THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 113

Record Number: 2017/387

High Court Record Number: 2016/835JR

Whelan J.
Noonan J.
Power J.

BETWEEN/

DANIEL LANNON

APPELLANT

-AND-

A JUDGE OF THE CIRCUIT COURT

AND AIB MORTGAGE BANK

NOTICE PARTIES/RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 24th day of February, 2020

1. This is an appeal from the judgment and order of the High Court (Ní Raifeartaigh J.) made on the 3rd April, 2017 refusing the appellant (Mr. Lannon) leave to seek judicial review.

2. The background to these proceedings is that Mr. Lannon is the owner of a dwelling house at 99, Burnell Square, Malahide Road, Dublin 17 being the lands comprised in Folio 114665L of the Register County Dublin. In 2005, Mr. Lannon sought a mortgage loan for the purposes of purchasing this premises from Allied Irish Banks Plc. A letter of offer of the 29th September, 2005 in the sum of €250,000 was issued and accepted by Mr. Lannon and a charge was executed by him over the property on the 13th December, 2005. Subsequently the interest of Allied Irish Banks Plc. under the mortgage was transferred to the second named respondent (the bank).

3. The affidavit evidence before the Circuit Court discloses that as of the 23rd October, 2013, a sum of €273,258.21 was due on foot of the mortgage which included arrears at that time of €57,212.87. It would appear that no payments were made on foot of the mortgage from the 17th November, 2008 until late 2014, a period of approximately six years. This appears to have coincided with Mr. Lannon losing his job as a construction worker in 2008, no doubt as a result of the economic collapse in that year. Default having occurred on the terms of the loan, a demand for payment was made by the bank

on the 19th November, 2013 followed up by a demand for possession of the premises on the 25th November, 2013.

4. A Civil Bill for Possession was issued in the Dublin Circuit Court on the 2nd December, 2013 which pleads the foregoing facts and at paragraph 14, asserts that the premises comprise Mr. Lannon's principal private residence. An application for possession came before the Circuit Court in the normal way grounded upon an affidavit of the bank sworn by Mr. Ken McCutcheon who averred that he was an officer employed by the plaintiff at Bankcentre, Ballsbridge, Dublin. The affidavit contained the usual averments and documentary proofs by way of exhibit, including an averment that the premises was the principal private residence of Mr. Lannon. The mortgage account bank statements exhibited describe the loan as a "Home Loan".

5. Mr. Lannon was initially represented in the proceedings by his solicitors, Messrs. Feran & Company of Drogheda who filed a replying affidavit on his behalf which refers to a number of issues. The first is a complaint about the rate of interest that was applied to his account and whether or not it corresponded with what he claims to have been agreed with the bank. He describes his attempts to engage with the bank following the loss of his job. He also makes certain complaints about an insurance policy covering payment protection which he says ought to have been available to him but which the bank disputed. He says that he sought the advice of the Irish Mortgage Holders Association who reached agreement with the bank for payment of the arrears, a fact disputed by the bank.

6. Finally, Mr. Lannon makes a complaint about a private investigator calling to an address at which he was residing in October, 2014. He says that he had not furnished this address to the bank and was concerned that his personal data had been unlawfully accessed in the Department of Social Protection. This gave rise to a complaint to the Data Protection Commissioner. These matters were all disputed in a replying affidavit of Mr. McCutcheon. It will be noted that no issue was taken with the averment that the property comprised Mr. Lannon's principal private residence or with the jurisdiction of the Circuit Court to deal with the application.

7. It would appear that subsequent to the swearing of his first replying affidavit, Mr. Lannon discharged his solicitors and from that point on, acted as a litigant in person. The court documents filed by Mr. Lannon since that time espouse a drafting style well familiar to the court and frequently adopted by so-called advisers to litigants in person who purport to provide advice and assistance in drafting court documents without any legal qualifications to do so. The activities of these advisors have been the subject of comment in many recent judgments of the Superior Courts. A common characteristic of such documents is the making of the most serious allegations against banks, their employees and legal advisors which are entirely unfounded.

8. In an affidavit sworn by Mr. Lannon on the 13th January, 2016, he accuses Mr. McCutcheon of perjury, without giving any specifics, and says that the bank's solicitors were complicit in this behaviour. He accuses the bank and the same solicitors of

deliberate and underhanded tactics which he claims they "are engaging in on a regular basis". He complains of behaviour which is unethical, unconscionable and contrary to moral decency. The affidavit comprises a litany of other complaints and allegations that the bank is guilty of outrageous behaviour and breach of natural justice and Mr. Lannon's constitutional rights. He claims to have been defamed by the bank. On the third page of this affidavit, Mr. Lannon avers that "I believe I was classed as non-cooperating in a deliberate attempt to seize my home", which appears to be a clear acknowledgment that the property is his principal private residence.

