in their motion of 11th June 2021.

16. He then went on to address the application advanced by the respondents under the slip rule. He heard counsel for the respondents advance the reasons for that application, and heard the objections of the defendants. The defendants objected to this application on the key grounds, *inter alia*, that they had received no motion from the respondents to discontinue the proceedings which was due for mention before the court the following week (i.e. on 6th May). It appears that the substance of the objection was that the defendants were expecting to be in court the following week in connection with the discontinuance of the substantive proceedings, and that they had intended addressing the court regarding the proceedings generally on that occasion, and, *inter alia*, to make objections to the appointment of a receiver and the sale of the property.

17. The trial judge noted that, while the respondents had not filed any motion in connection with the discontinuance of the proceedings, it was open to the appellants to serve a notice of discontinuance which would have automatically given rise to their entitlement to, in the words of the trial judge, “abandon a motion and the action in court without formally bringing an application to that effect”. Once they did that, the respondents would be liable to pay the expenses of the defendants, but otherwise the proceedings would be at an end.

18. The trial judge considered the order drawn and perfected on 27th April, and held that there was an error disclosed which required correction, and he made an order in the terms of the notice of motion of the respondents to reflect the order that he had actually made on 26th April 2021.

19. The trial judge also noted that it was important to emphasise that the court did not adjudicate upon the issue as to the validity of the appointment of the first named respondent as receiver over the property, this being an issue raised by the defendants in the proceedings by way of affidavit, in the context of the respondents’ motion of July 2017. However, that matter did not fall for adjudication by the court because the action was withdrawn. Since

the drawing up of the order was not the responsibility of either party, the trial judge made no order as to costs. The trial judge also made no order as to costs on the motion brought by the defendants.

20. In the course of the hearing on 13th December, the appellant asked the trial judge to recuse himself from the proceedings on the grounds that he was prejudiced against the defendants. When delivering judgment, the trial judge did not expressly address this application, but by necessary implication he rejected it by not recusing himself.

Notice of Appeal

21. In his notice of appeal, filed on 10th January 2022, the appellant set out seven grounds of appeal. In these grounds of appeal, he accuses the trial judge of disregarding the defendants and their arguments, misconduct and abuse of process. He claims the trial judge failed to consider his jurisdiction in his treatment of the motions before him, that he failed to address the points of law raised by the appellants, and that he failed to recuse himself when requested to do so. He claims the trial judge erred in proceeding to deal with a motion which was not filed, by the respondents, and that there was no lawful basis for the orders made by the trial judge. He asks this Court to set aside the orders of the trial judge in their entirety.

Respondents' Notice

22. In their respondents' notice filed on 9th February 2022, the respondents set out eight grounds of opposition to the appeal. They state that the appellant was not continually and wilfully interrupted by the trial judge (as contended by the appellant in his notice of appeal) and that the appellant was given ample time to address the trial judge. They state that the appellant had all pleadings and other papers necessary for the purposes of the proceedings before the court. They say that the trial judge addressed all papers in detail. They say that while there was no formal application before the trial judge to recuse himself, he nonetheless

considered the application of the appellant in this regard, but refused to do so as the application was groundless. They say that the trial judge did not err in law or in principle as alleged by the appellant.

23. The respondents further state that the decision of the trial judge made pursuant to O.28, r.11 of the Rules of the Superior Courts reflected the manifest intention of the judge in his decision of 26th April 2021. The decision made by the judge (on 13th December 2021, pursuant to O.28, r.11 of the Rules of the Superior Courts) was in compliance with authorities such as *Concorde Engineering Co. Limited v. Bus Átha Cliath* [1995] 3 IR 212, *Minister for Justice v. McArdle* [2005] 4 IR 260 and *McMullen v. Clancy* [2002] 3 IR 493.

24. The decision of the trial judge to refuse the reliefs sought by the appellant was correct as they were seeking orders which were entirely contrary to the manifest intention of the trial judge.

Submissions

25. In his written submissions, the appellant again complains about the conduct of the trial judge on 26th April 2021 and 13th December 2021, and on other dates that are not relevant. He claims the trial judge failed to address issues of law raised by him, that he interrupted the appellant and prevented him from reading his application into the court record, and failed to provide any lawful grounds for his decision. He claims that the judge ignored the motion to recuse himself, and did not explain why.

26. The appellant also raises issues about an earlier decision of the Ms. Justice Reynolds, which was not before the court at all on that date.

