THE COURT OF APPEAL

APPROVED

Record Number: 2023/139
High Court Record Number: 2020/7098P
Neutral Citation Number [2024] IECA 172

Power J.

Butler J.

O'Moore J.

BETWEEN/

ALAN MOYNE

PLAINTIFF/APPELLANT

-AND-

SAM TODD, EUGENE F. COLLINS, PAUL DEMPSEY, ABIGAIL BUTLER, MARK WALSH, AILISH COLGAN, KARL SMITH, PATRICK MABRY AND STEVE RODGERS

DEFENDANTS/RESPONDENTS

RULING of Mr. Justice Brian O'Moore delivered on the 2nd day of July, 2024

1. In my judgment of the 19th April, 2024, with which Power J. and Butler J. agreed, I dismissed Mr. Moyne's appeal against the order of the High Court striking out this action against all defendants on the grounds that it is vexatious, an abuse of process and bound to fail.

2. At paragraph 80 of my judgment, I expressed the provisional view that Mr. Moyne should pay the costs of all of the respondents to the appeal, given that they had been entirely successful. However, a provision was made for the making of submissions by either side in the event that a different order as to costs was sought. While such submissions were made, concluding with the defendants/respondents' replying submissions of the 13th June, 2024, they were not made in compliance with the original directions, as the solicitors for the defendants/respondents sought an extension for their initial submissions and Mr. Moyne also sought an extra five days for delivery of his submissions.

3. In those submissions, Mr. Moyne included a section (running from para. 11 to para. 17 inclusive) headed: -

> *"APPLICATION TO REVIEW/REVISIT THE DECISION BEFORE THE ORDER IS PERFECTED"*

4. On the 15th February, 2023, Birmingham P. issued a practice direction (CA 14). The practice direction noted that under Art. 34.5.3 of the Constitution the Supreme Court has appellate jurisdiction from a decision of this court only if satisfied that:-

> *"i. the decision involves a matter of general public importance, or*
>
> *ii. in the interests of justice it is necessary that there be an appeal to the Supreme Court."*

5. The practice direction then went on to state: -

> *"(b) the Court of Appeal ("the Court"), following case law of the Supreme Court… has determined that review applications will be considered by it only in the most exceptional circumstances…;*

(c) those circumstances are that, through no fault on the applicant's part, the order or judgment made operates both to deny the applicant justice and clearly to breach the applicant's constitutional rights. (see *Greendale*);

(d) a party intending to bring a review application… bears a very heavy onus of establishing that such circumstances exist;

(e) an intending applicant must show cogent and substantive grounds which are objectively sufficient to enable the Court to determine that a hearing of a review application on the merits is justified;

(f) it is desirable, in the interests of finality and certainty, that any review application to the Court be initiated as soon as possible and within the general period of time allowed by the Rules of the Superior Courts for seeking leave to further appeal to the Supreme Court (under RSC O.58, r. 16(1)) or shortly thereafter…"

6. In their final submissions, the defendants/respondents argued that this Practice Direction governs the current application. By email of the 17th of June 2024, Mr. Moyne sought to vary further the original directions by providing him with the opportunity (over an unspecified period) to deliver replying submissions to the supplemental submissions of the defendants/respondents. The reason he gives is this;

"I refer specifically to paragraph 2 therein in which the respondents refer to Practice Direction CA14, and case law relied upon, which does not apply, to application to review a decision, prior to the perfection of an order."

7. For the purpose of expedition in making this Ruling, I will not direct that further submissions by furnished by Mr. Moyne. It was open to him to address the question of the applicable standard in making his original submission that the main judgment to be reviewed or revisited. However, I have not in this Ruling applied the provisions of CA 14. This is not to create a precedent in respect of such an application. It is, rather, simply an approach specific to this case and tailored to deal promptly with an application made in the context of proceedings which themselves arise from an earlier ongoing claim initiated in the Circuit Court in 2015, some nine years ago. It is also an approach which is possible as the current application can be decided without a further round of submissions by applying a much lower standard, namely whether Mr. Moyne has raised any reason to revisit or review the main judgment.

