

BETWEEN

DERMOT GREGORY NOTTINGHAM

Appellant

AND

MALTESE CAT LIMITED

CLYDE MACLEAN

ELIZABETH CURRIE

Respondents

Hearing: 18 March 2019

Coram: William Young J
O'Regan J
Ellen France J

Appearances: Appellant in person (via AVL)
D J D van Hout for the Respondents

ORAL SUBMISSIONS ON LEAVE TO APPEAL

WILLIAM YOUNG J:

You are in person, Mr Nottingham?

MR NOTTINGHAM:

I am, Sir.

WILLIAM YOUNG J:

And...

MR VAN HOUT:

May it please Your Honours, counsel's name is van Hout appearing for the respondents.

WILLIAM YOUNG J:

Thank you. Right, Mr Nottingham, I think I can possibly cut this reasonably short. We are at least provisionally of the view that the process for dealing with your extensions of time and security for costs applications miscarried. There may be questions about what happens next and there are also one or two other more general questions that I want to raise and give you an opportunity to comment on.

The first of those is, what's your position as to what Justice Fogarty decided? Did he merely not strike-out proceedings as barred by limitation or did he determine once and for all that they were not barred by limitation?

MR NOTTINGHAM:

He determined that they were not barred by limitation.

WILLIAM YOUNG J:

Okay. If that's the case then probably, although I haven't looked at this in great detail, unless you can appeal against that for certain now, you're bound by it at trial. Do you understand that or not?

MR NOTTINGHAM:

Yes, Sir. I think that the Court of Appeal stated that –

WILLIAM YOUNG J:

Could you just pause there? I'm finding that you're not coming through terribly loudly. Can we crank up the sound a bit? Perhaps if you speak a little closer to the mic? You're just coming through a little quietly, Mr Nottingham.

MR NOTTINGHAM:

Yes, Sir, is that better?

WILLIAM YOUNG J:

Yes, that is a bit better, yes.

MR NOTTINGHAM:

Okay. The Court of Appeal decided that, I think, from memory, that each case has its own specificity of facts and that it could be possibly argued again but I don't think that's an accurate reflection of what Justice Fogarty's decision would be interpreted by another High Court Judge that was to hear the substantive suit.

WILLIAM YOUNG J:

Am I correct in assuming that the further hearing that Justice Fogarty contemplated in terms of whether the proceedings should be reconstituted hasn't taken place?

MR NOTTINGHAM:

No, Sir. No further hearing's taken place.

WILLIAM YOUNG J:

What's the basis of your participation in the proceedings? I know you were served as a party but as I understand it from the judgments, you haven't said yes or no to the issue of whether you are the publisher?

MR NOTTINGHAM:

Well, no, Sir. I deny I am the publisher but it is the intent of various people to prove that I am the publisher and I think it was another Justice, I can't remember his name but he decided that I should in fact be joined as a party because that's what they intended to try and prove.

WILLIAM YOUNG J:

Okay, so your position is you deny being the publisher but if you are held to be the publisher, you want the limitation defence?

MR NOTTINGHAM:

Of course I do, Sir.

ELLEN FRANCE J:

Sorry, so has an order been made formally joining you?

MR NOTTINGHAM:

Yes, Ma'am.

WILLIAM YOUNG J:

There was a direction as to service – it's a direction as to service at the outset, isn't it?

MR NOTTINGHAM:

It went further than that, Sir. I think there was the hearing for another Justice, I'm pretty certain. I can't remember his name but he was new to the bench at the time but he did formally adjoin me because it was opposed, I think it was opposed, by the, yeah, before the deposition.

WILLIAM YOUNG J:

Okay, thank you. Have you got any questions?

O'REGAN J:

No.

WILLIAM YOUNG J:

Look, we might just come back to you after we've spoken to Mr van Hout, Mr Nottingham.

MR NOTTINGHAM:

Thank you, Sir.

WILLIAM YOUNG J:

Mr van Hout, as I told Mr Nottingham, we can't help but think that something went wrong with the processes in the Court of Appeal. Partly, there is the question whether this was ever an interlocutory appeal anyway because at least as I read Justice Fogarty's judgment, he seems to be deciding the question as if it were a separate question under I think Part 10 of the High Court Rules rather than a strike-out. But then secondly, the process by which the applications, the question of extension and the question of waiver of security were dealt with seems at least to me to have miscarried. I can't see why the Deputy Registrar didn't deal with the application of security and it's not acceptable that that was allowed to run on until the time for applying for a fixture had lapsed.

MR VAN HOUT:

Yes. I think it might be useful to go back to, I guess, the background of the filing of the appeal. Actually, firstly, it might be useful to go back to the background of the judgments of Justice Fogarty.

WILLIAM YOUNG J:

Yes.

MR VAN HOUT:

So there were two judgments that took place. The first judgment, which was heard on 24 May 2016, and a decision was released on the 14th of July 2016. In that decision, His Honour essentially said there was only one real application that was before the Court, interlocutory application that was before the Court, and that related to the limitation issue. And all the other ones, he decided that they were either not interlocutory applications or he was postponing those and not dealing with those.

