Judgments

Judgment Title: In re Bovale Developments DCE v Bailey & anor

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Composition of Court: Denham J., Hardiman J., Fennelly J., Macken J., Finnegan J.

Judgment by: Fennelly J.

Status of Judgment: Approved

THE SUPREME COURT

[Appeal No: 25 & 26 of 2008]

Denham J.
Hardiman J.
Fennelly J.
Macken J.
Finnegan J.

In the matter of Bovale Developments

In the matter of the Companies Acts 1963 to 2006

In the matter of an application pursuant to s.160(2) of the Companies Act, 1990

Between/

The Director of Corporate Enforcement

Applicant/Respondent

and

Michael Bailey and Thomas Bailey

Respondents/Appellants

JUDGMENT of Mr. Justice Fennelly delivered the 14th day of July, 2011.

1. I am in full agreement with the judgment of Denham J and with the orders which she proposes. They dispose effectively of the matters of substance which have arisen on the appeal.

2. I write independently to express my concern at the procedures employed in these proceedings and their capacity, proved all too clearly by the events, to delay the substantive hearing of applications such as the present.

3. The respondent (whom I will call "the Director") issued a notice of motion on 8th August 2006 seeking orders disqualifying the appellants as directors pursuant to the applicable provisions of the Companies Acts. On 22nd November 2006, the appellants issued a notice of motion seeking to curtail the evidence on which the Director proposed to rely.

4. The object of the appellants' application was the striking out of six paragraphs of an affidavit sworn by Dermot Madden and one paragraph 8 of the affidavit of Peter Lacy. The grounds of the application to expunge the impugned paragraphs were:

> • the power contained in Order 40, rule 12 of the Rules of the Superior Courts (hereinafter "the Rules") "to strike out from any affidavit any matter which is scandalous;"
>
> • the power conferred by Order 19, rule 27 of the Rules to strike out "any pleading……on the ground that it discloses no reasonable cause of action or answer and that in any such case or in the case of an action or defence being shown by the pleadings to be frivolous or vexatious……;
>
> • pursuant to Order 40, rule 4 and rule 12 and Order 19, rule 27 and/or the inherent jurisdiction of the Court on the ground that the paragraphs contained inadmissible evidence.

5. The appellants' application was heard over four days in the High Court in June 2007. Judgment was delivered on 1st November 2007. By order of 28th November 2007, the Director's action was adjourned for plenary hearing with directions for pleadings. The final order was dated 18th December 2007.

6. The appellants served notice of appeal on 31st January 2008 against those parts of the High Court order where they had not succeeded. The Director served notice of cross appeal on 1st February 2008. The appeal was heard by this Court on 7th June 2011. The matter will now return to the High Court for hearing more than five years after the date of issue of the Director's notice of motion.

7. There has to be real doubt as to the efficacy of the use of the interlocutory procedures which were deployed in this case. Even if the time analysis were to be confined to the

High Court, a period of about sixteen months elapsed between the issue of the notice of motion and the determination, after a four day hearing, of the preliminary issues. The plenary hearing directed by the High Court has been abeyance pending the resolution of this appeal.

8. There has, in reality, been very little discussion in the High Court or in this Court of the jurisdiction invoked to justify the procedures followed. The following remarks must, for reasons which will appear, be regarded as largely obiter.

9. Order 40, rule 12 of the Rules is the first rule invoked by the appellants. It provides:

"The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid between solicitor and client."

10. That is the only provision in the Rules which provides a jurisdiction to strike out material from an affidavit. Although Irvine J accepted in the course of her judgment that "the evidence which the [appellants] wish to have excluded at this point cannot be described as either scandalous or vexatious such as to justify its exclusion under O.40, r.12…," the order of the Court was in fact made pursuant to that rule as well as Order 19, rule 27.

11. It is worth noting that the Irish rule or its antecedents was always confined to "scandalous" matter. The corresponding English rule included "any matter which is scandalous, irrelevant or oppressive." (see Supreme Court Practice—the White Book-1979, Order 41 rule 6). The authors of Civil Procedure in the Superior Courts (Hilary Delany and Declan McGrath, Thomson Round Hall Dublin 2005 at 18-61, p. 499), in considering Order 40, rule 12, state:

"The contents of an affidavit will be considered to be scandalous where it attempts to introduce into the proceedings extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. This will particularly be the case where that material is calculated to or has the effect of embarrassing or causing distress or offence to the opposing party. An affidavit will not be considered to be scandalous simply because it contains hearsay or because it contains serious allegations if those are relevant to the issues in the proceedings."

