

Neutral Citation No: [2023] NICA 19

Ref: KEE12087

ICOS No: 2021/52390
2021/69147

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

Delivered: 28/03/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

Between: 2021/52390

ROBIN SWANN

Plaintiff/Respondent

and

GEORGE IVAN MORRISON

Defendant/Appellant

and

Between:

GEORGE IVAN MORRISON

Plaintiff/Appellant

and

ROBIN SWANN
DEPARTMENT OF HEALTH

Defendants/Respondents

21/52390/01/A01

Mr Ringland KC and Mr MacMahon (instructed by Gateley Tweed Solicitors) for
Plaintiff/Respondent

Mr Millar KC & Mr Hopkins (instructed by Mills Selig Solicitors) for the
Defendant/Appellant

21/69147/01/A01

Mr Millar KC & Mr Hopkins (instructed by Mills Selig Solicitors) for the
Plaintiff/Appellant

Mr Dunlop KC and Ms Fee (instructed by the Departmental Solicitor's Office) for the
Defendants/Respondents

Before: Keegan LCJ, Treacy LJ and Colton J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] These are appeals brought by Sir Van Morrison (“the appellant”) against orders for judge only trials in two related defamation cases. These orders were made by McAlinden J (“the judge”). This court granted leave to appeal these interlocutory orders on 22 September 2022. There were also cross appeals raised by Robin Swann (“the respondent”) who was the Northern Ireland Health Minister and the Department of Health when these claims arose.

[2] We are aware that the law of defamation changed in Northern Ireland for claims initiated after 7 June 2022. By virtue of section 7 of the Defamation Act (Northern Ireland) 2022 the presumptive right to jury trial on request under section 62 of the Judicature (Northern Ireland) Act 1978 (“the 1978 Act”) is removed. These claims pre-date that threshold and so whatever the direction of travel the presumptive right to jury trial still applies to them and we must proceed on that basis. The point at issue is however of no relevance to defamation claims in the future but may, we were told, apply to a limited category of other cases.

[3] The net point in this appeal is whether the judge was correct in ordering judge only trials in both actions for a special reason, which he determined was that the actions were interlinked.

Factual Background

[4] Both of the actions at issue are related to the Covid-19 pandemic and differing views about the Health Minister’s response to this in terms of restrictions on the public. On 18 September 2020, the appellant announced that he would release three recordings of protest songs about the UK Government Covid-19 policy of lockdown and donate the proceeds to a hardship fund for musicians who were facing restrictions on live performance. The Department of Health provided copy to the publisher of Rolling Stone magazine for publication of the respondent’s position on 21 September 2020 in an article under the headline “Northern Ireland’s Health Minister would like a word with Van Morrison.” This article took issue with the appellant’s response to the Covid-19 pandemic lockdown policy by way of a report on the respondent’s reaction to the singer’s new anti-lockdown songs. Commenting on these songs the respondent was reported as saying:

“His words will give great comfort to the conspiracy theorists - the tin foil hat brigade who crusade against masks and vaccines.”

[5] Thereafter, in April 2021 a socially distanced test event in the Europa Hotel was proposed for 10 June 2021. It was ultimately decided that the event would be without live music. On the evening of 10 June 2021, the appellant addressed the guests in the ballroom of the Europa Hotel referring to the respondent and the

words published in the Rolling Stone article. The following words were spoken to the audience:

“Robin Swann has got all the power; he’s keeping us in this for over 15 months. All I have to say is, if I don’t have any power, my power is extremely limited, if at all, Robin Swann has got all the power, so I say, Robin Swann is very dangerous, Robin Swann is very dangerous, Robin Swann is very dangerous ... Robin Swann is extremely, extremely dangerous ...”

[6] Following this event, the appellant was approached by a Sunday Life reporter in the Culloeden Hotel and various phrases were attributed to him which formed the basis of further claims of libel. On 14 and 15 June 2021, the appellant posted two YouTube videos of himself speaking to camera in which he referred to the respondent and discussed among other things the Rolling Stone article and the cancellation of the Europa event.

[7] The relevant writs were issued out of sequence to when the alleged defamations occurred. *Swann v Morrison* is the first writ in time and concerns two spoken statements of the appellant (alleged slander) and two online publications (alleged libel) in the period between 10 and 15 June 2021 following events in the Europa Hotel.

[8] The second action relates to the article published by Rolling Stone, on 21 September 2020. This action was brought by the appellant who alleges libel in respect of words published about him which are attributed to the respondent.

