THE COURT OF APPEAL

APPROVED
NO REDACTION NEEDED

Neutral Citation Number [2020] IECA 313
Appeal No.: 2018/390
2020/65

Donnelly J.
Collins J.
Binchy J.

BETWEEN/

EOIN BEAKEY

APPELLANT

- AND –

BANK OF IRELAND MORTGAGE BANK

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 17th day of November 2020

1. This is a judgment on two appeals from decisions of Faherty J. made on 2nd October 2018 and 16th December 2019. In her decision of 2nd October 2018, delivered by way of reserved judgment, Faherty J. rejected arguments made by the appellant that affidavits grounding a motion issued by the respondent to dismiss these proceedings should not be admitted for the purpose of considering the motion. In her decision of 16th December 2019, delivered *ex tempore*, Faherty J. rejected an application advanced by the appellant pursuant to O.28, r.11 of the Rules of the Superior Courts (the "slip rule") to amend what the appellant claims are errors or omissions in the decision of Faherty J. of 2nd October 2018.

Background

2. On 21st July 2016, the appellant issued proceedings against the respondent in which he claimed that the respondent had caused the appellant "serious prejudice" in bringing what he described as malicious proceedings in the Circuit Court against him. The proceedings about which the appellant complained in his plenary summons were proceedings issued by the respondent whereby it sought possession of the appellant's dwelling house arising out of non-payment of the mortgage. While the respondent was unsuccessful with those proceedings in the Circuit Court, it was successful, on appeal, in the High Court, and on 15th February 2016, Noonan J. made an order for possession against the appellant.

3. On 14th September 2016, the appellant delivered a statement of claim in these proceedings. Thereafter, a notice for particulars was served by the respondent on 16th December 2016 and replies were delivered on 2nd February 2017. The respondent delivered its defence on 27th February 2017.

4. On 14th March 2017, the respondent issued a motion whereby it sought an order striking out the appellant's claim on several bases:

   (1) That the claim is an abuse of process, and is contrary to the doctrine of *res judicata* and the rule in *Henderson v. Henderson*;

   (2) His claim failed to disclose any reasonable cause of action against the respondent, and accordingly is bound to fail;

   (3) In the alternative that his claim is frivolous and vexatious; and

   (4) That he has failed to plead lawfully his claims of fraud against the respondent.

   This application is grounded on an affidavit of Helen Dorris who describes herself as a legal case manager based in the arrears support unit of the respondent.

5. On 29th May 2017, the appellant issued a motion to cross examine Ms. Dorris, and Ms. Dorris swore an affidavit in reply to the appellant's grounding affidavit on 13th July 2017. She swore a further affidavit on 12th September 2017.

6. On 26th September 2017, a Mr. Buckley, a manager in the employment of the respondent, swore an affidavit to verify Ms. Dorris' capacity to swear affidavits in the proceedings. In each case, when swearing affidavits, both Ms. Dorris and Mr. Buckley provided their working address in the opening paragraph of their affidavits, being New Century House, Lower Mayor Street, IFSC, Dublin 1. They did not provide their residential addresses. Also in each case, the affidavits sworn by Ms. Dorris and Mr. Buckley, while dated, gave no indication as to the time of day on which the affidavits were sworn.

7. Both motions came on for hearing before Faherty J. in the court below on 6th November 2017. In the course of the opening by counsel for the respondent of its motion to strike out the proceedings, the appellant objected to counsel opening the grounding affidavit of Ms. Dorris, on the grounds that the affidavit was invalid because it was not in compliance with either or both of O.40 rr. 6 and 9 of the Rules of the Superior Courts. This objection in effect gave rise to a preliminary issue which resulted in the judgment of Faherty J. of 2nd October 2018, whereby she dismissed the appellant's objections. This decision is the subject of the appellant's first appeal before the Court.

The First Appeal: O. 40, rr. 6 and 9 of the Rules of the Superior Courts

8. O.40, r.6 of the RSC provides:

> "Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgement of any deed, or recognisance, otherwise the same shall not be held authentic, nor be admitted to

be filed or enrolled without leave of the Court; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office."