9. Mr. Lannon swore a second lengthy affidavit on the same date. He avers that at the time Mr. McCutcheon swore the affidavit grounding the possession proceedings, he had also sworn an affidavit on behalf of EBS Mortgage Finance which stated that he was a manager of the Arrears Unit in that entity. Mr. Lannon exhibits an affidavit sworn in different proceedings by Mr. McCutcheon to that effect, although gives no information as to how this came into his possession. He deduces from this that Mr. McCutcheon had perjured himself again. He avers at paragraph 10 that a solicitor representing the bank, Ms. Kane "was purposely sent to court with strict instructions to repossess my home", a further acknowledgment of the status of the property.

10. Later in the same paragraph, he complains of criminal activity on the part of the bank while proceeding "with full repossession of my home while ignoring all promissory estoppel issues." He makes repeated references to his "home" and says (at para. 11) "They needed to repossess my home and have me declared bankrupt before I got a chance to expose the level of criminality and illegal activity that is really going on within AIB." He makes various complaints about AIB's activities concerning Mr. Lannon's credit card debts and the seizure of his truck. He concludes by invoking the equitable clean hands principle.

11. On the 3rd February, 2016, Mr. Lannon brought a motion seeking to have the civil bill for possession "turned into a plenary action". Another affidavit was sworn by Mr. Lannon on the same date which, *inter alia*, accused the bank of "Perjury, Forgery, and Offences against the State to name but a few…". A further affidavit sworn by Mr. Lannon on the 17th February, 2016 continues the same theme and makes extensive legal submissions. Mr. Lannon subsequently sought to summon a number of witnesses to attend before the court and give evidence at the hearing of his motion. These summonses were all set aside by order of the court. Mr. Lannon's motion came on for hearing before the Circuit Court (His Honour Judge Comerford) on the 30th May, 2016 when it was heard for a day and dismissed and although the order incorrectly refers to "the plaintiff's motion" being refused, this is clearly a typographical error.

12. The possession proceedings proper were adjourned and came on for hearing before His Honour Judge Comerford on the 26th October, 2016. A transcript of that hearing is available. The court was clearly familiar with the facts of the matter having dealt with them extensively at the previous hearing of Mr. Lannon's motion. Another affidavit was

sworn by Mr. Lannon on the 19th October, 2016 which related solely to Mr. McCutcheon's employment status with the bank and right to swear affidavits on its behalf.

13. The transcript of the hearing shows that it commenced after lunch and took the full afternoon.

14. At the outset of the hearing, the court identified that the primary issue arising was whether or not Mr. McCutcheon was an employee of the bank and an appropriate person to swear affidavits on its behalf. In that context, Mr. Lannon had sworn a notice to cross-examine Mr. McCutcheon and he proceeded to do so. Mr. McCutcheon's evidence was to the effect that he was co-employed by a number of AIB entities including the plaintiff and documentary evidence to that effect was produced. Having heard Mr. McCutcheon's evidence, the parties then made legal submissions and the court rose for a short period and resumed to give its ruling. The court concluded that it was satisfied that Mr. McCutcheon is an employee of the plaintiff and an appropriate person to swear the affidavits. Having made that ruling, the application for possession then proceeded.

15. At the conclusion of the hearing as the judge was finalising the figures outstanding on foot of the mortgage, Mr. Lannon for the first time raised the issue of jurisdiction. Counsel for the bank clarified that the court's jurisdiction arose pursuant to section 3 of the Land and Conveyancing Law Reform Act, 2013 which confers exclusive jurisdiction on the Circuit Court in applications for possession of land which is the principal private residence of the mortgagor. Mr. Lannon submitted that it was no longer his principal private residence as it was let to tenants who were paying rent. The court then had a discussion with counsel for the bank who submitted that the High Court had held in a case called *Maher v Woods* that the principal private residence issue fell to be determined by reference to the intention of the parties at the time that the loan was entered into. The court accepted that submission and granted an order for possession in favour of the bank.

16. It subsequently emerged that although the legal submission made by counsel in respect of the principal private residence jurisdiction was sound, counsel inadvertently gave the court the name of the wrong case and the case he actually intended to refer to was *Fennel v Creedon* [2015] IEHC 711. Counsel could certainly not be blamed for mis-remembering the correct name of the case in circumstances where, despite all that had gone before in the lengthy proceedings, not once had Mr. Lannon raised this issue until the dying moments of the hearing before the Circuit Court.