[9] For the purposes of this interlocutory ruling we will not comment further on the pleadings filed to date save to say that both parties raise various defences, including justification, honest comment, and public interest/Reynolds defence.

The Law

[10] Section 62 of the 1978 Act concerns the issue of trial with and without jury and reads as follows:

“Trial with and without jury

(1) Subject to subsection (2), an action or an issue of fact in an action in the High Court in which a claim is made in respect of—

(a) libel;

(b) slander;

(c) malicious prosecution;

(d) false imprisonment;

...

shall, if any party to the action so requests, be tried with a jury.

(2) The court may, on the application of any party to an action referred to in subsection (1), order that the action or any issue of fact in the action shall be tried without a jury if it is of opinion that such trial –

(a) will substantially involve matters of account;

(b) will require any protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury;

(c) will be unduly prolonged; or

(d) is for any special reason (to be mentioned in the order) unsuitable to be tried with a jury.

(3) Subject to subsection (4), any other action or any issue of fact therein shall be tried without a jury.

Section 62(5) of the 1978 Act also provides:

“(5) Subject to subsections (1) and (3), the High Court may, in accordance with rules of court order that different questions of fact arising in any action be tried at different times or by different modes of trial.”

[11] Order 33, rule 4(6) of the Rules of the Court of Judicature (Northern Ireland) 1980 (“the Rules”) provides that:

“The court may, upon application made under paragraph 4 or 5 and subject to section 62 of the Act, fix the mode of trial of any action or of any issue of fact therein and only where it considers that the interest of justice so require, order the different questions of fact arising in the action be tried at different times or by different modes of trial.”

[12] Order 43, rule 4(1) of the Rules provides that:

“The party setting down the action for trial must specify the mode of trial which he requests. If the party setting the action down requests a trial without a jury, then any other party may within seven days after receiving the notice of setting down lodge a request that the action be tried with a jury.

[13] Order 4, rule 5 also provides as follows:

“5(1) Where two or more causes of action are pending in the same division, and it appears to the court –

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that rights to relief claimed therein are in respect of, or arise out of the same transactions or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this rule, the court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or immediately after another or may order them to be stayed until after the determination of any other of them.”

The Judge's Ruling

[14] We have had the benefit of a transcript of the ex-tempore ruling of McAlinden J. It is apparent from this that the judge had a full appreciation of the facts of these cases. We refer to some salient parts of his ruling as follows.

[15] Para [6] states as follows:

“The court having considered the pleadings in both cases is of the view, that at some stage, the issue of an order under Order 4, Rule 5 will have to be made by the court either in the form of full consolidation or quasi-consolidation, but here is one thing for sure is that these two actions cannot be dealt with in isolation, it would be inappropriate and contrary to the interests of justice to do so.”

[16] Para [9] reads as follows:

“Pausing there, it is important to refer to the fact that in sub-paragraph (d), the legislator specifically provides that any special reason found by the court must be recorded in the order made by the court and that clearly is a strong indicator as to the need for the court to focus its mind precisely on establishing whether such special reason or reasons exist and, secondly, ensuring that the special reason or reasons identified by the court are clearly stated in the order made by the court depriving the party requesting it of the right to trial by jury. So again, I think that gives an indication of the important nature of the task assigned to the court under section 62(2) and also the importance of ensuring that the court clearly identifies and focuses on what are special reasons in respect of the depriving of a party to the right of trial by jury.”

[17] It is apparent from the ruling that the judge analyses each of the actions and decides that, on their own, they do not have a complexity or a special reason or would be unduly prolonged or have such documentation to come within the parameters of section 62(2) to allow for the presumptive right to jury to be removed. Rather, the judge’s rationale for the course that he takes derives from several paragraphs. In para [12] he says:

“Although section 62 does talk about an action etc, where an action is inextricably linked to another action, as these two actions are, the court must take into account that linkage and the court cannot ignore that linkage and although the language of section 62 does refer to an action, the court, I think, is entitled to interpret this as an action and any inextricably linked action.”

[18] At para [15] the judge also referred to issues with dealing with the case during the Covid pandemic. These considerations are no longer applicable.

[19] Next, we turn to para [16] which states:

“In making that decision I reiterate that I must accept the submission made by Mr Millar that in respect of the special reasons that must be identified, it is quite clear from the Court of Appeal case in *Stokes* and the judgment of Gillen LJ that the special reasons must be special to the facts constituting the particular case under consideration. That is limited to the facts of the case, I would extend it and expand it to any related intrinsically linked case. It does not include extraneous matters such as the availability of court space or other related issues. The special reasons must be linked to the case and the facts of

the case itself. However, if a special reason or reasons are identified then the residual discretion that the court has, may take into account wider issues such as the issues that I have identified.”