9. In her decision, Faherty J. noted that the affidavits of Ms. Dorris were sworn before a Commissioner for Oaths who attested that Ms. Dorris is known to him. The place and dates where the affidavits were sworn are set out, and the only objection raised by the appellant under this heading is that the time of day at which the affidavits were sworn is not recorded. Faherty J. stated that she did not consider that the absence of the time of day rendered the affidavits "unauthentic", as claimed by the appellant. Adopting the words of Kelly P. in the case of *Kearney v. Bank of Scotland Plc and Horkan* [2015] IECA 32, a case in which similar objections were raised, Faherty J. considered that it would be absurd to exclude the affidavits of Ms. Dorris simply because the time of day is not stated thereon. In any case, Faherty J. considered that she was entitled to rely on O.40, r.15 of the RSC which provides:

> "The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."

10. In its submissions on the issue, the respondent also relied upon *Kearney* and other authorities including *Allied Irish Banks Plc & Others v. Gibney & Others* [2018] IECA 362, a judgment of Peart J. in this Court, and in which he rejected the argument that the failure to specify the time of day could render an affidavit inadmissible. At paras. 14-17, he said:

> "14. I would further add that the construction of Ord. 40, r. 6 which is urged upon by the appellant, that is in relation to the time of day in the jurat, would lead to a manifest absurdity. A statement that a particular affidavit was taken by the Commissioner of Oaths at, say, 10 a.m. without adding the date in question would be meaningless and pointless. In that regard I would refer again to the provisions of Ord. 40, r. 6 which say that every Commissioner shall express the time when and the place where he shall take any affidavit.
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> 15. Now if that is to be given a literal interpretation the jurat would simply say e.g. 'sworn at 4.15 at Ormond Quay, Dublin 7 …' and it would have to omit the date. If the date was inserted a litigant such as the appellants, might well come in and submit that the jurat does not comply with the Rules because the date is inserted. In my view, any objection so raised would amount to an absurdity. In these circumstances I think it is appropriate to refer to the provisions of s. 5 (2) (b) of the Interpretation Act 2005. That says that in construing a provision of a Statutory Instrument that on a literal interpretation would be absurd or fail to reflect the plain intention of the Act as a whole, the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole.

16. Now if the reference to time is simply to time in the sense of time of day, then the provisions of Ord. 40, r. 6 simply do not reflect that plain intention of the drafters, in my view. I think it is plain that in using the word 'time' they intended to have an appropriate record for court purposes of when the affidavit was taken before the Commissioner for Oaths.

17. In these circumstances it is permissible, particularly having regard to s. 5 (2)(b) of the Interpretation Act to treat the word 'time' as it appears in Ord. 40, r.6 as referring not simply to the time of day but also embracing the date on which the affidavit was also taken."

11. There can hardly be a clearer statement of the law on this point. I fully agree with the decision of Faherty J. in the matter, based, as it is, on the authorities, as well as being a perfectly sensible interpretation of the rule. I would add that O.40, r.6 of the RSC itself does not exclude absolutely the admission of such affidavits, but simply says that such affidavits shall not be admitted *without leave of the court* (my emphasis), which Faherty J. granted. Many of the appellant's 26 grounds of appeal overlap, but a common theme amongst them is that the appellant asks the Court, indeed insists that the Court, apply a literal interpretation to the rules. Even on a literal interpretation of O.40, r.6, it clearly provides that the court may permit the admission of an affidavit which has not been completed in full accordance with O.40, r.6.

12. The appellant's second objection arises under O.40, r.9 of the RSC which states:

> "Every affidavit shall state the description and true place of abode of the deponent; and every affidavit of service shall state when, where, and how, and by whom, such service was effected and in the case of delivery to any person, shall state that the deponent was at the time of such delivery acquainted with the appearance of such person."

13. The appellant objects to the fact that Ms. Dorris in her affidavits has not stated her true place of abode. On this basis, he contends that the affidavit should be excluded. In his grounds of appeal, he emphasises that the courts have an obligation to enforce the laws of the State, as promulgated. He submits that there is no ambiguity about this rule. In response to the authorities (to which I refer below) in which the rule has been interpreted so as to permit the admission of affidavits in which the deponent has provided a place-of-work address (as here), he argues that this is "judge made law", contrary to the Constitution and that members of the judiciary are under a constitutional obligation, in respect of which they have taken an oath of office to uphold the Constitution and the laws of the State.