Then it came before His Honour again, I can't recall the date, I think I might have it here actually, to decide on the issue of whether the correct procedure was taken under Part 18 of the High Court Rules and whether it should remain on that track. At that time, both parties – well, Mr Nottingham anyway,

requested that His Honour make a decision in regards to the limitation issue, and so without hearing further submissions, on the basis that he had heard everything he required to make a decision on the limitation issue, he issued the judgment, which is the second judgment, which is strictly in relation to limitation, in which he finds that the case is not limitation-barred, not on the point of multiple publication which had been submitted but rather on the point that –

WILLIAM YOUNG J:

It's not a monetary claim?

MR VAN HOUT:

Exactly, yeah, yeah.

WILLIAM YOUNG J:

I think we understand this, actually. On the face of it, he's deciding the point once and for all, isn't he?

MR VAN HOUT:

Yeah. It would appear that way, Your Honour.

WILLIAM YOUNG J:

So it's not an interlocutory determination? It's not able to be reopened at trial?

MR VAN HOUT:

I guess the point taken by the Court of Appeal on that was that it would be possible to deal with that at trial.

WILLIAM YOUNG J:

But they assumed it was a refusal of a strike-out? They didn't proceed with it on the basis that it was a preliminary determination of a discrete issue?

MR VAN HOUT:

I guess the difficulty in this case is the pleadings and how they've come before the Court and the actual nature of the applications filed.

ELLEN FRANCE J:

But the end result does appear that what you have is a determination that will apply for the purposes of the trial. Do you agree with that or not, on limitation?

MR VAN HOUT:

It would appear that a decision has been made that it's not time-barred so potentially, that would be an issue that would not be further addressed at trial.

O'REGAN J:

Not – it wouldn't be able to be addressed at trial and it wouldn't be able to be addressed at an appeal against the outcome of the trial? Because won't it have created now initial estoppel?

MR VAN HOUT:

Potentially, yes, Your Honour.

O'REGAN J:

So, the Court of Appeal conclusion that this wasn't final and that it could be dealt with later does seem to be incorrect, doesn't it?

MR VAN HOUT:

That may be, Your Honour. I'll just quickly have a look at the application itself and see. It does appear from the judgment that he is specifically addressing the issue as to whether it is time-barred as opposed to a strikeout.

WILLIAM YOUNG J:

Yes. So the question is, where do we go? It does on the face of it appear as though the miscarriage of justice grounds is made out for the leave. That is, on the face of it, there is something tangible that has gone wrong with the process. Now, if necessary, we can grant leave, hear an appeal, and in six months' time, in all probability, the appeal will be allowed and you'll be back to where you were this time last year. There is an alternative, which is you can go back to the Court of Appeal and ask them to set it down for

hearing, extend time, and deal with the question of security for costs. I mean, I suppose it's not particularly what you wanted to hear but is there anything you wanted to say about that?

MR VAN HOUT:

I don't have instructions on that, so...

WILLIAM YOUNG J:

No, I don't – no. Are they your clients in the back of the Court?

MR VAN HOUT:

No, Your Honour.

WILLIAM YOUNG J:

What we are inclined to do is record where we've got to in a minute, leaving a time, perhaps a week or so, to get the case back on track in the Court of Appeal. Otherwise, we'll grant leave to appeal and hear the appeal.

MR VAN HOUT:

As the Court pleases.

WILLIAM YOUNG J:

Mr Nottingham, you got the drift of what I've said, I guess?

MR NOTTINGHAM:

Yes, Sir, indeed I have. It seems the most expedient way forward. The only issue I have, Sir, is that this process of how the Court of Appeal deals with these matters seems to be trending and I'm concerned that the Court's minute won't record the issue – well, it will record the issue, it won't be on a decision on process, I suppose, and the other issue is that the Court of Appeal didn't deal with the abuse of process argument.

WILLIAM YOUNG J:

Well, I don't think we can deal with that. What I should say, Mr Nottingham, and you may or may not be aware, is that rule 43 has now been amended effectively to cover your situation.

MR NOTTINGHAM:

Okay, Sir. I didn't know, I wasn't aware of that, Sir.

WILLIAM YOUNG J:

With effect from the 1st of March.

MR NOTTINGHAM:

Yes.

WILLIAM YOUNG J:

Okay. So we'll issue a minute probably later today or tomorrow giving you an opportunity, as it were, to take stock of where you are and decide what you want to do, okay?

MR VAN HOUT:

Excuse me, Your Honour.

MR NOTTINGHAM:

Thank you, I appreciate that.

WILLIAM YOUNG J:

Thank you, Mr van Hout. Thank you, Mr Nottingham.

ELLEN FRANCE J:

Sorry, he –

WILLIAM YOUNG J:

Sorry, Mr van Hout, sorry.

MR VAN HOUT:

Just one further point. I'm just looking – I looked at the judgment of His Honour Justice Fogarty but I'm looking at the application itself now. So it looks like the application was a strike-out application relating to statute-barring the proceeding.

WILLIAM YOUNG J:

It's not what he seems to have done, though.

MR VAN HOUT:

No, I appreciate that, Your Honour.

WILLIAM YOUNG J:

Okay, thank you.

MR VAN HOUT:

Thank you.

COURT ADJOURNS: 10.16 AM