



THE COURT OF APPEAL

Record Number: 2021/179

**Haughton J.
Ní Raifeartaigh J.
Allen J.**

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

-AND-

BALFORD CONSTRUCTION LIMITED

DEFENDANT/APPELLANT

RULING OF THE COURT delivered *ex tempore* on the 30th day of November, 2022

1. On 25 July, 2022 this court heard an appeal by the appellant against an order of Hanna J. made on 21 June, 2021 whereby he directed that a Notice of Motion issued by the respondent (“the Bank”) dated 11 February, 2021 (seeking *inter alia* amendment of the Summary Summons and summary judgment) and a Notice of Motion issued by the appellant (and returnable to 8 November, 2021) seeking to strike out the proceedings “*should travel together to be heard and determined on the same occasion*”, and whereby

he directed that both motions be transferred to the Non-Jury List for mention on the 24 June, 2021.

2. The appeal was heard on 25 July, 2022 and dismissed by this court. An *ex-tempore* judgment was delivered by Allen J., with which Haughton and Ní Raifeartaigh JJ. agreed in short *ex tempore* judgments. All questions of costs have been adjourned for future determination. A typed copy of the *ex tempore* judgment of Allen J. was delivered to the appellant's solicitors, and this ruling should be read with that judgment.
3. By Notice of Motion issued on 5 October, 2022, grounded on an affidavit sworn by Marilyn McNicholas on that day, the appellant has applied for a "Review of the Judgments" of the court. Ms. McNicholas is the solicitor acting on behalf of the appellant. She has also delivered written legal submissions dated 18 November, 2022. No replying affidavit has been filed on behalf of the respondent, but written legal submissions dated have been filed. The court also heard oral submissions on 30 November, 2022.
4. As this court found in *Launceston Property Finance DAC v Wright* [2020] IECA 146 the jurisdiction to review or set aside a judgment now invoked is an exceptional one. Judgments are otherwise final (subject, in the case of this court, to the acceptance by the Supreme Court under Article 34.5.3 of the Constitution of an application for leave to appeal to it on the ground that the decision involves a matter of general public importance or in interests of justice it is necessary that there be an appeal to the Supreme Court).
5. As was stated in *Launceston*, the jurisdiction to revisit an earlier decision was first recognised by Denham J. in the decision of the Supreme Court in *Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514, where, at p. 544 she said:-

"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus

rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.”

6. Subsequently, in *DPP v. McKevitt* [2009] IESC 29, the Supreme Court held that:-
7. “*Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant.*” (emphasis added). These principles and the “rare and exceptional” nature of the jurisdiction were recently affirmed in Supreme Court in *Student Transport Scheme Limited v The Minister for Education and Skills and Bus Eireann* [2021] IESC 22 (see Clarke C.J., para.3.1).

8. The scope of the jurisdiction in this Court was addressed in *Friends First Managed Pension Funds Limited v. Paul Smithwick* [2019] IECA 197 where Whelan J. said:-

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

16. Implicit in the jurisprudence is the importance of proportionality and finality. *The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect.* In particular, the jurisdiction

cannot appropriately be used as a vehicle to present further other or new arguments after judgment on material that was before the court which could have been deployed or availed of at the original appeal hearing for the proposition later advanced.” (emphasis added).

9. In *Bailey v. The Commissioner of An Garda Síochána* [2018] IECA 63, this Court emphasised that only a fundamental error which has a significance or a consequence for the result could amount to a denial of justice within the meaning of the case law on this issue (emphasis added). Further, the Supreme Court in *Tassan Din v. Banco Ambrosiano S.P.A* [1991] 1 I.R. 569, held that the discovery of new evidence, even if it would have affected the result if available at the time of the original hearing, is not a basis for setting aside a final order or judgment. This statement of principle was reaffirmed as being undoubtedly the law in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 by Fennelly J. speaking for the Supreme Court.

10. In *Launceston*, following a review of the caselaw, this Court stated:-

“7. In summary, the jurisdiction:-

- (i) is wholly exceptional;
- (ii) it must engage an issue of constitutional justice;
- (iii) requires the applicant to discharge a very heavy onus;
- (iv) is not for the purpose of revisiting the merits of the decision;
- (v) alleged errors which have no consequence for the result do not meet the required threshold;
- (vi) cannot be invoked on the basis of the discovery of new evidence;
- (vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;

(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome.”

11. Of particular relevance to the present application, in *Launceston* at para.12 the court observed:

“12. There is no obligation on a court to address each and every point advanced by each party. In *Doyle v. Banville* [2018] 1 I.R. 505, speaking for the Supreme Court, Clarke J. (as he then was) held that it was important that the judgment engage with the *key elements* of the case made by both sides and explained why one side was preferred and won the case or appeal as the case may be (emphasis added). Thus, a court is required to address the substantive points central to the case raised by each of the parties, but this does not mean that a party has a legitimate grievance where wholly peripheral, irrelevant or unstateable points are not specifically addressed in the judgment of the court. The failure of the judgment expressly to address each unmeritorious point advanced by a losing party cannot form the basis for an application to review the judgment and comes nowhere near satisfying the high bar which a litigant must clear in order to engage this exceptional jurisdiction...”