14. There are numerous authorities on this issue. Included amongst them is the decision of this Court in *Kearney v. Bank of Scotland* referred to above, and relied upon by Faherty J. who quoted from the following passage of the judgment of Kelly P.:

"7. Mr. Kearney is quite correct when he says that the rules of court we operate under are those which were published and promulgated in 1986. They constitute a revision of the rules of court which pertained until that time. He asks us to apply a literal interpretation of what is contained in O. 40, r. 9 which I have just read out. He says that because the affidavit did not show the place of residence of Mr. Horkan that it should be ruled out.

8. Unfortunately, like many lay litigants, he fails to take into consideration that the rules of court, just like any other piece of legislation, fall to be interpreted from time to time by the courts. The objection which he takes today is nothing new. It is a form to objection which has been taken in the past and the courts have had to rule on it. When I say the past, I go right back to the beginning of the 19th century, because Ms. Tighe's researches have been able to produce to a series of authorities which considered this question throughout that century. These are some of the cases where this question has been considered.

9. In *Haslope v. Thorne* [1813] 1 M & S 102, Lord Ellenborough C.J. is reported in relation to this form of objection as follows:- '*…the words 'place of abode' did not necessarily mean the place where the deponent sleeps, that the object of the rule was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he is employed during the greater part of the day and not the place where he would retire for the purpose of rest'*. So there, as far back as 1813, one finds a common sense approach being taken to the interpretation of the rule. The court asked itself 'what is the purpose of this rule'? The purpose of the rule is to apprise the reader of the affidavit as to where the deponent of the affidavit may be found. For most people in business life, they are much more likely to be found at their place of business during ordinary business hours than they are at their homes."

15. Kelly P. then goes on to quote from other authorities in which the same view was taken, but he then also went on to place reliance on O.40, r.15, cited above at para. 9. In the view of Kelly P., even if all the judges going back to the 19th century were wrong, and even if he was wrong, that rule could be applied in order to permit the admission of such an affidavit, because in the view of Kelly P., to exclude an affidavit simply because the deponent gave as his place of abode his place of business, would be absurd.

16. In *Gibney* Peart J. also addressed an argument in relation to O.40, r.9 of the RSC and stated, at para. 20:

> "I appreciate that if one seeks a dictionary meaning for the word 'abode', it will state 'dwelling' or some such, to indicate a place where a person lives. But giving the perfectly obvious purpose of the requirement to state an address for a deponent in the context of litigation must enable that word to include the address at which the deponent works and hence where he may be found should that be necessary for any purpose."

17. The respondent further relies upon the decision of Hunt J. in *Gilroy v. Callanan & Others* [2019] IEHC 480, in which addressing the same objection made in those proceedings, he stated:

> "As the deponents in question swore their affidavits for the purpose of their employer or the legal firm representing that employer, I am satisfied that their business address is their '*true abode'* in those circumstances, which have nothing whatever to do with their private capacity or residence. I am bound by, and fully agree with the approach of the Court of Appeal to this point in *Kearney v. Bank of Scotland plc and another* (23 February 2015) and *Allied Irish Banks and others v. Gibney* (9 November 2018). There is no possible or (sic) interest or benefit to the plaintiff in knowing the private residence of bank employees or solicitors in a case such as this."

18. Faherty J. also relied on other authorities including *Danske Bank A/S Danske Bank v. Kirwin* [2016] IECA 99 in which Irvine J. took the same view. I am in full agreement with the decision of Faherty J. in following this long line of authority and in dismissing the objections of the appellant. The appellant argues that the Court is bound to apply a literal interpretation of the rule notwithstanding over two centuries of decisions of the courts giving a purposive and common-sense interpretation to the rule. He may not like that interpretation, and it may not suit his purposes, but the fact is that that is how this particular rule has been interpreted both before and after the foundation of the State. Moreover, it is reasonable to assume that this interpretation of the rule was well known at that time that the current Rules of the Superior Courts were adopted and had the Rules Committee intended to depart from that interpretation, it would have used different language.

