Neutral Citation No. [2016] NICA 5

Ref: **GIL9860**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **08/02/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

McDaid's (John) Application [2016] NICA 5

IN THE MATTER OF AN APPLICATION BY JOHN McDAID FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Before: Gillen LJ and Weir LJ

GILLEN LJ (delivering the judgment of the Court)

Application

[1] The appellant in this matter, who was unrepresented, John McDaid, has appealed against the decision of Horner J refusing him leave to apply for judicial review of the decisions of Master Kelly dated 25 March 2014 and Deeny J dated 23 May 2014. He made it clear at the outset that he was proceeding before this court only on the challenge to the decision of Master Kelly.

Background

[2] The Official Receiver ("OR") as trustee in the bankruptcy of Marianne Colette McDaid (the wife of the appellant), had instituted proceedings against the appellant in respect of two properties at 4 Dundrum Park, Londonderry and 33 Frances Street, Londonderry.

[3] During the course of those proceedings the case made on behalf of the OR was that the appellant had transferred his title in the respective premises to Gemma McDaid and Darcy McDaid, both of whom were subsequently added as respondents to the proceedings.

[4] The background to all this was that in 2005 the appellant's wife was the owner of these two properties. In or around 4 November 2005 she transferred title to the Dundrum premises from the joint names of both herself and her husband, the

appellant, into the sole name of her husband. A similar transfer of the Frances Street premises subsequently occurred.

[5] The appellant's wife was adjudicated bankrupt on 7 January 2009 on foot of a bankruptcy petition presented by the Northern Bank on 17 October 2008.

[6] The OR has now brought proceedings as trustee in the bankruptcy of Marianne Colette McDaid against the appellant in respect of a further transfer dated 6 January 2012 of the Dundrum premises by the appellant to Gemma McDaid and, also on 6 January 2012, a transfer of the Frances Street premises by the appellant to Darcy McDaid ("the substantive application ").

[7] The appellant then instituted proceedings to dismiss the application by the OR on the grounds of insufficiency of process and abuse of process on 20 January 2014. these were dismissed by Master Kelly on 25 March 2014.

[8] The appellant then appealed the Master's decision to Deeny J who in substance adjourned the appeal to be heard after the substantive application had been determined by Master Kelly, on the basis that if the appellant were successful in defending the substantive application it would not be necessary to hear the appeal ,and if he were unsuccessful his appeal against the Master's decision on the substantive application could be heard with his appeal against the interlocutory decision.

[9] The appellant then lodged applications for leave to judicially review Master Kelly's decision and the decision of Deeny J.

[10] Horner J dismissed the applications for leave.

The decision of Horner J

[11] In the course of a brief judgment delivered on 24 September 2014, Horner J refused the applications for the following reasons:

- The decision of Deeny J was not judicially reviewable on the authority of Re Racal Communications Limited [1980] 2 All ER 634.

- The appeal against the decision of Master Kelly similarly lacked jurisdiction as the court had no jurisdiction to entertain an application for judicial review from a decision by a Master sitting in her capacity as Bankruptcy Master, invoking Re Rice's Application for Judicial Review [1998] NI 265.

- In any event such mistakes as were alleged in respect of failure to accord with a Practice Direction and other typographical mistakes etc. did not go to the merits and were susceptible to being cured under Rule 7-50 of the Insolvency Rules (Northern Ireland) 1991 (hereinafter called "the 1991 Rules").

- There was no evidence constituting bias or apparent bias on the part of Master Kelly.

- There was an alternative remedy in any event open to the appellant, namely the processing of an appeal, as outlined in the case management directions of Deeny J. The substantive issue could have been determined before Master Kelly. If the appellant was dissatisfied with the outcome, that appeal and the appeal against the abuse of process etc. could be dealt with, if necessary, by Deeny J. How that process was to be managed was entirely a matter for Deeny J and not a matter for Horner J.

Grounds of appeal

[12] The Notice of Appeal set out the grounds of appeal as follows:

- That the appellant had an arguable case for leave to judicially review Master Kelly which rendered Horner J's decision invalid.

- That Horner J failed to take notice of essential facts outlined in the Appellant's affidavit e.g. the court took place in chambers and not in open court, the court failed to establish jurisdiction in the absence of a competent witness for cross-examination, and did not give proper or any weight to these matters which constituted a violation of the appellant's fundamental rights to a fair trial under Article 6 of the ECHR.