8. In In Re McInerney Homes [2011] IESC 31 O'Donnell J held;

"It is only in exceptional circumstances where justice requires that course that the Court should reopen proceedings after the delivery of judgment and before the formal order is made." In the High Court in the same case, Clarke J had held that such a reopening could only happen when there were "strong reasons" for so doing.

9. In SZ (Pakistan) v Minister for Justice and Law Reform [2013] IEHC 95 Hogan J held that McInerney is "authority for the proposition that the Court cannot lightly and without grave reason reopen a final judgement."

10. The position was reviewed by Simons J in G. v A Judge of the District Court [2023] IEHC 386 (where the judge referred to the "limited circumstances" in which such a review was appropriate) and by Cregan J in Gaultier v Reilly [2023] IEHC 558 (where court referred to the need for "strong reasons" and "exceptional circumstances" in the context of an attempt to have it revisit its judgment).

11. All of these authorities relate to the reviewing of the judgment of a court of first instance. With regard to the Court of Appeal revisiting its judgments before its order is perfected, in Bailey v The Garda Commissioner [2018] IECA 63 Finlay Geoghegan J found that the court had an "exceptional jurisdiction" to revisit its judgments "where it is considered necessary to do so to comply with the constitutional imperative to administer justice"; paragraph 35 of the judgment.

12. For the purpose of this application, I will approach Mr. Moyne's submissions by initially considering whether they provide any reason why the main judgment should be revisited or reviewed. I am not, at this stage, requiring Mr. Moyne to show "strong reasons" or "exceptional circumstances" or anything of the sort. I do this only because Mr. Moyne, notwithstanding his failure to express his view about the relevant standard in his submissions, disputes the position of the defendants/respondents on this question.

13. Paragraphs 12 and 13 of Mr. Moyne's submission deal with the interaction between the provisions of the Constitution and the defence of absolute privilege. He says: -

> *"12. At paragraph 33, O'Moore J. seems to have misunderstand (sic) the written submissions of the Appellant who sought to amend his grounds of appeal for taking into account Noonan J. order, which was limited to seek declaration of unconstitutionality and incompatibility. The said order did not prevent to consider to which extend section 17 of the Act is compatible with the Constitution. The core element of my written submissions in this regard is/was that all element of section 17 must relate to exceptions expressly made in the Constitution. To that regard, the defence of absolute privilege is to be construed as being absolute when applicable, not of absolute applicability.*

13. The above core element to my submissions, as presented in his decisions would come clashing with O'Moore J.'s conclusion at paragraph 40."

14. The order of Noonan J. is set out at para. 27 of my judgment. It makes it quite clear that declarations of unconstitutionality were not to be litigated in the appeal before this court. The order did, therefore, *"prevent to consider to which extent s. 17 of the Act is compatible with the Constitution…"* as claimed at para. 12 of Mr. Moyne's most recent submission.

15. In as much as Mr. Moyne is arguing that his case is not that s. 17 of the Defamation Act is unconstitutional, but rather that absolute privilege is only available in circumstances specified in the Constitution, this is essentially to say that the clear provisions of s. 17 (which are of general application) are either inconsistent with the Constitution (an argument which Noonan J. ordered that Mr. Moyne could not advance) or alternately have to be read in the singularly tortuous way as advocated by Mr. Moyne. In any event, as Mr. Moyne concedes, para. 40 of my judgment concludes that an individual's right to their good name as provided for by the Constitution is moderated because of the need to have individuals involved in judicial proceedings be able to speak without fear of provoking a claim for defamation. I am satisfied that that conclusion is sound, not least because of the authorities to which I refer at paras. 36, 37 and 38 of the judgment. These are *Looney v Bank of Ireland* (Supreme Court, 9th May 1997), *Bebenek v Minister for Justice and Equality & Ors. (No. 2)* [2019] IEHC 154 and *Shatter v Guerin* [2021] 2 IR 415, at para. 45.