19. Insofar as the appellant objects to the concept of precedent or what he refers to as "judge made law", Peart J. also addressed this complaint in *Gibney* as follows:

> "They make a general submission, first, to say that this Court must apply the strict letter of the law in accordance with our judicial oath under the Constitution. They also make the point that the Rules of Court are the equivalent of Statute Law made pursuant to Regulations made under primary Acts, and that it is the Acts of the Oireachtas which comprise the law of the country and that case law ought not to be relied upon by this Court and this Court should apply only a literal interpretation of the Rules."

20. Addressing those arguments, Peart J. had this to say:

> "Now in my view these points are without any real merit. I would just say that even though the appellants have submitted that this Court cannot rely on case law, that is simply not correct. Courts interpret acts of the Oireachtas and they interpret the Rules of the Superior Courts from time to time where arguments are made as to a lack of clarity in those provisions. Those decisions of the Court by way of

interpretation of acts and of the rules are sources of law that this Court can be guided by."

21. As Peart J. stated, the courts are called upon to interpret legislation, and it is not at all unusual for words to have a different meaning in a legal context than they might have colloquially in everyday life. Such is the case here. The Rules of the Superior Courts exist to provide for the fair and efficient administration of justice. They are not an end in themselves. The courts have a duty to interpret and apply the rules in a purposive manner, and to avoid interpretations that will result in absurdities. Moreover, the rules themselves contain provisions enabling flexibility in the application of the rules, such as O.40, r.15, as well as O.124 of the RSC, rule 1 of which states:

> "Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall see fit."

22. Somewhat ironically, the appellant, who contends for a literal interpretation of the rules, argues that the Court should not place any reliance on O.40, r.15 or O.124 of the RSC. He submits that these rules cannot confer "any form of discretion" on the courts so as to permit a breach of the rules. However, this argument flies in the face of these very rules affording the courts discretion.

23. It is clear beyond any doubt that the words "place of abode" have been interpreted on numerous occasions previously as meaning the place of work of a deponent, where the relevant affidavit is sworn in connection with the deponent's work. It is equally clear that O.40, r.15 and O.124 of the RSC afford the Court discretion in deciding whether or not to admit an affidavit that has not been completed in strict compliance with the RSC, and that the Court should exercise that discretion in favour of admitting the affidavit where to exclude it for this reason alone would result in an absurdity or injustice. Such an absurdity would result in this case, were the Court to exclude the affidavits of Ms. Dorris and Mr. Buckley for this reason, as the appellant urges the Court to do. Just as Hunt J. found in *Gilroy* (see para. 17 above) the appellant can have no possible interest in knowing the private residential addresses of the deponents for the purpose of these proceedings. For all of the reasons given above, I am of the view that this ground of appeal too must be rejected, and the decision of Faherty J. affirmed.

The Second Appeal

24. In this motion, which was issued on 8th May 2019, the appellant seeks seven reliefs. These reliefs concern the judgment handed down by Faherty J. on 2nd October 2018, from which the appellant also appealed by notice of appeal dated 11th October 2018, and which appeal is the first appeal addressed by this judgment above.

25. It is expedient to set out the reliefs sought in full:

(i) An order amending the Judgment of Judge Faherty delivered on 2nd October 2016 (sic) to include the omitted enacted legislation which Judge Faherty relied upon to make her order and which critically and legally supports her order/judgment.

(ii) An order amending the Judgment of Judge Faherty delivered on 2nd October 2018 to include a declaratory order by Judge Faherty declaring that the specific and enacted laws being relied upon by the plaintiff as they stand enacted on the Irish Statute Books are not relevant and or (sic) of no legal use and or (sic) legal benefit to the plaintiff as Judge Faherty is deliberately relying upon so called "Case Law" and or so called legal "Precedent" which is contrary to "Enacted Law" upon which the plaintiff rests his case, and the court deems this so called "Case Law" and or so called legal "Precedent" to be superior to the enacted law of this State and not contrary to same, notwithstanding the provisions of the Enacted law(s) of this State, and Article 15.2.1 of the Constitution of Ireland.