12. There is a further difficulty about Order 19, rule 27, which provides:

"The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may, if it think fit, order the costs of the application to be paid as between solicitor and client."

13. This rule applies, in its terms, only to pleadings. Order 125, rule 1 defines a pleading as including "an originating summons, statement of claim, defence or counterclaim, reply, petition or answer." Apart from the fact that it does not come within that definition, I do not think an affidavit is a pleading, as that word is ordinarily understood.

14. In fact and in reality, Irvine J did not make her order under either of those rules. It is clear from her judgment that she made it under Order 40, rule 4. That rule provides:

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements of his belief, with the grounds thereof may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies or extracts from documents, shall not be allowed."

15. Two points may be noted by way of contrast with Order 40, rule 12: firstly, rule 4 confers no power to strike out parts of an affidavit; secondly, it does not confer any power to order that costs be paid as between solicitor and client. The latter point suggests that the power to strike out is to be used only in cases involving striking impropriety.

16. None of these matters were raised in the High Court. Nor are they raised on the appeal. The Director's argument in the High Court was that the appellants' motion was premature. The learned trial judge gave full and very careful consideration to this issue. She expressed the view that, at the stage when he issued his motion, the Director must have expected to proceed in reliance on the affidavits then filed. She correctly ruled the Director's application was not interlocutory and I do not think the Director has contended otherwise. Referring to the special rules of court governing applications of this kind, she said that nothing new should emerge after the filing of the original affidavits and they had to comply with the rule against hearsay: "It is clear that the evidence supporting any alleged wrongdoing at a hearing which is dealt with on affidavit must be just as admissible as evidence which would be given to a court by a witness at an oral hearing." There can be no question but that the learned judge was correct in this statement of the law.

17. It does not inexorably follow from the fact that the evidence upon which the Director may rely at the hearing, whether on affidavit or otherwise, must be admissible that the court has power by way of preliminary application to excise parts of an affidavit.

18. The learned judge explained in detail her reasons for rejecting the Director's submission that the application was premature. In substance, it appears to me that she was deciding a preliminary point or several preliminary points of law. Order 25, rules 1 and 2 are the relevant rules. The learned judge was "convinced that the appropriate time for a party to object to the admissibility of evidence in an affidavit supporting proceedings brought by way of originating notice of motion is the time at which the affidavit is delivered."

19. The learned judge gave her reasons under seven headings. In effect, these come down to identifying tactical or substantive disadvantages for the respondents (the appellants on this appeal) if decisions on the admissibility are to be postponed to the hearing of the application of the Director.

20. A brief summary of the reasons is as follows. A respondent would have to decide whether to counter assertions in affidavits even when he thought them inadmissible. If he decided not to, he might be treated as having accepted the evidence. In any event, the objection might fail at trial. They would then have a problem in making a late application to reply. If the respondent decided to reply, he might be later cross-examined on affidavits he should not have had to swear (if the Director's evidence was held inadmissible). The costs to the parties would be increased if replying affidavits were sworn in respect of matters later ruled inadmissible.

21. It is not appropriate to consider the strength and merits of these and other points in detail. The matter has not been fully argued on the appeal. In particular, there has been virtually no argument about the nature of the jurisdiction which was exercised by the learned judge. It seems doubtful whether, on the facts of this case, there was any power to strike out parts of affidavits under either Order 40, rule 12 or Order 19, rule 27. Order 40, rule 4, which formed the principal basis of the decision, contains no provision for the striking out of parts of affidavits, but that was what the High Court ordered. Order 25 may need to be considered. It is also clear that account must be taken of the fact that the existence of an independent right of appeal following an order on a motion such as in the present case has, in itself, the capacity to delay proceedings.

22. The Director makes the point that the procedures used have permitted the appellants selectively to challenge parts of the affidavits without giving any indication of the issues they dispute. He expresses concern that these procedures may give rise, in every

disqualification case, to split trials, with a first trial based purely on issues of admissibility. In my view, these are real and legitimate concerns.

23. In an appropriate case, consideration will need to be given to the precise basis of the jurisdiction to be exercised and to the most efficient and expeditious way of disposing of disputed issues of admissibility.

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