



THE COURT OF APPEAL

Record Number: 2021/252

High Court Record Number: 2021/808JR

Neutral Citation No. [2022] IECA 32

**Donnelly J.
Noonan J.
Haughton J.**

BETWEEN/

MARTIN TUCKER

APPLICANT/APELLANT

-AND-

A JUDGE OF THE CIRCUIT COURT

RESPONDENT

JUDGMENT (*Ex Tempore*) of Mr. Justice Noonan delivered on the 7th day of February, 2022

1. This appeal is brought by Mr. Tucker from the judgment of the High Court (Meenan J.) delivered *ex tempore* on the 11th October, 2021 refusing him leave to apply for judicial review. Mr. Tucker has helpfully provided the court with a chronology of relevant events and I propose to refer to some of these by way of background to illustrate how the matter in issue arises. Before doing so, I note there is no DAR transcript available of the *ex tempore* judgment of the High Court. It appears that Mr. Tucker thought he was required to obtain the DAR transcript of various hearings before the Circuit Court and has done so. While these provide useful background and have been considered by the court, they are not strictly relevant to this appeal. However, given that this is an appeal of the refusal of an *ex parte* application by the High Court, this court is entitled to deal with it on a *de novo* basis.
2. Mr. Tucker, together with his partner Ms. Curry, purchased a property in 2003 known as Apartment 39, Danesfort, Castle Avenue in Clontarf. This was purchased with the assistance of a mortgage loan from Permanent TSB. It would appear that ultimately, the terms of the mortgage with TSB were in default and in 2015, Permanent TSB sold on the

loan and associated mortgage as part of a portfolio of loan sales to a fund known as Havbell DAC.

3. Arising out of the arrears situation, Havbell ultimately brought proceedings in the Circuit Court for an order for possession of the property and on the 10th May, 2018 the County Registrar granted an order for possession of the property subject to a stay of three months. The order records that Mr. Tucker was represented by a solicitor and counsel at the hearing before the County Registrar. Mr. Tucker's chronology discloses that he appealed to the Circuit Court and the matter came before Her Honour Judge Linnane on the 25th June, 2018 when the order of the County Registrar was affirmed. A copy of that order does not appear to be with the papers.
4. It seems that an execution order issued on foot of which Havbell obtained possession of the property in March 2019. However, in May 2019, Mr. Tucker unlawfully re-entered the property and began to occupy it once more. This led to the institution of fresh proceedings by Havbell by way of equity civil bill seeking injunctive relief against Mr. Tucker compelling him to leave the property and to restrain him from interfering with Havbell's possession of same. Havbell sought an interlocutory injunction in those proceedings which came on for hearing before the Circuit Court, Her Honour Judge Linnane, on the 18th July, 2019.
5. The order records that on this occasion, Mr. Tucker appeared in person and gave a sworn undertaking to vacate the property within one week or by 4pm on the 25th July, 2019. A range of injunctions was also granted by the court against him. Mr. Tucker unfortunately appears not to have complied with either his undertaking or the injunction because Havbell went back in to Judge Linnane on the 26th July, 2019, the day after the expiry of the seven day stay, seeking leave to serve him with short notice of an attachment and committal motion. This was refused by the Circuit Court it would appear on the basis that the order that had been served on Mr. Tucker did not contain the required penal endorsement.
6. The transcript of later proceedings before the Circuit Court discloses that the Sheriff's agent, a Mr. Gray, attended at the property on the 29th July, 2019 to secure possession. Rather disturbingly, Havbell's uncontradicted evidence was that Mr. Gray was met by a group of individuals who told him they were there to prevent the "threat of eviction" and he departed, fearing he was about to be "ambushed". Havbell accordingly renewed its application before Her Honour Judge Baxter on the 21st August, 2019 but what happened thereafter is unclear.
7. In the meantime, Mr. Tucker had appealed the original order granting possession made by the Circuit Court to the High Court and the appeal came on for hearing before Mr. Justice Eagar on the 13th January, 2020. It would appear that the court gave an *ex tempore* judgment in which the appeal was dismissed and Mr. Tucker was ordered to hand over the keys and the alarm codes to the property by 4pm that afternoon. Mr. Tucker again represented himself on this occasion.
8. Arising presumably from the failure of his appeal, Mr. Tucker and Havbell appear to have entered into settlement negotiations which culminated in a settlement agreement of the

20th February, 2020. This agreement provided for the payment of a sum of €310,000 by Mr. Tucker on or before the 28th February, 2020. It would appear this payment was not made for reasons that Mr. Tucker suggests were related to the pandemic and consequently, Havbell sought to reactivate the attachment and committal proceedings. Mr. Tucker seems to have been assisted in connection with this agreement by a Mr. Neil Armstrong, who is described as a mediator. There appears to have been a suggestion by Mr. Tucker at this stage that there was some issue with Havbell's title because notwithstanding entering into the settlement agreement, Mr Tucker, or possibly Mr. Armstrong, appears at the same time to have been seeking documentary proof of title from Havbell, which seems like a curious approach to settlement.