- That Horner J failed to take into consideration the Court Rules, Practice Directions, procedures and judicial ethics which allegedly were not adhered to by Master Kelly.

- That Horner J's oral judgment fell below an acceptable standard. No written judgment was provided outlining his reasoning for dismissing the Appellant's leave applications for judicial review.

Discussion

[13] In the course of wide-ranging and discursive oral submissions proffered by the self-represented appellant, he seemed incapable of grasping the fact that his appeal as constituted by him related solely to his challenge to the decision of Horner J. Hence his criticisms of both the approach and the decisions of Deeny J and Master Kelly were often irrelevant to the grounds of appeal which he had served in this instance.

[14] We are conscious of the comments of Girvan LJ in this court in Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49

(cited with approval in Mikail v Lloyds Banking Group [2014] NICA 24), when he said at [4]:

> "When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued."

[15] Those comments are cross-referable to all divisions including the Court of Appeal. The overriding objective set out in Order 1 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 is to deal with cases justly, which includes saving expense, dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, the financial position of each party and ensuring that it is dealt with expeditiously and fairly. The Order also indicates that it is necessary to allot to a case an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

[16] Accordingly, as we made clear during the hearing, we decline to delve into or discuss those various areas raised by Mr McDaid which are not relevant to the grounds of appeal set out and to that notice of appeal we now confine ourselves.

Conclusion

[17] We have come to the conclusion that the applicant's appeal must be dismissed for the following reasons. First, it is trite law to state that certain of the superior courts, including the Supreme Court, the Court of Appeal and the High Court are immune from judicial review when these courts make decisions taken in the exercise of their jurisdiction as superior courts. The principle is so well established that it is sufficient for this court to cite Re Racal Communications [1981] AC 374 per Lord Diplock at pp 638-639 and Lord Scarman at p646, Monteith's (John) Application (Leave Stage) [2011] NIQB 18, Re Rice's Application for Judicial Review [1998] NI 265 and Re Weir and Higgins Application [1988] NI 338 as clear authority for the proposition

[18] It is equally clear that where a judge or other officer of the court is not acting as a superior court but is merely exercising similar statutory functions, judicial review will be available in respect of a decision taken in exercise of those statutory powers.

[19] Thus, for example, in R (John Singh & Co) v Supreme Court Taxing Office [1995] 7 Admin LR 849 the decision of the Supreme Court Taxing Office, refusing a certificate under regulation 16(1) of the Legal Aid in Criminal Care Proceedings (Costs) Regulations 1989 sought by a firm of solicitors who had been adversely affected, was held to be judicially reviewable. Taxing Masters exercising a special statutory jurisdiction independent of the jurisdiction of the courts are subject to supervision by way of prerogative order. We pause to observe that Singh's case did not follow the *obiter dicta* of the Divisional Court in R v Shemilt (Taxing Officer) Eexp. Buckley [1998] COB 40 which did indicate that the decisions of a Master of the Supreme Court when carrying out the duties of a Taxing Master were not judicially reviewable. For the purposes of the arguments in this case we are prepared to adopt the approach of Singh which was cited with approval in the 5th Edition of Judicial Remedies in Public Law, Sir Clive Lewis, at paragraph 2-122.

[20] The authority cited by Mr McDaid, namely Allied Irish Bank Plc and Another v Honohan [2015] IEHC 247, is another classic illustration of this. This was a case in the Republic of Ireland where the applicant banks had issued a special summons against the Notice Party who was a solicitor. The reliefs claimed were for an order that she had not complied with undertakings that she had given in her capacity as a solicitor acting for customers of the banks in relation to loans relating to certain properties and/or compensation for loss suffered by the customers as a result of her failure to comply with those undertakings.

[21] The special summons, issued under the Rules of the Superior Courts, was processed through the Master's Court in compliance with Order 37 r.1 to ensure that the papers in the case were in order before transferring the matter to the court list to be dealt with by a judge. Hearing this special summons, the Master not only refused to make the order sought, namely the transfer of the matter to the court list, but stated that he would be sending the papers in the proceedings to the Director of Public Prosecutions on foot of the alleged perjury contained in the affidavits of the banks. The applicants had sought to appeal this decision but, on requesting a copy of the order, found that the record referred only to an adjournment of the case. When this was drawn to the attention of the Master, he refused to draw up an order in the terms of the decision made on the basis that he was taking the course that he suggested as a private citizen.

