



THE COURT OF APPEAL

**UNAPPROVED
NO REDACTION NEEDED**

**Neutral Citation Number [2022] IECA 70
Record Number: 2021/97
High Court Record Number: 2021/849P**

**Whelan J.
Noonan J.
Haughton J.**

BETWEEN/

PHILIP WARD

PLAINTIFF/APPELLANT

-AND-

**TOWER TRADE FINANCE (IRELAND) LIMITED
& AENGUS BURNS**

DEFENDANTS/RESPONDENTS

**COSTS JUDGMENT of Mr. Justice Noonan delivered on the 24th day of March,
2022**

1. This judgment is concerned with the issue of costs, the principal judgments dismissing the appeal having been delivered on the 13th January, 2022. Two *ex tempore* judgments were delivered, by me and by Haughton J., with which each member of the court agreed. The facts of the matter are fully set out in my judgment and a brief recapitulation will suffice for the purposes of this ruling.

2. The plaintiff's son, Michael Ward, was the beneficial owner of a company called Michael Ward Engineering Limited. Michael Ward and his father, the plaintiff herein, were both directors of that company. The company entered into a financing agreement, called a Trading Agreement, which was to be construed in accordance with the laws of South Africa and subject to the non-exclusive jurisdiction of the High Court of South Africa.

3. Separately from the Trading Agreement, Michael Ward signed a guarantee with Tower in respect of the company's debts which was subject to Irish law and the jurisdiction of the Irish courts. The company defaulted on its obligations and Michael Ward's personal guarantee was called in. Tower then issued a summary summons against Michael Ward. No proceedings were taken against the company. Michael Ward was at all times advised by solicitor and counsel and ultimately, the proceedings were compromised in a written settlement agreement.

4. In essence, the agreement provided that Michael Ward would pay a sum of €100,000 to Tower within 12 months and in default, judgment would be entered against him for a larger amount. In order to secure the performance of Michael Ward's obligations, his father, the plaintiff herein, joined in the settlement agreement for the purpose of providing security over certain lands he owned. The plaintiff executed a deed of charge in respect of those lands in favour of Tower together with a guarantee of his son's indebtedness.

5. The settlement agreement expressly provided that it was to be governed by Irish law and the parties submitted to the exclusive jurisdiction of the Irish courts. Before these documents were executed by the plaintiff, his son's solicitor quite properly advised him that he should seek independent legal advice before executing the documents. The plaintiff did so and a memorandum was attached to the settlement agreement to that effect signed by the plaintiff's personal solicitor.

6. Again, default occurred in making the agreed payment by Michael Ward, and accordingly Tower appointed the second defendant as receiver over the plaintiff's lands. The receiver arranged for the lands to be sold by public auction on the 17th December, 2020. The plaintiff made an attempt to thwart the auction proceeding by circulating a document purporting to be a plenary summons against not only the defendants but the receiver's employer, solicitors and auctioneers. This document was drafted by an unqualified friend of the plaintiff and is described in the principal judgment herein as "scurrilous and scandalous".

7. Three days before the auction, on the 14th December, 2020 the plaintiff consulted with Mr. William Murphy in the office of GN & Co., solicitors, of which the principal is Mr. Geoffrey Nwadike. As confirmed by counsel for the plaintiff in the course of the hearing of the appeal, Mr. Murphy had previously acted in a number of cases before the court as a McKenzie friend to litigants in person. He is now employed as an assistant by Mr. Nwadike.

8. Mr. Murphy telephoned the defendants' solicitors in relation to the matter when it transpired that they had received the earlier purported and unissued plenary summons. Mr. Nwadike says, in his affidavit sworn in respect to this application, that because of the existence of this document, he declined to accept instructions from the plaintiff on that day.

9. The auction on the 17th December, 2019 was unsuccessful and a second auction was scheduled to take place on the 25th February, 2021. On the 9th February, 2021, the plaintiff again attended at Mr. Nwadike's office and on this occasion, Mr. Nwadike says he agreed to represent him. Mr. Nwadike arranged for the issuing of a plenary summons on the 10th February, 2021 seeking an injunction restraining the sale and a declaration that the receiver's appointment was null and void on the ostensible grounds that the plaintiff's consent to the charge on his land was procured through misrepresentation and breach of contract.

10. As subsequently emerged, the alleged misrepresentation and breach of contract by Tower was its failure to inform the plaintiff that a summary summons was wrongfully issued against his son in circumstances where the courts of South Africa, and not Ireland, had jurisdiction. There was also an allegation that Tower had failed to disclose the existence of this jurisdiction clause to the plaintiff, notwithstanding the fact that the plaintiff himself signed the agreement containing it.