16. The second ground on which Mr. Moyne feels the main judgment should be reviewed is set out at para. 14 of his submission:-

"14. In relation to malicious falsehood, O'Moore J. should stand corrected that application to amend the High Court pleadings as part of this appeal was not feasible. Rather, it was to be consider (sic) that the possibility of such existed after

defect first identified in the Respondent's submission of December 2023 (and not in May of last year as suggested at his paragraph 50)."

17. This argument is quite unconvincing. It was made plain in the main judgment that (notwithstanding any failure on the part of Mr. Moyne to suggest amendment to the pleadings which would save the action) it was for the court to consider *"whether the circumstances of this case would admit of an amendment to the pleadings which could allow the claim for malicious falsehood to be advanced…"*; see paragraph 53 of the judgment.

18. However, in considering any such possible amendment it would have been important for Mr. Moyne to have proposed how the case might be amended. He could have done that at any stage. He never did.

19. With regard to the two dates referred to at para. 14 of his submission, these relate to the times when I found (at para. 50 of the main judgment) that Mr. Moyne must have been alert to the fact that the proceedings could have been saved by an appropriate amendment. The submissions to this court of the defendant/respondent were filed on the 11th December, 2023. They state in clear terms that Mr. Moyne had not pleaded special damage or pleaded that the publication of the relevant statement was calculated and likely to cause financial harm to him. These pleadings are required by the provisions of s. 42 of the Defamation Act, 2009. The reference to May of 2023 is the date of the High Court judgment, which also referred to the possibility that the current claim could be improved by a suitable amendment (see paragraph 27 of the judgment of the High Court).

20. Paragraph 15 of Mr. Moyne's most recent submission contains his third argument as to why the judgment should be reviewed. It states: -

> *"15. Furthermore, in the last sentence at paragraph 53, O'Moore J. failed to consider the test of 'is likely to cause losses' with due regard to the loss of a property (as the respondent's company or its successors had been attempting to change Folio numbers on the Land Registry) and the legal costs of the Circuit Court proceeding."*

Mr. Moyne is here referring to the requirement, again set down by paragraph 42 of the 2009 Act, that the tort of malicious falsehood is only made out where (*inter alia*) the plaintiff establishes that a publication *"was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or her property…"*. The fact that the impugned statement of Mr. Todd was made in the context of proceedings involving the possession of land, and in respect of which Circuit Costs could have been awarded, does not meet the requirement of s. 42(2)(b) of the 2009 Act.

21. The final substantive complaint made by Mr. Moyne is this: -

> *"16. I respectfully submit that he (sic) allegation of Cox and McCullogh, upheld by this court, that the vindication of a constitutional right cannot be sought in court of first instance, which has full jurisdiction under the Constitution itself, is both ludicrous and fanciful."*

22. Cox and McCullough is the leading Irish textbook on defamation. It is, justifiably, highly regarded. The proposition as set out in Cox and McCullough (at para. 7-55 of the second edition) to which I referred at para. 76 of the judgment is itself grounded on the decision of the Supreme Court in *Looney*, to which I have already referred. I do not think that the judgment of O'Flaherty J. in *Looney*, as explained in Cox and McCullough, is either ludicrous or fanciful.

23. At paragraph 17 of his submission, Mr. Moyne sets out a general belief which he seems to hold to the effect that the threat of litigation encourages tradesmen to do their work properly. He extrapolates from this that legal professionals should be subject to the threat of litigation in the event that they defame somebody during the course of court proceedings. He concludes: -

> *"This can only be construed as a subjective bias of the Irish Courts, for the benefit of their former peers, other colleagues or family members."*

24. This objection is completely misplaced. The provisions of s. 17 are designed to be of assistance to everybody who speaks during the course of court hearings, as it enables them to give their evidence (or make their submissions) without having to worry about the possibility that a disgruntled individual will sue them. The absolute privilege provided for by s. 17 of the 2009 Act is not confined to lawyers. One striking aspect of the current appeal (and the hearings that preceded it) is that, if absolute privilege is not applied to statements made in court, Mr. Moyne himself could well have been the subject of claims for defamation because of the singularly damaging statements that he made about individuals. Happily for Mr. Moyne, he (like Mr. Todd) is entitled to the protection that s. 17 provides.