[20] The judge’s conclusion is found in para [15] where he makes the following comments:

“The court is firmly of the view that in the circumstances that we are faced with at present the court is minded to direct that the trial of these two actions should be carried out by a judge alone.

At some stage serious consideration will have to be given to the making of a formal consolidation order or quasi-consolidation order in this case because the court views that there are considerable areas of common issues between the two actions, they are inextricably linked and will have to be dealt with together to ensure a fair result is achievable in both actions and ensure that both actions are dealt with in an efficient and timely manner.”

Grounds of Appeal

[21] The appellant raises four core grounds:

- (i) That the judge misdirected himself to the effect that section 62 of the 1978 Act allowed him to aggregate the facts and issues in the two actions in order to find a special reason under section 62(2)(d).
- (ii) Even if this was permissible, then finding that there was a special reason for overriding the right to jury trial was wrong in law.
- (iii) Failing to record a special reason in each of the orders appealed offends section 62(2)(d) of the 1978 Act.
- (iv) Placing reliance on an irrelevant consideration in exercising the discretion against jury trial, namely that it may not be possible to list it during the Covid pandemic.

[22] The cross appeals in the *Swann v Morrison* action maintain that the judge erred in finding that the complexity of the issues in the action were not sufficient to constitute a special reason under section 62(2)(d) of the 1978 Act and that the judge failed to record any special reasons in contravention of section 62(2)(d). In the *Morrison v Swann* action Mr Dunlop abandoned his argument in the cross appeal and accepted that there was no basis to displace the right to jury trial on the basis of the facts of that action alone.

[23] Mr Ringland pursued his cross appeal that the judge was wrong to categorise the *Swann v Morrison* action a suitable for jury trial in its own right given the complexities of the case.

[24] The cross appeals also maintain the following propositions:

- (i) The court was entitled to interpret section 62 of the 1978 Act as an action and any inextricably linked action.
- (ii) This action and the other action are inextricably linked.
- (iii) There will inevitably be a need for an order under Order 4, rule 5 for the special reasons where the complexity of the issues arising from the relationship between the two actions which made them unsuitable to be tried with a jury. The cross appeal also referred to the fact that the appeal should be allowed on the basis of reasons not contained within the judge's ruling, namely that the actions should be tried without a jury pursuant to section 62(2)(b) because the trial would be unduly prolonged due to the number and complexity of the issues of the case and also that by virtue of the multiple publications and multiple defences that this was a suitable case for trial by judge alone.

Consideration

[25] This appeal centres on whether the judge was correct to find special reasons under section 62(2)(d) of the 1978 Act to dispense with the presumption for jury trial in these defamation cases. It is accepted that the judge has erred by not including his reasons in each order, however, all parties know what his rationale was and so this appears to us to be a technical error which is not determinative of this appeal and can be easily rectified.

[26] The decision of the judge in relation to court accommodation during the Covid-19 pandemic is overtaken by events and so we need not deal with that argument any further save to say we do not think that such issues can truly form a special reason to dispense with jury trial.

[27] Therefore, we must examine two issues which we categorise as (i) the interpretive issue; and (ii) the substantive issue. We undertake this analysis in the context where two defamation actions arise out of sequence and where no formal order under Order 4, rule 5 has been debated or made. We observe at the outset that there is an element of prematurity to the decisions reached because the provisions of section 62 clearly deal with mode of trial, and so, one would think that consolidation or sequencing of the trial might be determined first.

[28] We are informed by the decision of the Court of Appeal in *Martin Stokes v Sunday Newspapers Ltd t/a The Sunday World* [2016] NICA 60. The majority decision

overturned a previous decision of Stephens J who had ordered that the action be tried by a judge without a jury (Treacy J dissenting). In that case the issue was a *Reynolds* defence which was a complicated matter. The court set out the approach to the *Reynolds* defence in some detail and then applied the apparent complexities to section 62.

[29] The court also considered the position in Northern Ireland and referred at para [33] to the direction of travel in England & Wales leading to the enactment of section 11 of the Defamation Act 2013. That legislative provision removed the right to jury trial in defamation actions in England & Wales. A similar amendment has now been made in Northern Ireland for claims initiated after 7 June 2022.