11. An application for an interim injunction was made to the High Court (Reynolds J.) by Mr. Nwadike on Friday 19th February, 2021. In the affidavit grounding the application sworn by the plaintiff, the plaintiff failed to disclose to the court his previous attempt to prevent the earlier auction proceeding. This court in the principal judgment took a serious view of that non-disclosure but considered that no further action was necessary for the reasons set out. In a written judgment delivered on the 12th March, 2021, the High Court (Allen J.) dismissed the application for an interlocutory injunction on the basis that it was unstateable and did not even meet the threshold requirements of raising a fair issue to be tried.

12. The plaintiff appealed that refusal to this court and, pending the hearing of the full appeal, brought what was in effect a further application for an interlocutory injunction before the directions judge, Costello J. It was again refused on ostensibly the same grounds, *i.e.* that no fair issue to be tried had been raised. The plaintiff has sought to appeal that decision to the Supreme Court where a determination on his application has not been made because, as this court was informed during the costs hearing, the plaintiff has failed to lodge with the Supreme Court a transcript of the hearing before Costello J.

13. In my judgment dismissing this appeal, I criticised the affidavits sworn by both the plaintiff and Mr. Nwadike for the reasons set out. I was also critical of the plaintiff and Mr. Nwadike's failure to disclose, initially at least, the facts surrounding the first auction. I

described the core argument of the plaintiff that South African law applies and the South African courts have jurisdiction as “simply absurd”. I further described the contention that the settlement agreement was somehow invalid because Michael Ward had grounds to challenge the summary proceedings but did not do so, as “heaping absurdity upon absurdity”- see para. 37.

14. At para. 43, I said: -

“43. Finally, it only remains for me to say that it is a matter of regret and concern that such patently untenable and misconceived arguments as have been advanced in this case, now for the third time, and possibly a fourth if the Supreme Court grants leave to appeal, have allowed the accumulation of enormous costs, almost certainly well in excess of the value of the property concerned, and thus at an entirely disproportionate level, which all ultimately fall for the account of the plaintiff.”

15. In his concurring judgment, Haughton J., having agreed with the view I expressed that the plaintiff’s arguments were patently untenable and misconceived, went on to say: -

“5. I would go further, and describe them as spurious, being entirely unfounded in law and fact, and entirely without merit.

6. This appeal is frivolous and vexatious and in my view should not have been pursued. It is one that in my view responsible solicitors and counsel would have advised their client should not be pursued.”

16. Following the delivery of these judgments, an application on behalf of the defendants was made for a wasted costs order against Mr. Nwadike and having regard to the significance of that issue, the court allowed the parties time to provide written submissions to the court. The plaintiff also availed of the opportunity to swear an affidavit in connection with the costs

application, as did Mr. Nwadike, and a replying affidavit was sworn by the defendants' solicitor, Mr. Thomas Dowling.

17. At the costs hearing, Mr. Nwadike, who is a sole practitioner practicing under the title and style of GN & Company, represented himself without the assistance of counsel. He told the court that he commenced practice as a solicitor in 2019 and that a wasted costs order in the terms sought by the defendants would have a devastating impact on his practice.

Legal principles

18. Order 99, r. 9 of the RSC (formerly O. 99, r. 7) provides: -

“(1) If in any case it appears to the Court that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the legal practitioner, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may –

(a) call on the legal practitioner acting for the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the legal practitioner and his client and (if the circumstances of the case require) why the legal practitioner should not repay to his client any costs which the client may have been ordered to pay any other person, and thereupon make such order as the justice of the case may require;...”

19. The rule recognises the inherent jurisdiction of the court to protect its processes from abuse by exercising control over its officers. It is a jurisdiction that has been described as both punitive and compensatory. The use of language such as “without reasonable cause” denotes that it is not confined to deliberate misconduct.

20. The leading authority in this jurisdiction on wasted costs orders, and one that has been consistently followed and applied over the years, is the judgment of Finnegan P. in *Kennedy v. Killeen Corrugated Products Limited* [2006] IEHC 385. In its judgment, the High Court approved the judgment in *Myers v. Elman* [1940] AC 282 as representing the law in this jurisdiction also.

21. In *Myers*, five members of the House of Lords delivered judgments, the first by Viscount Maugham. He disagreed with the conclusion of the Court of Appeal that the jurisdiction was a punitive one in relation to misconduct of a solicitor analogous to that which might give rise to an application to strike the solicitors of the Rolls. In such cases, even negligence of a serious character would not be sufficient to amount to misconduct. However, in the view of Lord Maugham, disgraceful or dishonourable misconduct was not necessary for the exercise of the wasted costs jurisdiction, but negligence of a serious character would suffice (p. 290).

