THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 1

Record Nos. 2018/177

2018/365

Baker J.
Costello J.
Collins J.

IN THE MATTER OF PERMANENT TSB GROUP HOLDINGS PLC

IN THE MATTER OF A PROPOSED CAPITAL REDUCTION PURSUANT TO SECTION 84 AND SECTION 85 OF THE COMPANIES ACT 2014 (AS AMEDED)

IN THE MATTER OF THE COMPANIES ACT 2014 (AS AMENDED)

BETWEEN/

PERMANENT TSB GROUP HOLDINGS PLC

APPLICANT/RESPONDENT

- AND -

PIOTR SKOCZYLAS

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 21st day of January 2020

1. I agree with the judgment of Collins J. delivered on these two appeals save as regards the appeal in relation to the trial judge's decision to award the respondent the costs of the recusal application. This judgment explains why I would refuse the appeal and affirm the order of the High Court. It necessarily requires that I also address the appeal in respect of the measurement of the costs of the recusal motion by the trial judge.

2. The appellant applied to the trial judge to recuse himself on the grounds of objective bias, as is explained in the judgment of Collins J. The test whether a judge should recuse his or herself is an objective one. It is not to be assessed by reference to the subjective views of the moving party or, indeed, of the judge. The test is whether an objective, reasonable observer, who has knowledge of the relevant facts and who is not overly sensitive, would have a reasonable apprehension that, in this case the appellant, would not have a fair hearing before an impartial judge. The appellant has not met this test. It necessarily follows that there was no reasonable ground to apprehend that the application would not be tried by the trial judge in an impartial manner. In those circumstances, is it appropriate to interfere with the trial judge's decision on the costs of the recusal application?

3. The starting point in relation to all questions on costs is that they are within the discretion of the court, but that Order 99 RSC provides that costs follow the event. Thus, this is the usual order as to costs. If there are special circumstances, or if the case is complex, the principles identified in *Veolia Water*, [2007] 1 IR 690, arise and the court may make alternative orders as to costs to meet the justice of the case. In so doing, the court must identify the special reasons it has identified in the case. Finally, as has been often stated, as an appellate court, this court will, in general, be slow to interfere with the trial judge's exercise of his discretion in awarding costs; although, if the trial judge has demonstrably departed from identified principles, an appellate court will intervene (*M.D. v N.D.* [2016] 2 IR 438).

4. Applying these principles to this case, the appellant's application, that the trial judge recuse himself, failed in the High Court and on appeal. The basis for the failure is the finding that there was no reasonable apprehension that the case would not be determined by an impartial judge. This court's jurisdiction to intervene in the trial judge's exercise of his discretion on the costs of the motion should be exercised sparingly. The application lasted for nearly a day in the High Court. The trial judge exercised his discretion in relation to the costs of the application and he saw no reason not to award the costs to the successful party, the respondent, in accordance with O. 99. If this court is to intervene in those circumstances, it must identify special reasons which would justify both departing from O. 99 and overturning the exercise of the High Court's discretion as to costs.

5. I see no reason why the respondent, as the successful party on the motion, should be deprived of its costs. The appellant was not required to bring his application. Both this court and the trial judge have, in effect, found that his apprehension was unreasonable. It was not inappropriate for the respondent to oppose the application, so it should not be penalised for having done so successfully. It must be borne in mind that the appellant had the benefit of the transcript prior to bringing the motion and it is apparent from the transcript that the trial judge wished to hear from the appellant and sought to facilitate the appellant in the presentation of his case: he refused to proceed with the confirmation hearing in his absence and he varied the directions to allow the appellant to file a replying affidavit. This indicates that the trial judge wished to afford the appellant a fair opportunity to present his case, which is precisely the opposite of what the appellant contended in bringing his application that the trial judge should recuse himself. The rules in relation to costs apply in the circumstances, and I see neither any error in the application of established principles by the trial judge in his order as to costs, nor any special reason for this court to allow the appeal on the order as to costs.

6. In light of this conclusion, it is necessary to go on to consider the appellant's appeal in respect of the decision of the trial judge to measure those costs at €20,000, plus VAT. In my view, this decision cannot stand; however, not for the reasons advanced by the appellant regarding his own alleged incapacity to meet the award. The trial judge made his decision both to measure the costs, and the quantum of the costs, without affording the parties the opportunity to address him on the issues in advance of his ruling. In my opinion, this was an error and amounted to a failure to hear the parties on the two issues.

It is clear from the authorities that the trial judge was not required to receive evidence from the parties as to the costs incurred by the respondent in opposing the motion and the sum likely to tax in respect of those costs. He is entitled to have regard to his own experience as to the likely costs of the respondent as the judge in charge of the Commercial List of the High Court and a former barrister of very considerable experience. In my opinion, the trial judge was endeavouring to act in ease of the appellant and he measured the costs at a figure well below that at which he expected them to tax, but that is not the point. The appellant does not accept this and has appealed the decision. The trial judge ought to have permitted the parties to make submissions both as to the appropriateness of exercising his power to measure the costs and the level at which he measured those costs. He did not do this and so the decision was arrived at, for whatever reason, in a manner which did not respect the appellant's right to be heard on the issues. For this reason, I would allow the appeal and I would order that the appellant should pay the costs of the respondent on the recusal application when taxed and ascertained.

7. In all other respects, I concur with the judgment of Collins J.