[22] Upon the applicants seeking judicial review of the Master's decision, it was argued that the Master was not amenable to judicial review in the exercise of his functions under the Rules because he was thus exercising part of the jurisdiction of the High Court and the High Court is not judicially reviewable.

[23] The High Court ,per O'Malley J, considered the terms of Order 37 Rule 6 of the Rules which dealt with the powers of the Master to transfer a case to the court list for hearing. Citing with approval ACC Bank plc v Hefferman [2013] IEHC 557 the court concluded that the Master's task in such cases is to transfer the matter to the High Court for hearing when the case is in order i.e. that the case is administratively ready for hearing. Thus the Master was not empowered to strike out contested cases on the ground that the pleadings were in some way irregular etc. In short his powers were confined by Rules of Court merely to transferring the case to the court for listing at the first opportunity when a case was contested.

[24] Accordingly, this was one of those instances where the Master was exercising a specific statutory function and thus judicial review was available.

[25] In any event Honohan's case is not only a case determined under different Irish legislation from that in Northern Ireland, but it was an instance where no appeal was open to the applicant because the Master had refused to make an order.

[26] In summary, the question of jurisdiction in judicial review has to be resolved by looking at the function being performed by the person or body whose decision is being challenged, and not the office held by that person, or the general description of that body.

[27] In the instant case, we are satisfied that the Master, as an officer of the court, was exercising her jurisdiction as a superior court and not in the confined manner of Honohan's case.

[28] Section 68 of the Judicature (Northern Ireland) Act 1978 provides:

> "Departments
>
> 68-(1) There shall be established those departments of the Court of Judicature specified in the first column of Schedule 2.
>
> (2) The business to be assigned to each department shall –
>
> (a) be prescribed by rules of court; and
>
> (b) subject to any directions given by the Lord Chief Justice under sub-section (4), be transacted under the supervision of the officer specified in relation to that department in the second column of Schedule 2.
>
> ……

> (4) The Officer supervising a department shall discharge his functions in accordance with directions given by the Lord Chief Justice."

[29] Practice Direction 2/2007 was given pursuant to Section 68(2)(b) and (4) of the 1978 Act as follows:

> "Practice Direction 2/2007 – Functions of the Masters (High Court)
> …..
>
> Direction pursuant to Section 68(2)(b) and (4) of the Judicature Act 1978 [2007] 1 BNIL 80.
>
> This Direction gives details of the Masters of the High Court."

Master Kelly is the Bankruptcy and Companies Office Master.

[30] Article 359 of Insolvency (Northern Ireland) Order 1989 provides the power to make rules for the purposes of giving effect to the Order. At Article 359(c), provision is made for enabling the Master (Bankruptcy) to "exercise such of the jurisdiction conferred for the purposes of this Order on the High Court as may be prescribed and for enabling the review of any such jurisdiction".

[31] The Insolvency Rules (Northern Ireland) 1991, at Rule 7.03 provide at 7.03-(1) those applications that can be made direct to the judge (which include the instant proceedings). At Rule 7.03(2) the Rules provide as follows:

> "(2) Subject to paragraph (1), unless the judge has given a general or special direction to the contrary, **the jurisdiction of the court to hear and determine an application may be exercised by the Master**(*our emphasis)*, and the application shall be made to the Master in the first instance."

The Rules define "the court" as follows:

> "'The court' means the High Court of Justice in Northern Ireland (Chancery Division) exercising its jurisdiction under the Order and in respect of administrative functions includes the Bankruptcy and Companies Office."

[32] When the Master determined this matter in the instant case, she was discharging the function of the High Court under the Insolvency Order and Rules. Such functions are not judicially reviewable.

[33] Accordingly, we affirm the decision of Horner J that her decision was not amenable to judicial review.

Alternative remedy

[34] Even had we been wrong in this conclusion, we are satisfied that judicial review was an inappropriate avenue for the appellant to pursue in this instance.

[35] Judicial review is not the sole or immediate means of protection against legal wrongs by public authorities. The existence of other avenues of protection, and the question of whether these have been or can be pursued, stand to affect whether judicial review will be available and, if so, how it will operate.