22. In the same case, Lord Atkin agreed that a breach of the duty owed to the court by gross negligence could lead to the exercise of the jurisdiction. Lord Wright took a similar view saying (at 319): -

“The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor’s duty to ascertain with accuracy may suffice... The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice... The jurisdiction is not merely punitive but compensatory.”

23. In *Delaney and McGrath on Civil Procedure* (4th Ed., 2018), the authors note (at para. 24-265) that in *Ridehalgh v Horsefield* [1994] Ch 205, Bingham MR considered *Myers* to be authority for five propositions:

“(1) The court’s jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors. (2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not. (3) The court’s jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice. (4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross. (5) The jurisdiction is compensatory and not merely punitive.”

24. Finnegan P. also cited with approval the dicta of Sachs J., applying *Myers v. Elman*, in *Edwards v Edwards* [1958] P. 235 (at 248): -

“It is, of course, axiomatic but nonetheless something which in the present case should be mentioned, that the mere fact that the litigation failed is no reason for invoking the jurisdiction: nor is an error of judgment, nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to a ‘serious dereliction of duty’, something which justifies according to other speeches in that case, the use of the word ‘gross’. It is not, however, normally necessary to establish *mala fides* or

other obliquity on the part of the solicitor; though it may be that if mala fides is established that might turn the scale in a particular case...”

25. An analysis of these judgments led Finnegan P. to conclude (at para. 17): -

“On my review of the authorities I am satisfied that the power of the court to make an order under Order 99 Rule 7, whether as to costs as between the solicitor and his own client or an order that the solicitor personally bear the costs awarded against his own client, depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the Court.”

26. *Kennedy* was subsequently applied by the High Court (Cooke J.) in *O.J. v The Refugee Applications Commissioner* [2010] IEHC 176. Having referred to the passage I have quoted above in *Kennedy*, Cooke J. said: -

“22. This Court agrees with that approach to the application of Rule 7 and to the interpretation of the authorities upon which it is based. It is clearly, however, a jurisdiction which should be exercised sparingly and only in clear cases where it is necessary to do so in order to do justice between the parties...”

24. The first duty of legal practitioners is, of course, to ensure that the legitimate interests of their clients are secured in exercising their right of access to the courts... Practitioners have also, however, a duty to the court to ensure that the right of access to the court is not abused by vexatious, wasteful or speculative litigation. There is no obligation to pursue litigation at all costs simply because it is possible to do so especially when it has no purpose other than that of prolonging the process and postponing a final determination of the asylum application.

25. Whenever the Court has good reason to conclude that there has been a failure in the discharge of this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse will be had to O. 99, r. 7 in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases.”

27. This judgment was subsequently approved by the Supreme Court in *P.O. v Minister for Justice and Equality* [2015] IESC 64, [2015] 3 IR 164.

28. The issue was again considered by the High Court (Hogan J.) in *H.O. v. Minister for Justice, Equality and Law Reform & Or.* [2012] IEHC 231. Having quoted O. 99, r. 7, which he described as giving rise to an exceptional jurisdiction, Hogan J. said: -

“The jurisdiction to make wasted costs order

15. The foregoing is, accordingly, the general context by reference to which this wasted costs application procedure falls to be measured. In considering this question, it must be recalled, of course, that it is a pure fallacy to suggest that all (or even a significant majority of) litigants will follow the advice of their lawyers. It is for the lawyer to advise and the client to decide. Once the client has decided to continue with the litigation, it becomes the task of the advocate lawyer - be he or she a solicitor or a barrister - to put the best possible case before the court for that client. It is for this reason that the mere fact that a hopeless case is pursued will not *in itself* justify the making of a wasted costs order: see, e.g., the comments of Sir Thomas Bingham MR in *Ridehalgh v. Horsefield* [1994] Ch. 205, 234:-

“Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insisted (sic) that cases be litigated. It is rarely, if ever, safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers concerned. They are there to present the case; it is... for the judge and not the lawyers to judge it.””

29. The court went on to say: -

“17. Nor would it be in the public interest that the creativeness and inventiveness of the legal profession should be stifled or that much cherished independence thwarted by the threat of a wasted costs order. If that were so, then there would be a real danger that the wasted costs procedure - or even the threat of it - would become an instrument of oppression in the hands of the wealthy or the powerful or the vested interests who, for example, feared legal change being brought about by ground-breaking litigation...