This was recently restated in this court by Murray J. in the decision of *Murphy v. McKeown* [2020] IECA 188:

*“...a court in delivering judgment is not required to advert to every argument made or submission delivered to it or to address every point advanced by each party. A judgment must engage with the key elements of the case made by each side and explain why one side has won the case or appeal as the case may be (*Launceston v. Wright* at para. 12). In an appeal, the issues which must be so*

addressed are defined by the grounds of appeal. This does not mean that the court must itemise each and every ground of appeal and address it. It is entitled to direct itself to the substance of the issues. Here the Court did in fact expressly categorise and address every one of the twelve grounds of appeal raised by the appellants explaining -in some detail by reference to each- why the appellants failed in their appeal.” (emphasis added)

12. In the application for review Ms. McNicholas relies on the authority of *Doyle v. Banville* and *Launceston* (both decisions are mentioned at para.45 of her submissions) to suggest that the judgments delivered by this court on 25 July, 2022 did not engage with key elements of the appeal, and that the appellant cannot know why it lost the appeal. She seeks in her written submissions to suggest that the judgments of this court proceeded on an erroneous premise, namely that Hanna J. did not direct that the Bank’s application to amend its pleadings, along with its application for summary judgment and the appellant’s application to strike out, should “travel together to be heard and directed on the same occasion”. She therefore suggests that this court did not address or engage with Ground of Appeal No. 2 which pleads that the trial judge in making his order “erred in law”, and hence she argues that this court failed to give reasons. She argues this on the basis that at no point did the judgments delivered by this court expressly recite the relevant part of the order of Hanna J. She therefore submits that this court gave judgment on the incorrect premise that the only part of the application of the Bank that was transferred to the Non-Jury list was the application for summary judgment, and that her written and oral submissions on Ground 2 were not considered.
13. This submission is patently wrong. It is clear from the judgment of Allen J. (as it is on the face of the Bank’s notice of motion dated 11th February, 2021) that there were two elements to the Bank’s motion, first, liberty to amend and secondly summary judgment. It is clear

from the order of Hanna J. of 21st June, 2021 (as it is from the transcript of his decision) that he transferred both motions – that is, the Bank’s motion, in both parts, and the then defendant’s motion to strike out – to the non-jury list for the following Thursday, for mention. The judgment of Allen J. refers to both the Bank’s “motion” (which applied *inter alia* for amendment of the Summary Summons as well summary judgment), and the appellant’s motion, and what took place before Hanna J. on 18 June, 2021 and 21 June 2021. Allen J. then states –

“14. It is significant to note here that the order of Hanna J. was that the two motions should travel together in order that they might be heard and directed on the same occasion. The judge did not make any order as to the sequencing of the motions.”

That, in substance, is what Hanna J. ordered. Allen J. then proceeds to trace the subsequent listings of both motions in the Non-Jury List, and the hearing of the Bank’s motion by the High Court (Ferriter J. who delivered a written judgment on 2 June, 2022) which granted the application to amend and gave judgment against the appellant. As Allen J. notes, the defendant’s motion to strike out was abandoned – this abandonment was notified by Ms. Mc Nicholas to the Bank’s solicitors in advance of the hearing before Ferriter J. by letter dated 4 May, 2022.

14. In the circumstances there was no need for this court to recite in full the wording of the order of Hanna J. There was no misapprehension by this court as to the full order the subject of the appeal. The affidavit evidence, and the parties’ written submissions were read and considered. Having then heard the parties’ oral submissions the court was in a position to deliver *ex tempore* judgments. It is clear from the judgment of Allen J. that the court found no error of law in the decision or order of Hanna J., and considered the appeal misconceived.

15. The appellant's written submissions suggest that Allen J. described the substance of the appellant's case in the High Court – that the loans were not, as alleged by the bank, payable on demand, and that the Bank's proposed particulars of indebtedness did not show that appellant had been given credit for the proceeds of the realisation of part of the security – as *“a cunning plan to thwart the progress of the litigation.”* That is not correct. The appeal was an appeal from a routine case management order, which had been overtaken by the disposal of the substantive applications. It is quite clear from the judgment of Allen J. that what he was addressing was not the substance of the appellant's case but its attempt to secure a perceived strategic advantage. The Bank's motion had been issued on 11th February, 2021 originally returnable for 22nd March, 2021 and had been adjourned until 21st June, 2021. On 18th June, 2021 – four months after the Bank's motion had been issued and on the very eve of the adjourned date – the appellant issued a cross motion to strike out the plea in the special indorsement of claim that the loans were payable on demand. The appellant's motion had been assigned a return date of 8th November, 2021. The Bank proposed asking the High Court to bring the appellant's motion forward, but the appellant insisted that the Bank's motion should go back. The efficient management of both motions had nothing to do with the merits of either. The appellant was absolutely entitled to make its case but was not entitled to dictate the progress of the litigation.

16. The appellant has not demonstrated any error of law or fact in the judgments delivered in this court. It is indeed hard to conceive of how judgment on an appeal from case management orders of the sort made in the High Court in this instance could ever engage an issue of constitutional justice. The present application, with a wide-ranging grounding affidavit and written submissions addressing issues not even arising in the appeal, appears to be one aimed at revisiting the merits of the summary judgment decision of Ferriter J. in the High Court, which itself in the subject of a pending appeal before the Court of Appeal

or, at best, the merits of the appeal that was decided by this court nor was the appellant deprived of its constitutional right to a fair hearing by this court. The appellant has failed to discharge the heavy onus on it to engage the exceptional jurisdiction of the court to review its own judgment. There is no denial of justice or engagement with any constitutional issue.

17. Accordingly the court refuses the review application.

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