



THE COURT OF APPEAL - UNAPPROVED

High Court Record Number: 2017/6204P

Court of Appeal Record Number: 2022/3

Neutral Citation Number: [2023] IECA 17

**Whelan J.
Ní Raifeartaigh J.
Binchy J.**

BETWEEN/

TOM KAVANAGH AND TANAGER DESIGNATED ACTIVITY COMPANY

**PLAINTIFFS/
RESPONDENTS**

- AND -

**JAMES LARKIN (SOLE APPELLANT) AND CATHERINE (OTHERWISE
QUINN) LARKIN**

DEFENDANTS

RULING OF Mr. Justice Binchy delivered electronically on 31st day of January 2023

1. By Notice of Appeal dated 10 January 2022, the appellant appealed two orders of the High Court (Allen J.) made on 13 December 2021. The Court gave its decision on this appeal on 7th April 2022, under neutral citation reference [2022] IECA 90 . By notice of motion issued on 13th May 2022, the appellant has requested this Court to review its judgment. This is my ruling on that request.
2. In order that this ruling may be fully understood, it is necessary to set out some of the background leading up to the appeal. However, a more complete summary of the background is to be found in the judgment of the Court of 7th April, 2022.

3. The respondents originally issued these proceedings because, they claimed, the defendants had failed to deliver up possession of property to the first named respondent in his capacity as receiver of that property duly appointed by the second named respondent . The defendants had originally acquired the property with the assistance of a loan from Bank of Scotland Ireland, and ultimately that loan and related security was acquired by the second named respondent.) The respondents further claimed that the defendants had interfered with the receivership of the property. The respondents had issued a motion on 10 July 2017, seeking interlocutory reliefs, including, *inter alia*, an order restraining the defendants from trespassing on the property. This motion was adjourned on numerous occasions and had ultimately been made returnable before the High Court on 6 May 2021. By that time, however, the respondents had obtained possession of the property and the property had been sold, and the respondents no longer wished to continue with the proceedings. As is recorded in the judgment of this court at para. 8 thereof, the respondents had informed the defendants in writing (on 9 April 2021) of their intention to make application to strike out the proceedings.

4. However, the defendants had, on 25th January 2021, issued a motion of their own which was returned for 26 April 2021 , and the respondents, rather than wait until the date on which their own motion had been listed for hearing i.e. 6th May 2021, took the opportunity to apply on 26th April 2021 to strike out the proceedings in their entirety. The transcript of the proceedings of 26th April 2021 records that the High Court judge first heard the defendants' motion of 25th January 2021 declined the reliefs sought. The orders sought by the defendants included an order for the attachment of the respondents' agents, BRG Gibson Auctions Belfast and Dublin, and the directors of that company, on the grounds, *inter alia*, that they had facilitated fraudulent activity and deceived the Court, an order holding the respondents in contempt of court, and an order dismissing the

proceedings for “want of standing/evidence...”. The High Court judge refused to make the orders sought because he could find no basis for the grounds relied upon by the defendants in support of their motion. Importantly, the defendants did not appeal this decision of the High Court judge.

5. The High Court judge then proceeded to hear the application to strike out the proceedings *i.e.* both the substantive proceedings and the motion seeking interlocutory relief. He granted both applications, noting that the respondents would be entitled to abandon the action by serving a notice of discontinuance, and there would be little point in bringing the parties back to court again the following week. In granting the respondents’ application, the High Court judge ordered them to pay any outlay incurred by the defendants in the proceedings. The appellant/defendants did not appeal this order either.

6. However, on 4 June 2021, the appellant issued a further motion, and, as observed at para. 12 of the judgment of the Court, the reliefs sought by this motion were somewhat unclear. In the first paragraph thereof, the appellant sought an order to “perfect the orders referred herein” and then proceeded to claim that the High Court judge had (on 26th April 2021) failed to administer due process and had perverted the course of justice by denying the defendants the orders they sought in their motion before the court on 26th April 2021. In the text of the motion he then reproduced the terms of the orders he had sought on that date, in the same terms as his motion of 25th January ,2021. He also reproduced the terms of other orders sought in an entirely different motion dated 24th April 2019,, being orders for cross examination (and related orders) of various employees or agents of the respondents, which had been previously refused on 27th May 2019, by another judge of the High Court. However, although it is unclear, he does not actually appear to seek orders in the terms of those aforementioned orders, but he does seek orders for costs, and damages.

The appellant's motion of 4th June 2021 was one of two motions that came before the High Court on 13th December 2021.

7. The second motion before the High Court on 13th December 2021 was one issued by the respondents on 14th October 2021, whereby the respondents sought relief pursuant to O.28, r.11 of the Rules of the Superior Courts (the "slip rule"), specifically an order correcting the terms of the earlier order made by the High Court judge on 26th April 2021, so as to reflect the fact that the within proceedings had been struck out by the High Court judge on that date, on the application of the respondents. The perfected order of the High Court judge (of 26th April 2021) had referred (erroneously) only to the striking out of an application for interlocutory relief previously brought by the respondents pursuant to the motion issued on 10th July 2017. On 13th December 2021, the High Court judge granted the relief sought by the respondents and refused the reliefs sought by the appellant in their respective motions. The judge noted that if the defendants were dissatisfied with the orders that he had made on 26th April 2021, then their remedy was to appeal to the Court of Appeal, and not to come back to the High Court asking it to revisit decisions already made (as observed at paragraph 15 of our judgment of 7 April 2022).