[36] An existing alternative remedy raises a question for the courts "discretion", whose judicial exercise is in truth a matter of "judgment". Judicial review is regarded as a last resort and it can properly be declined if the court concludes that the claimant has and should pursue a suitable alternative remedy. The question whether the pursuit of judicial review is inapt is usually best addressed at the leave stage when the pursuit is commencing, rather than at the alternative hearing after it has occurred (see Judicial Review Handbook 6th Edition Michael Fordham QC, at paragraph 36.3).

[37] In short, judicial review was and is always a remedy of last resort (see Baroness Hale in R (Cart) v Upper Tribunal [2011] UKSC 28). It is thus not the practice of the court to use the power of judicial review where a satisfactory alternative remedy has been provided by Parliament (see Lord Phillips at [71] in R (Cart) v Upper Tribunal [2011] UKSC 28).

[38] This appellant had another means of redress conveniently and effectively available to him which he should ordinarily have used before resorting to judicial review. It would have been no less effective, convenient and suitable to determine the issues he wished to raise.

[39] The Insolvency Rules rule 7.42 provide for such an alternative remedy in relation to the decision of Master Kelly. It provides as follows:

> "Appeals from Master
>
> 7.42-(1) Without prejudice to the power of the Master to review an order made by him under Article 371, an order or decision of the Master in Insolvency

> proceedings may be reviewed by an appeal to the judge.
>
> (2) Order 58, Rule 1(2) to (4) of the Supreme Court Rules applies to such an appeal, with a substitute in paragraph (3) of the words '28 days' for the words '5 days' and the words '7 days' for the words '2 clear days'."

[40] The matter had come before Deeny J who had taken steps to case manage that appeal and the substantive issue raised before Master Kelly. (See also Hegarty v The Enforcement of Judgments Office [2013] NICA).

[41] Despite our invitation, and indeed exhortation, to the appellant during the course of this hearing to avail of this method of redress outlined by Deeny J, he has steadfastly and without explanation refused to do so.

[42] Accordingly, we are satisfied that Horner J was correct in finding that there was an alternative remedy to judicial review and that this formed yet another ground for rejecting the current application.

[43] For the sake of completeness, we shall deal with the other grounds in short compass. First, we find absolutely no basis for Master Kelly recusing herself in this case on the ground of bias. This ground is so clearly unfounded that it is unnecessary for us to lay out the well trammelled cases on bias. Suffice to say that we agree with Horner J's view that the fact that she had dealt with other interlocutory applications in a manner that was not in favour of the appellant does not provide a basis for an allegation of bias or apparent bias.

[44] Secondly, Mr McDaid outlined a litany of technical or procedural defects upon which he relied. These ranged through a suggestion that the court order had not been signed by a court officer, allegations of collusion between the Master and Mr Sheil on behalf of the notice party, absence of a stamp on an affidavit in circumstances where clearly an affidavit by oversight had been filed before the actual summons and his absence from the hearing before the Master on 18 November 2014. These were not matters of any substance or, alternatively, if any were, they could have been the subject of an appeal against the decision of the Master. They also ignored the provisions of Rule 7.50 in Article 371 of the Insolvency Order which provide that insolvency proceedings shall not be invalidated by any form of defect or any irregularity unless the court before which an objection is made considers a substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court. These matters could easily have been raised on appeal and doubtless would have been had the appellant chosen to pursue that avenue.

[45] The criticisms of the judgment of Horner J are similarly without foundation. Brevity is undoubtedly a virtue in many judicial pronouncements especially where there are net issues that can be swiftly and comprehensively dealt with in short compass. Most judgments are, as in this instance, handed down *extempore* with the reasoning succinctly contained therein. Horner J's judgment comfortably falls within this genre.

[46] For completeness, we rehearse that we rejected the argument of the respondent that because the Notice of Appeal was unarguably out of time not having been served until 9 November 2015 i.e. considerably outside the time for appealing provided for in Order 59 Rule 4 of the Rules, the appeals before this court should be dismissed. The respondent had been made aware through the lodgement of the Notice of Appeal in the Court Office that an appeal was pending notwithstanding the failure to *serve* within the appropriate timescale. The Respondent was thus not prejudiced and we did recognise that the appellant was an unrepresented litigant. In the circumstances, albeit that time had sped, and the default of time was not insubstantial, we extended the time for service and granted leave for the appeal to continue in the exercise of our discretion.

[47] Having dismissed the appeal, we will now hear counsel on the issue of costs.