9. Havbell appear to have encountered some difficulties having this matter listed before the Circuit Court as a result of pandemic restrictions but in the meantime, it would seem that Mr. Tucker instituted separate proceedings in the High Court on the 23rd November, 2020 seeking to injunct Havbell from retaking possession and registering a *lis pendens* against the property, The course of those High Court proceedings is not particularly relevant to this judicial review application other than to note, as the court was informed today by Mr. Tucker, that ultimately those proceedings were dismissed by Allen J. What is however relevant is that another attachment and committal motion appears to have come before His Honour Judge O'Connor in the Circuit Court in the equity proceedings on the 15th April, 2021. Mr. Tucker was not present on this occasion and His Honour Judge O'Connor extended the time for service of the possession orders with a penal endorsement for 7 days and returned the matter to the 20th May, 2019.
10. On the latter date, Mr. Tucker was represented by solicitor and counsel. It seems that possibly before he secured representation, Mr. Tucker swore an affidavit making a wide range of allegations of fraud and criminal conduct by various parties as well as mounting a challenge to Havbell's title. However, counsel for Mr. Tucker appears not to have sought to stand over those allegations but on the contrary, sought to withdraw the affidavit. Instead, counsel focused his submissions on legal issues around the criminal contempt jurisdiction of the court and the onus of proof.
11. On the 20th May, 2021, Judge O'Connor granted an order of attachment against Mr. Tucker directing An Garda Síochána to arrest him and bring him before the court. On the 16th June, 2021, the gardaí executed the warrant, arrested Mr. Tucker and brought him before Judge O'Connor on that day. Mr. Tucker was on this occasion represented by another counsel who did not contest the matter but made submissions concerning undertakings, designed to avoid Mr. Tucker's immediate incarceration. No point was taken before the Circuit Court regarding the penal endorsement on that occasion. Mr. Tucker was called by his counsel to give evidence on oath and to formally confirm that he would now, and finally, immediately comply with the order and also secure that other persons in apparent possession of the premises would vacate immediately. Mr. Tucker now says that he gave an undertaking to vacate the premises under duress on that occasion, which does not appear to be born out by the transcript.

12. Judge O'Connor adjourned the matter for two days to Friday the 18th June, 2021 to ensure compliance with the order and on the return date, counsel for Havbell confirmed to the court that the premises had indeed been vacated. Given that Mr. Tucker in effect consented to the order that was made on this occasion, it is more than a little surprising that it would appear that an urgent appeal was brought before the High Court on the 28th June, 2021 which was dismissed, although Mr Tucker has advised the court today that this may have been an appeal of the earlier order that Judge O'Connor made in April of that year.
13. On the 11th October, 2021, Mr. Tucker made the within application for leave to seek judicial review.
14. What is initially striking about Mr. Tucker's statement of grounds is that the relief sought is an order quashing a decision of the Circuit Court identifying only the record number of the proceedings. Mr. Tucker does not identify what order or orders he seeks to have quashed.
15. However, a reading of his statement of grounds and his written submissions before this court makes clear that Mr. Tucker now seeks to mount a root and branch challenge to the validity of the original order for possession made by the County Registrar and upheld successively by the Circuit Court and the High Court. Although he makes complaint about the subsequent equity proceedings which resulted in his attachment and arrest, his complaint in that regard is clearly premised on the basis that the original possession proceedings against him were invalid.
16. Before dealing with the substance of that contention, I think the first point to be noted is that Mr. Tucker is long since out of time for seeking to judicially review any of the orders he impugns. Order 84, Rule 21(1) of the Rules of the Superior Courts provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. In *Shell E&P (Ireland) Limited v McGrath* [2013] IESC 1, the Supreme Court held that the rules are a form of secondary legislation and the time limits therein have the same effect as if in primary legislation, such as for example the Statute of Limitations.
17. The court further held that this time limit amounts to a legal barrier to the bringing of proceedings outside the time limit subject only to the power contained in the Rules themselves to extend time. No application is made in this case for an extension of time nor have any grounds been disclosed which would warrant such an application. Accordingly, it is clear that this application must fail *in limine*. Even the last order of the Circuit Court that is in contention here was made on the 18th June, 2021 and predates the leave application by more than three months.
18. Having said that however, I note that Mr. Tucker filed his statement of grounds and grounding affidavit in the Central Office on the 8th September, 2021 which is, just about, within three months of the orders for attachment made by Judge O'Connor on 20th May, 2021. There is a school of thought which suggests that this latter date should be regarded as the relevant date for the purposes of O. 84, r. 21. The better view however in my opinion is that the application is made when the court is moved. Were it otherwise, it would be

open to an applicant to file papers and not proceed before the court for an indeterminate period of time, and at his sole discretion. I do not consider that that can be the intention behind the time limit imposed by the Rule.