27. He submits that the trial judge, on 26th April, granted an application that was not before the court at all, by way of motion or otherwise i.e. the application of the respondents to discontinue the proceedings. He claims that in the absence of consent, which the appellant

had made clear was not forthcoming, such an application could only be granted pursuant to a motion seeking such relief.

28. The appellant also raises other arguments in his submissions, which it is not necessary to summarise here, concerning the lawfulness of the appointment of the first named respondent as receiver of the second named respondent, as well as other matters concerning the substance of the proceedings. It is unnecessary to address these arguments in any way because these were not matters before the court and are not the subject of any adjudication at all by the trial judge, never mind the matters under appeal.

29. The appellant makes it clear that he prepared the submissions without the benefit of the DAR transcription of the proceedings, but of course it must be observed that the appellant was in court and an active participant on both 26th April and 13th December 2021. Moreover, by the time this appeal came on for hearing however, the transcript of the proceedings of the court on both dates was available to the appellant.

30. In their submissions, the respondents claim that by his motion, the appellant sought bespoke orders in place of those granted by the court on 26th April 2021, contrary to the manifest intentions of the trial judge. The trial judge was correct in his determination that the order of 26th April 2021 should not set out the reasons for the decision of the trial judge, or be amended to record that the court had acted improperly, it was contended.

31. The respondents also submit that the trial judge was correct in refusing to change his order so as to amend an earlier order made by Reynolds J. in the High Court. The respondents also point out that the defendants had actually appealed this particular decision, but the appeal was struck out because of the failure on the part of the defendants to comply with an ‘unless’ order of this Court in relation to that appeal. This was not something which the appellant drew to the attention of this Court. However, in the course of the hearing of this appeal he submitted that there had been no determination of the merits of the appeal,

and that the defendants had been unable to comply with the ‘unless’ order because they did not have the transcript of the hearing before Reynolds J.

32. As regards the order of the trial judge granting the application of the respondents, the respondents submit that this is in accordance with O.28, r. 11 and with the jurisprudence referred to above. They quote from the decision of Murray C.J. in *McMullen v. Clancy* in which he stated that there is a fundamental public interest in ensuring that an order of the court accords with what the court has decided, and that the order should “not be thwarted by an accidental slip or error or clerical mistake.”

Decision

33. We have carefully considered the written and oral submissions of the parties. We have no hesitation in saying that both appeals should be dismissed. Both appeals are unstateable.

34. Dealing first with the defendants’ motion of 11th June 2021, the orders sought are clearly an abuse of process. It beggars belief that the defendant/s could be serious in asking a trial judge to amend his order so as to state that in making the order he interfered with and perverted the course of justice. In the course of the hearing of this appeal, the appellant was twice given the opportunity to withdraw this allegation, but regrettably he declined to do so.

35. The second order sought in the defendants’ motion related not to an order made by the trial judge at all, but to an order made by Ms. Justice Reynolds on 27th May 2019. As already mentioned above, the defendant/s purported to appeal that order, but failed to comply with directions of the Court concerning their appeal, as a result of which it was struck out. The appellant complained that the Court had not dealt with his appeal in that regard ‘on the merits’ but the fault lies entirely with the appellant for failing to comply with an ‘unless’ order made by the Court. Such orders must be complied with by all litigants if they wish to prosecute their appeals.

36. As to the decision of the trial judge in respect of the application of the respondents, pursuant to O.28, r.11, there is not the slightest doubt but that the order he made was made in accordance with the wording of the rule, with the purpose of the rule and with the jurisprudence relating to the rule. As the DAR transcript records, the trial judge on 26th April 2021 explicitly struck out not just the respondents' motion of 10th July 2017 but the proceedings in their entirety; he referred to a strike out of both "the action" and "the motion". The order drawn up and perfected on 27th April 2021 referred only to the striking out of the motion. This was clearly an error of precisely the kind for which O.28, r.11 is intended to rectify.

37. In the course of the hearing of this appeal, the appellant confirmed that he fully understood the nature and purpose of an application under O. 28, r. 11. However, he appeared to have difficulty accepting that the trial judge made the orders that he did on 26th April 2021, i.e. that the orders made by the court on that date referred not just to the respondents' motion, but also to the substantive proceedings, even when the express words of the trial judge as appearing in the transcript of the hearing of 26th April 2021 were read back to him by this Court. Ultimately, on being pressed by the Court, he appeared to accept that the trial judge had indeed made the orders that he did, although in making this concession he did so in a qualified way, saying the situation should never have arisen. In any case, whether he accepts it or not is of no consequence. The trial judge clearly ordered the striking out of both the motion and the substantive proceedings as the transcript of the hearing conclusively shows.