8. The appellant's appeal from the orders made by the High Court judge on 13th December 2021 came on for hearing before this court on 31st March 2022. Judgment of the court was delivered on 7 April 2022, whereby the appeal was dismissed, and the order dismissing the appeal was perfected on 13th April, 2022.

9. By motion issued on 13 May 2022, the appellant asks the court to review its judgment, in the words of the appellant: "*in accordance with the actual written submissions and application of the defendant(s)/appellant(s), and, if the court declines to review the same, seeks a written order identifying its reasons for doing so.*" The appellant states in the motion that that "*the written judgment does not reflect the proceedings held*

on 31st March 2022, and this current judgment fails to address and/or critically examine the abuse of process, fraud and malicious deception of the plaintiff...(now respondent) and their legal counsel.” The motion is grounded upon an affidavit of the appellant of 13th May 2022.

10. That the court has a limited and exceptional jurisdiction to review its decisions is not in doubt. The jurisdiction was first recognised in *Greendale Developments Limited (No. 3)* [2000] 2 IR 514 and has been the subject of a number of judgments in the intervening years. While the jurisdiction of the court to review its own judgment is not in doubt, neither is it in doubt that this is an exceptional jurisdiction to be exercised only in circumstances where it is established that there has been some fundamental denial of constitutional justice. It is well established that it does not exist to allow a party to re-argue an issue that has already been determined.

11. It is also established that, procedurally, a court asked to review its own decision may consider the papers and make a ruling on that basis as to whether the case should proceed any further – see in this regard the decision of Haughton J in this Court in *Dowling and ors v Minister for Finance and Permanent TSB* (notice party), 13th December 2022 (at paras 4-10). I consider this to be an appropriate case in which to follow that procedure.

12. In a decision of this court in *Launceston Property Finance DAC v. Wright* [2020] IECA 146, Whelan J. conducted a review of the authorities relating to this exceptional jurisdiction and summarised the applicable principles as follows:

“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 the result;*
- (viii) *cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment; and*
- (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.”*

13. In his affidavit grounding this motion, the appellant asserts that he was not accorded a fair trial, and that *“many measures were put in place to prevent him from litigating and defending his defence/case.”* He claims that this Court *“failedto review or adjudge the substantive issue of the lack of jurisdiction of the High Court, and /or to critically address the lack of legitimacy of the Plaintiff..”* He raises issues that were not properly before the court in his appeal, such as, for example, the respondents engaged in an abuse of process by lodging their *“original application”* which I take to be a reference to the notice of motion issued by the respondents on 10 July 2017 seeking interlocutory reliefs restraining the defendants from interfering with the functions of the first named respondent as receiver over certain property of the defendants, as well as related orders restraining the defendants from trespassing on that property. The appellant claims that this court, *“although fully aware of the facts and fraudulent criminal activities of the plaintiff and their legal counsel, have failed, refused and/or neglected to address these matters in [their] purported judgment.”* However, these were not matters that fell for adjudication in this appeal.

14. The appellant appears to have difficulty in understanding that a matter that was not before the High Court, and formed no part of its decision, cannot form any part of an appeal to this Court, and this cannot be rectified merely by including the issue concerned in submissions to this Court. The appellant appears to need reminding that it was not the decision or orders of the High Court of 26th April 2021 that was/ were under appeal to this Court - as he did not appeal from that decision or those orders - but rather what was under appeal were the orders made by the High Court on 13th December 2021.

15. While the appellant, in his affidavit, avers that the decision of this court is “*anathema to the constitution and all possible law*” he fails to identify the denial of fair procedures to which he alludes, or any denial of constitutional justice such as to engage the jurisdiction of the court to review its judgment.

16. He raises an issue regarding the validity of the appointment of the first named respondent as receiver over the property. He raises another issue regarding the liquidated amounts claimed as being due by the defendants [to the second named respondent].. These, and other matters to which the appellant refers did not fall for adjudication by this Court on appeal ,because they were not matters before the High Court on 13th December 2021, and consequently there were no orders made by the High Court regarding these matters, which were the subject of the appeal to this Court.

17. The appellant is critical in his affidavit of the judgment of this court which he considers to be “*derisive*” of the defendants, their applications and submissions. It is true that the court made criticisms of the appellant in respect of what the Court considered to be scandalous remarks that he made about the respondents, their legal advisors and the High Court judge. The fact that the court was critical of the appellant for such conduct does not give rise, and could not give rise, to the exercise by the court of its exceptional jurisdiction to review its own judgment and order.

18. I have carefully reviewed the grounding affidavit of the appellant and the judgment handed down by this court on 7 April 2022, in light of the principles summarised by Whelan J. in *Launceston*. While it is plain that the appellant is dissatisfied with the decision of this Court, as he was with the decision of the Court below, he has not identified any flaw in the proceedings before this Court, let alone any that could be considered to constitute a denial of constitutional justice. If the appellant has grievances with the judgment of the court, then he should have pursued these in the ordinary way by making an application to the Supreme Court for leave to appeal.

19. Finally, the appellant exhibits what he describes as new evidence relating to the illegal sale of the property by the respondents. Apart from the fact that this was not an issue before this Court on appeal, it is not open to the Court to receive new evidence of this kind in an application such as this.

20. For the foregoing reasons, I would dismiss this application.

21. Whelan J. and Ní Raifeartaigh J., having also examined the papers submitted, have confirmed their agreement to this ruling.