19. However, giving Mr. Tucker the benefit of the doubt on this point in considering his grounds, I propose to deal with them. I note that Havbell, who clearly has an interest in this application, has not been named as a notice party by Mr. Tucker but that is not fatal in circumstances where the court could grant leave subject to that requirement.
20. On the substantive grounds raised by Mr. Tucker in the statement of grounds, it is often said that judicial review is concerned solely with jurisdiction and process, not with the merits of the case. Litigants in person, in my experience, often confuse the two. This appears to me to be exactly such a case. Mr. Tucker's statement of grounds and submissions make clear that he regards the original Circuit Court proceedings seeking possession as being flawed by virtue of a lacuna in Havbell's title.
21. In other words, he alleges that Havbell did not acquire proper title to his mortgage deed and loan with Permanent TSB, in consequence of which they never had a right to seek possession in the first place. He suggests that his interest in the mortgage was in fact never transferred to Havbell but rather it was that of Ms. Curry. He extrapolates from this that Havbell advanced its claim in the Circuit Court in bad faith. The first and obvious point to make here is if there was any validity in this contention, the time to make it was when the matter came before the County Registrar, or again when it came before the Circuit Court, or even when it came before the High Court on appeal.
22. The first time this issue seems to have surfaced was in early 2020 when the matter was under settlement with the assistance of Mr. Armstrong. Although this court has not had sight of Mr. Tucker's injunction proceedings instituted in the High Court in November, 2020, it may be that these issues are raised in those and Mr. Tucker appears to have confirmed that today. In the context of the Circuit Court proceedings, the title issue appears to have been first raised by Mr. Tucker in response to the committal application at a time before he was represented. It is striking that when he did secure representation by solicitor and counsel, not only was this issue not advanced but it was expressly disavowed by counsel on Mr. Tucker's behalf.
23. Accordingly, Mr. Tucker cannot now seek to impugn the validity of the order for possession on grounds that were never raised before the County Registrar, or on appeal to the Circuit Court, or on appeal to the High Court.
24. Even ignoring the time element, there is no conceivable basis for a suggestion that these orders were made without jurisdiction. They are final and conclusive and cannot be revisited now on new grounds that were at all times available to Mr. Tucker to raise had he wished to raise them. Nor can he complain that the orders in the contempt proceedings were lacking in jurisdiction for that and the additional reason that this so-called complaint about Havbell's title was expressly withdrawn before the Circuit Court, no doubt on the sensible advice on his legal team.

25. Mr. Tucker makes a further complaint that his right of redemption of the mortgage has been interfered with and denied by Havbell and here again, if there was any substance in this point, the time to make it was before the trial court. To the extent that Mr. Tucker suggests that there is an ongoing refusal on the part of Havbell to allow him his right of redemption, which is difficult to understand in circumstances where he did not honour the obligations he entered into in the settlement agreement, that does not in any way impinge on the jurisdiction of the courts that originally dealt with this matter. If correct, it might give rise to a claim on Mr. Tucker's behalf which would be a new claim and one that does not bear in any way on the validity of the orders already made by the court. In any event, so long as the property has not yet been sold it is still open to Mr. Tucker to proffer what is properly due to Havbell – and I stress what is properly due is not any figure that is less than the full amount due under the mortgage, absent any enforceable agreement for a lesser sum – and to thereby redeem the mortgage.
26. Mr. Tucker agitates a number of other points concerning the validity of service of various documents and court orders upon him and whether the correct record numbers were always consistently applied to these documents. None of that in my view could conceivably impinge on the court's jurisdiction to make the orders complained of. Here again, the time to make a complaint about that was when the matter was before the court that decided it, either at first instance or on appeal.
27. Mr. Tucker complains that Judge O'Connor's decision and/or ultimatum that he hand over the keys to his home or go to jail was unfair, unjust or unreasonable. I am at a loss to understand this contention in circumstances where the transcript clearly shows that Mr. Tucker was facing immediate imprisonment for blatant breaches of previous court orders and undertakings and submitted to sworn undertakings at the behest of his own counsel to avoid this eventuality. Even if there was any conceivable complaint about the way that Judge O'Connor dealt with the matter, the remedy was to appeal, which I have already noted appears to have been availed of.
28. Finally, Mr. Tucker makes a complaint that the penal endorsement on the order was defective because it did not limit a time for compliance. However, O. 36, r. 25 of the Circuit Court Rule, where it refers to a time for compliance is in my view a reference to time specified in the order itself, which in this case had already expired. The attachment order is, in any event, now spent having been executed and any issue in that regard is moot. In any event, his statement of grounds does not refer to any complaint about the order being addressed to the wrong officer of An Garda Síochána.
29. For these reasons therefore, I am fully satisfied that the trial judge was correct in concluding that Mr. Tucker had demonstrated no arguable ground upon which leave could properly be granted and he was therefore entirely correct to refuse such leave. I would therefore dismiss this appeal.