21. All of this means that the courts must be especially wary of retrospective endeavours to saddle solicitors with wasted costs orders simply because the case has been lost. Obvious cases such as misconduct, lack of *bona fides* and a vexatious desire to harass and oppress one's opponent by litigation aside, the jurisdiction to impose a wasted costs order must otherwise be confined to those cases where it is obvious that the litigation is so obviously pointless...

22. ... As Finnegan P. noted in *Kennedy* the fact that the solicitor in that case was acting on the advices of counsel was a major factor in the court's decision that he could not properly be adjudged to have been guilty of gross negligence.”

30. Refusing the application for a wasted costs order, Hogan J. analysed the relevant authorities on asylum law relevant to the issue raised by the applicant and having do so, observed (at para. 38): -

“38. ...[I]t cannot be said that the prospects were hopeless to the point where the further continuation of the litigation was plainly wasteful and vexatious...”

39. ...But it cannot be said that the case was untenable and certainly not in the sense of being wasteful and vexatious.”

31. The Supreme Court, [2013] IESC 41, upheld the judgment of Hogan J., referring with approval to some of the passages I have quoted above. In her judgment, with which the other members of the court agreed, Denham C.J. expressly approved *Kennedy* and adopted and applied the analysis of Finnegan P. She considered that among the factors relevant to the making of a wasted costs order was the fact that the solicitors were acting on the advice of counsel.

32. Each of these authorities was most recently considered by the High Court (Keane J.), in *Bebenek v. The Minister for Justice and Equality & Ors.* [2018] IEHC 323.

Conclusions

33. I think the following points can be derived from the authorities summarised above: -

- (i) The jurisdiction arising under O. 99, r. 9 permits the court to make two types of wasted costs orders, the first disentitling the solicitor from recovering costs from

his or her own client and the second, rendering the solicitor in effect personally liable for the costs of any third party whose costs the client has been ordered to pay;

- (ii) The jurisdiction is a wide one which empowers the court to make “such order as the justice of the case may require”;
- (iii) However, the jurisdiction is one to be exercised sparingly and only in the clearest of cases;
- (iv) In the absence of deliberate dishonesty or misbehaviour, a mere error of judgment, even one amounting to negligence, will not suffice to warrant the exercise of the jurisdiction;
- (v) What is required is gross negligence amounting to a serious dereliction of the duty of a solicitor to the court, which may in this sense be described as misconduct;
- (vi) Such misconduct includes the institution, pursuit and continuation of litigation which the solicitor knows, or ought reasonably to know, is vexatious, wasteful of court resources or otherwise an abuse of process;
- (vii) Pursuing litigation on the advice of counsel may afford a solicitor a defence to a wasted costs application, unless that advice is so obviously wrong that any reasonable solicitor giving the matter due consideration would realise that fact;
- (viii) The fact that a claim is likely to be hopeless does not necessarily give rise to the potential for a wasted costs order, provided the case has at least some stateable basis, even if theoretical. Development of the law is often advanced by the bringing of claims that are novel, without precedent or even contrary to existing authority, and such claims ought not be stifled by an over zealous application of the jurisdiction;

- (ix) The presence or absence of *bona fides* by the solicitor in pursuing litigation is not relevant to whether there has been gross negligence or not, but the presence of *mala fides* or an improper motive may render the pursuit of litigation, which might otherwise be regarded as merely negligent, properly the subject of a wasted costs application;
- (x) The jurisdiction is properly regarded as both punitive and compensatory.

34. I would note in passing that the new O. 99 came into effect in consequence of the passage of the Legal Services Regulation Act 2015. One potentially significant change made by O. 99, r. 9 over the previous O. 99, r. 7 is that where “solicitor” appears in the old order, the term “legal practitioner” appears in the new one. S. 2 of the 2015 Act defines the term “legal practitioner” as “a person who is a practising solicitor or a practising barrister”. On its face therefore, the new rule appears to expand the jurisdiction in relation to wasted costs orders to now include barristers. While the point does not arise for consideration on the facts of this case, the comments I have made at para. 31 above are derived from the law relating to the old O. 99, r. 7 which exclusively concerned solicitors and should be seen in that context.

35. In the course of his oral submissions to the court at the hearing of the costs application, Mr. Nwadike accepted that he was, to use his own phrase, “a little bit wrong” in bringing the claim but did so out of a desire to help the plaintiff in his wish to retain lands that had been in his family for many years. While he said that he had received a modest payment on account from the plaintiff initially, he had acted largely *pro bono*.