17. It is quite clear that there was more than ample evidence before the Circuit Court to ground its finding that the property in issue was Mr. Lannon's principal private residence. The civil bill showed jurisdiction on its face and was underpinned by an averment by the bank's deponent, Mr. McCutcheon, that it was his principal private residence. In addition, Mr. Lannon repeatedly referred to the house as "his home" in his affidavits. He issued correspondence in 2015, long after the proceedings issued, giving the property as his address. Of further relevance is the fact that the bank dealt with the case on the basis that the Code of Conduct on Mortgage Arrears applied and Mr. Lannon engaged with this process, despite the CCMA being confined to cases involving the mortgagor's residence.

18. Mr. Lannon did not appeal the decision of the Circuit Court to the High Court. Had he done so, he would have been entitled to a full *de novo* hearing of the matter when he would have been free to canvass all issues of concern to him. Instead, Mr. Lannon brought an application for leave to seek judicial review. The matter came on for hearing before the High Court (Humphreys J.) on the 7th November, 2016 when he directed that the application be made on notice to the respondents. In his statement of grounds, Mr. Lannon set out a number of points on which he challenged the judgment of the Circuit Court and I will attempt to summarise these briefly as follows: -

(1) The Circuit Court lacked jurisdiction because Mr. Lannon did not consent to enlarging its jurisdiction to that of the High Court;

(2) The Circuit Court had no jurisdiction by virtue of the decision of this court in *Permanent TSB v Langan* [2016] IECA 229, which dealt with issues of rateable valuation;

(3) Mr. McCutcheon was not entitled to swear the grounding affidavit which deprived the court of jurisdiction;

(4) The documents produced by Mr. McCutcheon concerning his employment were flawed;

(5) The court had no jurisdiction because the property is not a family home and is let;

(6) The amount of money involved exceeded the Circuit Court's jurisdiction;

(7) There was a breach of natural justice and constitutional principles;

(8) The contract was tainted by illegality by virtue of the bank's criminality and was thus, unenforceable;

(9) The judge failed to order a plenary hearing in line with the established principles in *Ryanair v Aer Rianta* [2003] IESC 62;

(10) The court failed to provide reasons;

(11) Various breaches occurred of the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union;

(12) Counsel for the bank misled the court;

(13) "The unjust conduct and management of this case shows all the hallmarks of a systematic bias against the lay litigants in favour of a failed, corrupted, state owned bank."

19. It will be seen from the foregoing that with the exception of grounds 3 and 5, none of these issues were ever raised before the Circuit Court. After the order of the court was made directing that the leave application be made on notice, Mr. Lannon attempted,

without leave, to expand his grounds by swearing a supplemental affidavit on the 16th December, 2016. This raised the issue of counsel referring incorrectly to the title of relevant authority as *Maher v Woods* when in fact it should have been *Fennel v Creedon*. Mr. Lannon alleges in typical fashion that counsel for the bank deliberately misled the Circuit Court in this respect. He also makes complaints about breach of the Banker's Books Evidence Act, never previously raised.

20. A replying affidavit was sworn by Mr. McCutcheon on the 11th January, 2017 which was in turn replied to by Mr. Lannon in an affidavit sworn on the 10th February, 2017. The leave application came on for hearing before the court (Ní Raifeartaigh J.) on the 14th March, 2017. The trial judge delivered an *ex tempore* judgment on the 3rd April, 2017. In her judgment, the trial judge set out the facts in broad outline as I have described them. She noted that judicial review is a limited form of remedy. It is not an appeal and is limited to a clear absence of jurisdiction on the part of the court below. She cited other instances where the court might be deprived of jurisdiction by a failure to afford a fair hearing, an error on the face of the record or clear irrationality in the decision making process.

21. The judge noted that judicial review is not a remedy which applies where a judge gets the law wrong or comes to the wrong conclusion on the facts, as these are all matters for an appeal. The trial judge then proceeded to deal with the various points made by Mr. Lannon, concluding that the Circuit Court has a clear jurisdiction in the case of a principal private residence and the Circuit Judge satisfied himself on the evidence that it applied to this case. She noted that Mr. Lannon complained that the judge had got the facts wrong but that this was not a matter for judicial review but rather an appeal. She noted the point about the incorrect name of the case but held that the correct principal of law had been cited and correctly applied by the Circuit Judge. Even if that were not so, it would still not give rise to judicial review but would be an error of law within jurisdiction. She accordingly held that Mr. Lannon had raised no arguable ground upon which leave could be granted and refused the application.

