



THE COURT OF APPEAL

CIVIL

[2015 432]

The President

Neutral Citation Number [2024] IECA 213

Binchy J.

Meenan J.

BETWEEN

ANDRIES VAN TONDER

APPELLANT

AND

JUDGES OF THE DISTRICT COURT AREA OF TRIM DISTRICT NO 10

RESPONDENT

AND

CHILD AND FAMILY AGENCY (FORMERLY HEALTH SERVICE EXECUTIVE)

NOTICE PARTY

JUDGMENT of the Court (*ex tempore*) delivered on the 12th day of April 2024 by

Birmingham P.

Introduction

1. The situation in which the Court finds itself today is far from satisfactory. Before us is an appeal arising from the refusal of the High Court to grant the appellant leave to bring judicial review proceedings. That refusal was in the course of a decision of Peart J. of 28th June 2010. The application for judicial review that was brought to the High Court, which is now the subject of this appeal, arose from how the District Court dealt with an application, which has been described by way of shorthand as a “common informer” application. That common informer application which the applicant had sought to bring was in respect of, we

have been told, offences under the Childcare Act 1991, as amended, the Criminal Justice (United Nations Convention against Torture) Act 2000, as amended, and the Protection for Persons Reporting Child Abuse Act 1998, as amended.

Background

2. What came before the High Court, and what was at issue there, was a decision of the District Court in Trim on 15th October 2009. That was a decision of a now retired Judge of the District Court, Judge Fitzpatrick. Judge Fitzpatrick did not permit the applicant to issue a summons as a common informer, and that gave rise to an application for leave to seek judicial review. The initial application for leave we understand was on 10th May 2010, so the initial application for leave was some seven months after the proceedings in the District Court, that was at a time when a six months time limit for the relief of *certiorari* was applicable subject to the possibility of extension, and that six-month period had expired some six weeks earlier.

3. It is of some note and some significance, that the application to Peart J. that has now been appealed to us today is one of two applications that were apparently brought to Peart J. First, there was the application we are dealing with today, and there was a second application, and that in itself might raise issues as to whether the rule in *Henderson v. Henderson* [1843] 3 Hare 100 had any application and whether the applicant was bringing his best foot forward and bringing all issues that arose before the Court. In any event, what has emerged is that the Court today is being asked to hear an appeal in respect of a decision of the High Court in June 2010, a decision of the High Court which related to a District Court decision of October 2009, and the District Court proceedings in October 2009 themselves related to matters that had occurred at a somewhat earlier date still. What we are told, and in some respects are learning for the first time, today, is that it is clear that the decision of 28th June 2010 has now

long since been overtaken by events. The appellant has told us not once but a number of times today that he appealed this matter to the Supreme Court, and that he appealed it alongside an appeal arising from the second occasion that the matter had come begging in one form or another before Peart J.

4. We are told that what happened in Supreme Court was that the appellant met some success in that he says that the Supreme Court indicated that the fact that proceedings are *in camera* was not a bar to criminal offences that occurred during the course of those proceedings being investigated, and that, it seems, was the objective that the appellant wanted to establish and wanted to be established clearly. We have been told that that ruling was primarily at least based in the context of parallel proceedings, and, according to the appellant, the Supreme Court indicated that the other set of proceedings – the proceedings that are the primary issue today – were being put on hold.

5. Having made the progress that he did in those proceedings, the appellant went back before the High Court, and it appears that an order was made by Noonan J. to the same effect as had been indicated by the Supreme Court, and indeed it appears that the terms of that decision were entirely to the appellant's satisfaction. If he has a grievance, or if he has a cause for dissatisfaction, it is that the decision did not receive the publicity that he would have wished, and that he would have liked to have seen it promulgated in a more extensive manner. In any event, the applicant, having secured satisfaction as he apparently did in the High Court before Noonan J., went back before the District Court. We have not been given details of what transpired there, but we understand that what was involved was effectively a renewal of the application for the issuing of a summons by way of the common informer procedure. However, the appellant was unsuccessful this time round as well, and it appears that he found himself facing difficulty by reason of the fact that what he wanted to do was to

bring proceedings where he said the evidence for the misconduct was to be found during the course of proceedings that were *in camera*.

The Appeal

6. The notice party, which has attended today and participated, notwithstanding that it would not have been a party to the application by way of the common informer proceedings, which involve an *ex parte* application. It is the situation that the initial judicial review application raised not just the common informer proceedings but also challenges to various orders that had been made under the Child Care Act 1991, as amended, and it appears that, in those circumstances, Peart J. at one stage directed that they should be put on notice. So, having been a party to the original comprehensive proceedings, the notice party has attended here today even though the only relief that is in issue at one level does not concern it directly. The notice party makes the point, and seems to me that it is a point that is well made, that the present proceedings are really entirely moot, because if the appellant was to succeed, the first thing that would happen is that the case would be sent back to the High Court. If ultimately it was decided that the appellant should be given a further opportunity to make an application in the District Court by way of common informer proceedings, he has had that opportunity already as the appellant was back in the District Court in 2013. It seems to me that the application for judicial review of a 2009 District Court decision is entirely moot. That decision is well and truly in the past; it has well and truly been overtaken by events.

7. A further aspect that merits consideration is that it appears that the appellant, apart from seeking relief by way of judicial review, also instituted plenary proceedings. He was encouraged to do that by Peart J., though Peart J.'s encouragement was met with a response that the proceedings were already in being, and in fact, in the course of those proceedings, at one point, the appellant had the assistance of legal representation, and it appears that his

settlement was negotiated. Notwithstanding that a settlement was negotiated, the appellant wants to proceed with his challenge to a 2009 decision in the District Court. No information has been put before the Court so as to provide a basis for concluding that the judge's decision in the District Court was not one that was open to him. We have not been provided with details of the information, and we just do not know on what basis the appellant could contend that there was only one decision open to the judge of the District Court which was to permit the appellant to act as common informer.

Conclusion

8. I am bound to say that the appellant's pursuit of the decision of October 2009 at this remove, almost fifteen years on, is entirely misconceived. I have no doubt the appeal should be dismissed.

Binchy J.:

9. I have listened very carefully to what the President has had to say in the judgment he has just delivered and I am in full agreement with it. Just to add one point to it, and this is it, in addition to not knowing the basis on which the District Court judge arrived at his decision, as the President referred to, we do not have any details upon which Peart J. arrived at his decision in June 2010 either. It may well be, for all we know, that he considered that there was no basis upon which what was sought could be granted because, as counsel for the Child and Family Agency has pointed out, there are no grounds for which this particular relief is set out in the Statement of Grounds. It may be that Peart J. considered the application was out of time, but in any event, we simply do not know. That is all I have to say about the matter, aside from affirming my complete agreement with the decision given by the President.

Meenan J.:

10. I agree with the decision of the President and Binchy J.