25. Having considered the application to review the main judgment, I have decided to decline it. The application does not provide any coherent reason to revisit the earlier judgment, no matter what standard is applied.

26. I will now deal with the question of costs.

Costs

27. The defendants/respondents submit that, following the judgments of Murray J. in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 and *Higgins v*

Irish Aviation Authority [2020] IECA 277 the costs of appeal should be awarded in their favour. They justify such an award by identifying the starting point as being that the defendants/respondents have been entirely successful in seeing off the appeal. In as much as the conduct of the parties come into play, they say that Mr. Moyne's conduct in the proceedings *"amply justifies an award of costs against him…"* for the following reasons: -

(a) Mr. Moyne failed to abide by the order made by Noonan J., to which I have already referred; and

(b) as noted in my earlier judgment, Mr. Moyne did not appeal against the High Court's finding that he had improperly conflated the directors of Tanager DAC with the company itself. Notwithstanding the failure to appeal this finding against him, which was critical as far as the involvement of those defendants/respondents were concerned, Mr. Moyne nonetheless kept those directors in the proceedings.

28. Mr. Moyne, in response, submits that the court should depart from the ordinary rule on two grounds: -

(a) It is suggested that *"exhibit ST1"* to the affidavit of Sam Todd sworn on the 9th May, 2022 was *"extensively altered by neglect, recklessness and/or with intent."* It is also said that this exhibit could not have been accurate, as it purported to put before this court an exhibit to an affidavit of Mr. Moyne notwithstanding the fact that included in the documentation at *"ST1"* was a court order which post-dated Mr. Moyne's relevant affidavit by four months.

Similarly, with regard to the conduct of the defendants/respondents, Mr. Moyne complains that the High Court was mislead (and this court was the

subject of an attempt to mislead) on the question of whether there was a mistake in the Land Registry with regard to the registration of the property the subject matter of these proceedings;

(b) The current case was a test case, as explained at paragraphs 24-48 of Delany & McGrath (4th edn.).

29. I agree with the defendants/respondents that the starting point in considering the question of costs is the fact that those parties succeeded entirely in having the appeal rejected. Before I consider the other grounds upon which the defendants/respondents say they would be entitled to costs, I should consider the reasons put forward by Mr. Moyne as to why the ordinary rule should not apply.

30. I am unimpressed by Mr. Moyne's argument that there was some manipulation of the exhibit to Mr. Todd's affidavit. As counsel for the defendants/respondents conceded, the exhibit was poorly assembled. However, precisely because of the inclusion of the Circuit Court order mentioned by Mr. Moyne, it was possible with some precision to see where the exhibit to Mr. Moyne's affidavit ended and the other documentation began. Counsel for the defendants/respondents with considerable care opened the documentation to the court. Far from constituting, as Mr. Moyne alleged, *"a particularly pernicious insertion with a clear intention of deception"* the solicitors for the defendant/respondents made an unfortunate error in putting together the documents and this was addressed appropriately by counsel in conducting the appeal.

31. The other complaint about the conduct of the defendants/respondents is simply not made out by Mr. Moyne. Submissions may well be made which are found to be erroneous. That does not necessarily involve a false statement, or conduct of the type that justifies a departure from the ordinary approach towards the costs of a proceeding.

32. On his second argument, the current proceedings are not a test case, in the manner which that phrase is used by Delany and McGrath in the paragraph helpfully brought to the court's attention by Mr. Moyne. The issues raised by Mr. Moyne were ones which are well-settled, and which in the view of both this court and the High Court did not even have the required complexity not to be struck out being bound to fail and (consequently) an abuse of process; see *Moylist Construction Limited v Doheny* [2016] 2 IR 283.

33. There is therefore no reason to depart from the ordinary approach, which is that the successful party will be awarded costs. In the circumstances, I do not have to carry out the exercise of considering whether any failings in conduct on the part of the defendants/respondents can be counterbalanced by complaints about the conduct of Mr. Moyne.

34. I propose that the defendants/respondents be awarded their costs of the appeal, to be measured in default of agreement.

35. Power J. and Butler J. agree with this ruling.