22. In his notice of appeal and legal submissions, Mr. Lannon in essence agitates the same issues about the evidence before the Circuit Court on the issue of principal private residence. He says that Judge Comerford was "hoodwinked" into thinking he had jurisdiction. He complains that the Circuit Judge never gave him an opportunity to deal with the so-called *Maher v Woods* case which was a breach of natural justice. Of course that issue only arose because Mr. Lannon, without any prior notice, raised it at the very end of the proceedings. He did not at any time suggest to the Circuit Judge that he was unable to deal with the point or indeed that he required an adjournment to do so. It is a somewhat extraordinary mode of proceeding to raise a point, without notice to the other side, at the conclusion of a hearing and when it is responded to, complain that you had not been afforded an opportunity to deal with it.

23. He again makes complaints about the bank gaining illegal access to his records from the Department of Social Welfare which was the subject of separate High Court proceedings

and entirely irrelevant to the issues in this case. He identifies the two errors made in the Circuit Court; First, as the principal private residence and letting issue and; secondly, accepting wrong case law to determine the matter. It seems to me however, that in none of this does Mr. Lannon identify any error made in the judgment of the High Court beyond, effectively arguing, that his submissions were not accepted.

24. He also, rather extraordinarily, alleges objective bias on the part of both the Circuit and High Court judges, again a point not agitated in either court. It is, in any event, entirely without any evidential foundation. I have had the opportunity of reading the transcripts of the hearings before both courts which demonstrate that Mr. Lannon was treated with absolute propriety, courtesy and fairness in both courts. It is commonplace for litigants in person who lose their cases to resort to making such serious and unwarranted allegations against judges without the slightest shred of evidence to support them. Such litigants appear to assume that a court finding against them is to be equated with bias, an absurd but unfortunately regularly occurring proposition and one that is to be deprecated in the strongest terms.

25. It has repeatedly been said in our courts that judicial review is concerned with the lawfulness of decisions, not their correctness. The classic test for the grant of leave to seek judicial review is that set out by the Supreme Court in the judgment of Finlay C.J. in *G. v DPP* [1994] 1 IR 374. There the Chief Justice said (at p. 377 – 378): -

> "It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an appellant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An appellant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters: -
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> …
>
> (b) That the facts averred in the affidavit will be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
>
> (c) That on those facts an arguable case in law can be made that the appellant is entitled to the relief which he seeks.
>
> …
>
> (e) That the only effective remedy, on the facts established by the appellant, which the appellant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

26. Of course mere arguability by itself cannot be a sufficient basis for the grant of leave, because, as pointed out by Charleton J. in *Esmé v Minister for Justice* [2015] IESC 26, any point is arguable. However, arguability in this context means that the point must be

stateable in the sense of having some prospect of success. Were it otherwise, the threshold for the grant of leave would be quite meaningless.

27. It seems to me difficult to escape the conclusion that the points relied on by Mr. Lannon in support of his application for leave to seek judicial review are either all points which were, or could have been, raised in the context of the merits of his case in the Circuit Court. The Circuit Court Judge was perfectly entitled to accept the evidence and the legal submissions advanced on behalf of the bank to the effect that the court both had jurisdiction and sufficient evidence to enable it to reach a lawful conclusion that the bank was entitled to an order for possession. The fact that Mr. Lannon disagrees with the findings of fact made in the Circuit Court is of course *nihil ad rem* insofar as judicial review is concerned.

28. Even if it could be said that the Circuit Judge took an erroneous view of the law, which in my view he did not, that was plainly an error within jurisdiction and not a matter which is capable of rendering the decision without jurisdiction and unlawful. Judges decide issues of fact and law every day of the week and the fact that they do so incorrectly does not, without more, give rise to a right to seek judicial review. An appeal mechanism is provided for that purpose and it is the one that Mr. Lannon ought to have availed of before seeking judicial review.

29. In general, there is of course an onus on an applicant to exhaust his or her remedies before invoking the supervisory jurisdiction of the High Court even in cases where that might otherwise be available. This is not, in any event, such a case and I am quite satisfied that all of Mr. Lannon's grounds are entirely misconceived and amount to no more than an attempt to appeal on the merits. I agree entirely with the judgment of the trial judge in that respect.

30. Accordingly, I am of the view that this appeal should be dismissed.

31. It is yet again regrettable to note that litigants in person such as Mr. Lannon incur very significant costs liabilities in pursuing futile appeals and indeed judicial review applications in possession cases at the behest of unqualified advisors to the very great detriment of the litigant concerned.

32. [Whelan J.]: I agree with the judgment delivered by Noonan J.

33. [Power J.]: I agree with the judgment delivered by Noonan J.