THE COURT OF APPEAL

Court of Appeal Record No. 2021/126

Record No. 2019/232SP

Neutral Citation Number [2023] IECA 228

Barniville P.
Faherty J.
Ní Raifeartaigh J.

BETWEEN:

ALLIED IRISH BANKS, P.L.C.

Plaintiff/Respondent

and

RICHARD FINBAR FITZGERALD

Defendant

and

EILEEN DALY

Notice Party/Appellant

Judgment of the Court delivered on the 25 September 2023 in relation to Costs

1. The Court delivered judgment on the substantive appeal on the 22 December 2022 and invited written submission on the issue of costs, having expressed a preliminary view

(as it usually does) that the costs should be awarded to the successful party. In response, the parties provided written submissions. Those of the appellant focus primarily on criticizing the Court's judgment and appear to invite the Court to re-open the case, although there was no formal motion issued to that effect. The submissions say that the appellant requires the Court to "*review its Order, under the principles enunciated in Wright and Bailey, considering the adverse, and unfounded, and somewhat inadequate reasoning the Court has chosen*" and that "*the Court misunderstood, or possibly forgot, the grounds upon which the Applicant sought to advance in her appeal*".

2. As noted, the appellant did not bring any motion seeking to re-open the case, nor did she refer to the extensive jurisprudence setting out the parameters governing such applications (other than the fleeting reference to *Wright* and *Bailey* above, without citations). There is considerable caselaw in this area, including the key Supreme Court decision in *Greendale Developments Limited (No. 3)* [2000] 2 IR 514. Recent decisions of this Court where the caselaw is summarized include *Kirwan v. Connors* [2023] IECA 120, *Dowling and Others v. Minister for Finance* [2022] IECA 285 and *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63. The high threshold for re-opening a case in which judgment has been delivered was described in 2021 by Clarke CJ in *Student Transport Scheme Limited v. The Minister for Education and Skills and Bus Éireann* [2021] IESC 35 where he said that a party seeking a *Greendale* order must establish to the very high threshold identified in the case law that there has been a '*clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, in the manner in which the process leading to the determination in question was conducted*'. The appellant does not engage with the principles enunciated in those cases at all.

3. The appellant simply maintains that the Court misunderstood the points she was making

on appeal and dealt with a point that she did not make. For example, she complains that the Court erred in dealing with a point upon which she says she did not pursue on appeal, namely the effect of the Residential Tenancies Act 2004 upon her position. In fact, as appears from the grounds of appeal (set out in the substantive judgment on the appeal), her grounds of appeal included that the High Court judge erred in failing to interpret the Residential Tenancies Act 2004 correctly which would have protected her property rights. In any event, the fact that a court may address an argument unnecessarily does not in any way affect the remainder of a court's judgment; at worst, that part of the judgment is surplusage.

4. The appellant also complains as to how the Court dealt with the grounds of appeal which had raised new issues on appeal which had not been raised at first instance. As was its entitlement, the respondent objected to those being dealt with. The Court in its judgment made it clear that it would not deal with those arguments; see paragraphs 46-48 of the substantive judgment. The appellant in her submissions refers to, and is critical of, paragraph 34 of the Court's judgment but this is merely a setting out of the respondent's submissions. She also takes issue with how she perceives the Court to have dealt with the point on the merits. However, the Court clearly held that it was not deciding the issues on their merits and was instead declining to hear the arguments because they were raised for the first time on appeal. The appellant does not accept the Court's view in this regard, but a party is not entitled to have a case re-opened simply because she does not agree with the Court's conclusion to this effect.

5. The appellant also repeats (in her costs submissions) her arguments that she was prejudiced by reason of the absence of service of documents at the outset of the proceedings. The Court dealt with this issue at paragraphs 39 and 40 of its judgment and does not propose to repeat itself in that regard. The appellant raises one particular

issue in connection with a comment by the Court in its judgment that she did not cross-examine the deponent. She says that she did not know she could do so and that the High Court judge 'directed' matters. This point is entirely without merit. The appellant was legally represented by the time the matter came on for hearing and it was for her and her legal advisers to decide on strategy at that stage. Proceedings are adversarial and strategy is not directed by the judge. Insofar as the judge issued directions with regard to service of documents and affidavits, this was to facilitate the appellant in circumstances where she had not been served in the first instance, and to give her an opportunity of reply. No doubt the judge would have continued to facilitate her if an application had been made by her legal advisers for an opportunity to cross-examine, but no such application was made to the judge. However, it would never be appropriate for a judge to decide on a litigant's behalf whether they should cross-examine a witness: that is entirely a matter for the litigant herself in conjunction with her legal advisers.

6. The appellant in her submissions on costs makes another point in criticism of the judgment: she advances the view that she did not know where the landlord was living in London. She says:

> "The Applicant was not aware of his whereabouts. Upon discovery of his said whereabouts, it transpired the Defendant resided in London. London!! A city of multiple millions of people. Both Ireland and England in lockdown. How the Court would expect a Litigant in person to track a Defendant down, without being legally entitled to leave the country, is unexplainable".

This however may be contrasted with what the appellant swore in her affidavit of 23rd November 2020 (as recorded in the substantive judgment), where she said:

> "I say your Deponent has since located the said Defendant, Richard Finbarr

> Fitzgerald, now resides in the UK and given the current restrictions we are unable to meet him and fully discuss matters with him. I say and believe that once the restrictions have been lifted, we intend to have the Defendant set out the factual position in relation to the Plaintiff Bank's consent on Affidavit."

Accordingly, far from swearing on affidavit that she had no idea where the landlord/defendant was living in London, as she now contends, the appellant had sworn that she intended to have him swear an affidavit once the restrictions were lifted. The only reason she gave for not having been able to do so to date was "the restrictions": no reference was made to her not knowing where he resided. Further, as the Court pointed out, the appeal was not heard until March 2022, having been listed for hearing on three occasions. At no stage was it ever indicated to the Court by way of affidavit or otherwise in the intervening period that the appellant could not fulfill the 'intention' referred to in her affidavit of November 2020 because she could not locate the landlord/defendant in London.

7. The appellant has not therefore come anywhere near the threshold for having a case re-opened on the basis of error or a failure of justice within the jurisprudence of the superior courts as described in the caselaw since the decision since *Greendale* and summarized in the authorities referred to earlier.
8. As to the issue of costs, s.169(1) of the Legal Services Regulation Act 2015 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including a number of matters which are then listed in subparagraphs (a) to (g).
9. The appellant, as has been seen, primarily contends that the Court's judgment was

entirely erroneous. Other than that, she contends that she has raised issues of public importance. The Court disagrees. The appellant has not raised any issue of general public importance which would warrant any departure from the usual rule on costs (and indeed, even raising an issue of general public importance would not in and of itself necessarily be sufficient). The case concerns her own personal situation in the context of a tenancy created without the consent of a Bank and she herself maintains that the wider issue concerning the 2004 Act did not fall within the appeal. The remaining issues raised by her (some of which were new points which were raised for the first time on appeal and therefore not dealt with by the Court) concern procedural and evidential matters arising out of the facts of her own particular case.

10. In all of the circumstances, the Court will make an order for the costs of the appeal in favour of the respondent who was entirely successful in the appeal. It will not disturb the order of the High Court as to costs, which was entirely appropriate, namely that the appellant would be responsible for *only* those costs which arose *after* she came into the proceedings.