38. The appellant submits that the respondents should have moved their application to discontinue their proceedings by way of a motion or other formal notice of application, and that there was no proper application before the court to discontinue the proceedings on 26th April 2021. However, as the trial judge pointed out on that occasion, it is open to any

plaintiff who wishes to discontinue proceedings to do so by filing a notice of discontinuance, following upon which that party will be liable for the costs and expenses of the defendants. Alternatively, as occurred here, a plaintiff may apply to court for permission to discontinue the proceedings, but in such event the plaintiff will still be responsible for the costs and expenses of the other party incurred up to that point in the proceedings. Although the trial judge did not expressly refer to the Rules of the Superior Courts, all of this is provided for in O. 26 of the Rules. While the appellant complained at the hearing of this appeal that the trial judge did not cite authority for making the order striking out the proceedings, the trial judge was under no obligation to do so. He correctly summarised and applied the relevant procedure. The orders he made were plainly within his jurisdiction. The procedures set out in the Rules of the Superior Courts are part and parcel of the everyday business of the courts and litigants, even lay litigants, should inform themselves of the correct procedures before accusing judges of failing to observe them.

39. The trial judge also correctly made an order directing the respondents to discharge any outlay incurred by the defendants in the conduct of these proceedings, subject only to a right of set off in respect of a costs order made in favour of the respondents. Being lay litigants, the defendants were entitled to no more than their outlay actually incurred. There was nothing else for the trial judge to consider, because the appellants had never filed a defence or counterclaim to the proceedings. As the trial judge observed, there were not before the court for determination any issues associated with the validity of the appointment of the receiver, and nor were any issues concerning the precise amount due and owing by the defendants in connection with the loan originally drawn down by the defendants from Bank of Scotland Ireland. If the defendants have complaints about these or any other matters, then they must advance these complaints by their own proceedings. They failed to do so.

40. Before concluding, we wish to make some observations about comments and allegations made by the appellant (orally and in writing) in the course of the proceedings about the conduct of the trial judge, and the other parties to the proceedings, and their representatives. In extravagant language, the appellant repeatedly accused the other parties to the proceedings and their legal advisors of, amongst other things, fraud, deceit and other criminal conduct. He advanced no evidence for these allegations, which were made by way of assertion only, and on the face of it appear to have been made in response to the exercise by the respondents of their legal entitlements. Allegations of this kind, which in no way serve the defendants' case, are scandalous and an abuse of process, and must be strongly deprecated by the Court.

41. Insofar as the appellant cast aspersions of a similar character on the trial judge, and further accused the trial judge of discourtesy and perverting the course of justice (and did so in the proceedings before the trial judge), his conduct was most probably a contempt of court. At the hearing of this appeal, the appellant went so far as to suggest that impeachment proceedings should be commenced against the trial judge. Any reasonable reading of the DAR transcript of the proceedings on both 26th April 2021 and 13th December 2021 demonstrates that the defendants were afforded a full and fair hearing on each occasion and were treated with courtesy by the trial judge. We cannot therefore let the occasion pass without rebuking the appellant for these remarks. If the appellant were to persist with such conduct in other proceedings, then this decision may be taken to be fair warning that such conduct may well result in proceedings against him for contempt of court.

42. For all of the foregoing reasons, we dismiss these appeals.

Costs

43. There can only be one order as to costs so far as this appeal is concerned, and that is that the respondents, having succeeded entirely in resisting both appeals, are entitled to an

order directing the appellant to pay their costs incurred in connection with each appeal in full, such costs to be adjudicated in default of agreement between the parties. As far as the costs of the proceedings in the High Court are concerned, given the lack of clarity as to the participation of the second named defendant in the proceedings, it is appropriate to adjust the costs order of the trial judge so as to direct that the appellant only, and not the second named defendant also, shall discharge the costs of the respondents incurred in connection with the appellant's motion filed on 11th June 2021, such costs to be adjudicated in default of agreement. In the event that the respondents only have any objection to this adjustment to the order for costs made by the trial judge, then they shall have liberty to apply.