(iii) An order amending the Judgment to include an omitted and critical order where Judge Faherty confirms that she has not deliberately or at all prevented, deflected and or hindered the plaintiff in any context whatsoever from relying upon the current and enacted law(s) of the State, and has not denied and or infringed the plaintiff's constitutional and legal rights and guarantees in any context whatsoever pertaining to same.

(iv) An order amending the Judgment to include an omitted and critical declaration from the court, clarifying that old "case law" and or legal precedent from the 1900s; the 1800s; and the 1700s *inter alia*, as relied upon by the court in the herein, which both factually and legally was at the material times stated contrary to the enacted laws at those material times, and which factually and legally is contrary to the enacted laws of this State at this material time and at all material times during the hearing of the herein, can be employed and relied upon by Judge Faherty notwithstanding the fact at law that same "case law" and or legal precedent is contrary to the Enacted laws of this State, and the bringing in and or use of and or reliance of any form of law which emanated from outside the Houses of the Oireachtas and or any legislative authority established by the Oireachtas in accordance with law, by Judge Faherty is not a breach of Article 15.2.1 of the Constitution by Judge Faherty and Judge Faherty's duties thereunder.

(v) Failing the above, an order critically outlining why and how at law Judge Faherty will fail, refuse, and or neglect to make any and or all of the orders sought herein, and outlining and citing the specific laws relied upon to refuse/decline making the orders sought herein.

(vi) Failing the above, and should Judge Faherty disagree, an order where Judge Faherty will state a case into the Supreme Court questioning the legal ability of any Judge to employ and or rely upon *inter alia*, any "case law" which is contrary to and or contravenes the enacted laws of this State most notably O.40, rr. 6 and 9 but not limited to same.

(vii) A further order for a case to be stated pertaining to the alleged "discretion" referred to in O.40, r.15 and a Judge's alleged ability to rely on any such and (sic) alleged "discretion" to permit the breaking of O.40, rr. 6 and 9, as such an alleged "discretion" would be wholly unconstitutional as any such discretion would permit the wholesale abuse of and breaking of laws which stand enacted under the Constitution of Ireland, which would be and is unconstitutional. There simply cannot be at law, one particular law which permits the breaking of other enacted laws, the law is the law and was never designed to have a provision which permits certain persons to break the enacted laws of the State.

26. In his submissions in relation to this appeal, the appellant claims that Faherty J. refused the reliefs sought by this motion without giving reasons. The appellant submits that if Faherty J. considered that she had to refuse the orders requested, then she should have stated a case to the Supreme Court, as sought by the last two paragraphs of the motion.

27. In his written submissions, the appellant states that "[b]ased on Judge Faherty's judgment/order delivered on 2nd October 2018 the Plaintiff had relied upon Order 28 rule 11 of the Rules of the Superior Court (S.I. 15 of 1986) to have a number of errors arising from accidental slips or omissions corrected." He claims that Faherty J. omitted to set out in her decision the legislation which she relied upon in support of the same, and that she should have issued a declaratory order to the effect that the laws relied upon by the appellant in his arguments concerning the admissibility of the affidavits of Ms. Dorris (and Mr. Buckley) i.e. the Rules of the Superior Courts are "not relevant and or of no legal use and or legal benefit to the Plaintiff as Judge Faherty is deliberately relying upon so called 'Case Law' and or so called legal 'Precedent' which is contrary to the 'Enacted Law'…" The appellant makes other arguments but in substance they are the same as those summarised above and to a large extent repeat the content of the motion itself. The substance of the arguments advanced is that the trial judge did not adequately explain, or explain to the satisfaction of the appellant, or in a form or manner to his satisfaction, the reasons for her decision of 2nd October 2018.