36. As I have said however, the fact that a solicitor acts *bona fide* in pursuing a vexatious claim cannot be viewed as exculpatory where gross negligence is demonstrated. To take perhaps a benign view of the matter, it is at least possible that Mr. Nwadike had a genuine,

albeit misguided, belief in the validity of the claim, at its initial stages at any rate, and this might perhaps have been relied on in answer to an application for a wasted costs order, had such application being made following the dismissal of the claim by the High Court.

37. It must be remembered that this was an application for an interlocutory injunction, not the trial of the action which has yet to take place, where the plaintiff was required in the first instance to establish the relatively low threshold test of raising a fair issue to be tried. The plaintiff not only failed to raise such an issue, but did so by a very wide margin as Allen J. made clear. He described the primary argument concerning the exclusive jurisdiction of the High Court of South Africa as “unstateable” at para. 22. He said, at para. 25, that the argument that the choice of jurisdiction clause precluded the jurisdiction of the Irish court “does not get out of the blocks” for the simple reason that it was plainly non-exclusive. He described, at para. 27, the point about non-disclosure of the clause by Tower to the plaintiff as “a thoroughly bad one” and the application failed “*in limine*” and “in its entirety”- see paras. 31-32.

38. The effect of the judgment of the High Court could not be clearer and yet the appeal to this court was brought on precisely the same points, without identifying any alleged error in the approach of the High Court other than suggesting it was wrong.

39. Any lingering doubt in that regard was however laid to rest by the refusal of Costello J. in this court to grant an interlocutory injunction pending the hearing of the appeal on largely the same grounds. Indeed, the application itself to Costello J. was entirely misconceived as it started life as an application for a stay on the order of the High Court where, of course, a stay on a dismissal is a *non-sequitur*. When this was pointed out to the appellant, the application became one for an injunction.

40. Even if Mr. Nwadike had laboured under a mistaken view of the matter up to that point in time, and I have to say I have considerable reservations about that, particularly in light of the replying affidavit in this application sworn by the defendant's solicitor, Mr. Dowling, that view ought to, by then, have been roundly dispelled by the crystal clear judgments of the High Court and Costello J.

41. Thereafter, it seems to me clear that the decision by Mr. Nwadike to persist with the appeal, notwithstanding everything that had gone before, cannot be viewed as other than a complete and deliberate waste of valuable court resources. To pursue the appeal in those circumstances was at best grossly negligent and at worst, a deliberate dereliction of Mr. Nwadike's duty to the court.

42. Having regard to these factors, the court must in my judgment mark its disapproval of the manner in which this appeal was initiated, pursued and continued by Mr. Nwadike and protect its process from such abuse now and in the future.

43. Thereafter, the only issue that arises is the extent of the costs for which Mr. Nwadike should be made personally responsible. The defendants have sought their costs of not just the substantive appeal but also of the hearing before Costello J. However, I am satisfied that as no application was made to Costello J. for a wasted costs order, it would not be appropriate that that should be revisited now.

44. In relation to the appeal proper, Mr. Nwadike in effect suggested that were he to be made personally responsible for the defendants' costs, it would in practical terms bring his practice to an end. I also note that the plaintiff has sworn an affidavit in support of Mr. Nwadike which notes the fact that Mr. Nwadike appeared on his behalf at the costs hearing before the Legal Costs Adjudicator and succeeded in achieving a very substantial reduction in the defendants' bill of costs.

45. Having regard to all matters, I am persuaded that it would, in the particular circumstances of this case, be disproportionate to order Mr. Nwadike to personally meet the defendants' costs of this appeal. I am satisfied that the justice of the case would be met by the court making an order disallowing Mr. Nwadike's costs as between himself and his client, the plaintiff herein. For the avoidance of doubt, this applies to all such costs, including any payments on account already made by the plaintiff, which must accordingly be reimbursed.

46. In relation to the costs of the appeal generally, as the defendants have been entirely successful, they are entitled to their costs, noting that no contrary position was advocated on behalf of the plaintiff at the costs hearing herein. However, as regards the costs of the wasted costs application, the defendants have only been partially successful in that regard. While a wasted costs order has been made, it is not the order sought by the defendants or one that will benefit them. In those circumstances, in my view the fairest outcome is to direct that there shall be no order as to costs in relation to the wasted costs application. Again, for the purpose of clarity, Mr. Nwadike will have to personally bear his own costs in respect of that application which will not be for the plaintiff's account.

47. As this ruling is delivered electronically, Whelan and Haughton JJ have indicated their agreement with it.