28. In its submissions on this motion, the respondent refers the Court to numerous authorities in relation to the application of the slip rule. For the purpose of this judgment, it is sufficient to refer to the recent decision of Baker J. in the High Court in the case of *Costello Transport Limited v. Singh No.2* [2019] IEHC 143 in which she stated at para. 13:

> "Order 28, r. 11 RSC, commonly referred to as the as the 'Slip Rule', provides for the correction of 'clerical mistakes in judgments or orders' where the error arises from an 'accidental slip or omission'. The Order provides for corrections which may be made 'without an appeal', and, in its terms, envisages that there may be occasions when the use of the 'Slip Rule' is not appropriate and an appeal is the only remedy available to a disaffected litigant."

29. In the same judgment, Baker J. went on to consider the inherent jurisdiction of the court to revisit the contents of a judgment, over and above the jurisdiction conferred by the slip rule, stating:

> "The power to revisit the contents of a judgment in the context of the general jurisdiction of the court is set out in the judgment of Clarke J. in *In re McInerney Homes Ltd* [2011] IEHC 25 where, at para. 3.12, he held that the power to revisit can arise when there has been 'a simple error on the part of the judge concerned in the judgment'."

30. The respondent also relies on a passage from a judgment cited by Baker J. in *Singh* from the case of *Danske Bank v. Macken* [2017] IECA 117 where Hogan J. stated, at para. 11:

> "There is a clear public interest in the finality of a judicial determination, subject only to an appeal. It is, moreover, generally understood and accepted that where a High Court judge has pronounced judgment in a given matter, that judgment is final and the only remedy open to the disappointed litigant is to appeal. This point is so firmly embedded in our system of civil procedure that it is actually difficult to find direct authority on the point."

31. The respondent submits that the reliefs sought by the appellant in his slip rule application go to the merits and substance of the decision of Faherty J. of 2nd October 2018. If therefore the appellant has a grievance with that decision, the appropriate remedy is for him to appeal it, and of course he did so very soon afterwards, and that appeal has been heard concurrently with this appeal. In her *ex tempore* judgment, Faherty J. made it clear that there is no accidental slip or omission in her judgment capable of being corrected under the slip rule, noting that "the Court's judgment is the Court's judgment". Having delivered her judgment therefore, and having determined that it did not contain any accidental slip or omission, she was *functus officio*.

32. Finally, the respondent submits that even if the slip rule were a suitable remedy for the appellant, he invoked it too late and having regard to intervening procedural events it would be unfair and unjust to permit the appellant to revisit the contents of the judgment of 2nd October 2018.

Conclusion on the Second Appeal

33. The purpose of the slip rule is well established. As stated above, it is there to facilitate the correction of minor clerical errors in the judgment or order of a court. In this case, Faherty J. heard the appellant's application and was satisfied that there is no accidental slip or omission to be corrected. While the appellant has complained in his submissions that Faherty J. gave no reason for her decision, this is simply incorrect. The fact that the decision was delivered *ex tempore*, briefly and succinctly, does not mean that no reason was given; on the contrary, Faherty J. rejected this application for the simple reason that she considered that there was no error or omission in her judgment that required correction, that the slip rule was therefore of no application and that what the appellant really sought to do through this motion is to ask the court to revise, amend and substitute

certain findings of fact and law with arguments canvassed by the appellant. Faherty J. concluded, correctly in my view, that all of the matters contended for by the appellant in the context of this motion are more properly matters to be raised by way of appeal from the decision of Faherty J. of 2nd October 2018.

34. In my opinion, the issue is so obvious as to require no further explanation. It is clear from the motion issued by the appellant that he was asking Faherty J. to make substantial changes to her judgment of 2nd October 2018 and to make orders and declarations which he considers are necessary for his purposes. In other words, he was asking the trial judge to rewrite her judgment in a substantial way, and not merely to correct a minor or clerical error. For these reasons, I have no hesitation in dismissing the appeal.

Costs

35. As regards costs, the appeals have failed, and subject to consideration of any submissions the appellant may wish to make within fourteen days from the date hereof, the appropriate order is that costs should follow the event, and that the respondent, having been entirely successful in these appeals shall be entitled to recover from the appellant the costs incurred by it, both in this appeal, and in the court below, when taxed and ascertained.

36. Since this decision is being delivered electronically, Donnelly and Collins JJ. have authorised me to record their agreement with the terms of this judgment.