[30] Of relevance to the present case is para [44] wherein the court said:

“[44] Invocation of the use of special reasons has a lengthy statutory history both in the UK and elsewhere, particularly in road traffic legislations.”

[31] As to the proper formulation of special reasons we refer to para [45] as follows:

“[45] Whilst these cases arise in different contexts to that now before us and there is no algorithmic formula for distilling their presence, nonetheless, we consider that special reasons draw their hue from the definitions arising in such cases. Accordingly, when considering the concept of special reasons, we consider the following principles should apply:

- (i) Special reasons necessarily connotes the existence of some situation which is patently a substantial departure from the normal position.
- (ii) A special reason is one that is not found in the common run of cases. While not necessarily being categorised as exceptional or extraordinary it is one that may properly be categorised as not ordinary, common or usual.
- (iii) It must be special to the facts constituting the particular case under consideration.”

[32] Para [53] of the judgment also deals with the point as follows:

“[53] We are conscious that the term ‘special reasons’ dictates that such reasons must be related to the particular case under scrutiny. It is solely the facts of the instant

case that must be sufficiently unusual to justify what amounts to a substantial departure from the normal approach that such trials are by way of judge and jury at the request of one party.”

[33] As the Court of Appeal stressed in *Stokes* an appeal will not be entertained from an order which was within the discretion of the judge to make unless it has been shown that he exercised his discretion under a mistake of law, and disregarded principle, under a misrepresentation of the facts, that he took into account irrelevant matters or that the conclusion which the judge reached in the exercise of his discretion was “outside the generous ambit within which a reasonable disagreement is possible.” The added factor is that this was an interlocutory decision taken in the case management phase of proceedings. We bear this context in mind in reaching our conclusions.

[34] Section 62(1) creates a statutory presumption in favour of a jury trial upon request by virtue of the word “shall.” That presumption may be displaced if any of the exceptions found in section 62(a)-(d) are satisfied. Order 33 rule 4(1) provides the route by which a party may apply by motion for an order under section 62(2). The onus is upon the party applying under Order 33 rule 4(1) to establish a reason why an action should be tried without a jury. The provisions of Order 33 rule 4(6) also reflect the terms of section 65(5) which allow different questions of fact arising in the action be tried at different times or by different modes of trial.

[35] Properly analysed, section 62 must clearly be applied to an action rather than several actions. In this case the court had to consider the facts of each case and reach a determination. In our view, the words in section 62(2) refer to the action in which the request for jury trial has been made. We think that if section 62(2) is to be read properly there should be a consistency to it. In other words where section 62(2)(a), (b) and (c) relate clearly to the action and matters in relation to the trial or such trial, (d) cannot be widened to include something extraneous to the action at issue.

[36] Accordingly, we do not consider that the court was entitled to consider the linkage with another case as a special reason. This follows the ordinary meaning of the words of the statute. We apply the majority decision in *Stokes* at para [45] that special reasons must go beyond the ordinary, common, or usual and be special to the facts constituting the case under consideration. The judge therefore erred in aggregating the facts and issues in the two cases to deny the right to jury trial applied for in each case. The appeal succeeds on Ground 1.

[37] The further question which arises for determination is whether the judge was correct to find that each case merited jury trial in its own right. This is raised in the cross appeal and was pursued by Mr Ringland in argument. We have considered the point and conclude that the judge was entitled to find that the presumption for jury trial was not displaced in either case. To our mind the judge was correct to find that none of the exceptions in section 62(2)(a)-(d) were made out. Section 62(2)(a) does not apply. Mr Dunlop rightly conceded in the *Morrison v Swann* action that

section 62(2)(b) could not be established. We are not satisfied that there is a basis for satisfying 62(2)(c) that proceedings would be unduly prolonged. Finally, in relation to 62(2)(d) there were no special reasons in the individual actions sufficiently unusual to justify what amounts to a substantial departure from the normal approach in libel actions. Therefore, the cross appeals must fail.

[38] The above determination is sufficient to deal with the appeal. Given the course we propose we form no conclusion on the other substantive grounds of appeal. We refer to a few other matters by way of observation only.

[39] Whilst the point does not strictly arise in this appeal, our provisional view is that, if there were a consolidation order which is provided for in Order 4, rule 5 in advance of an application of a section 62 application for trial by judge alone, that “the action” may encompass a consolidated action.

[40] We also observe that Order 4, rule 5 does not simply provide for two actions to be heard simultaneously. They could be heard in sequence or in a variety of ways. It is premature to make any assessment of the substance of the Ground 2 submissions in this case prior to a determination (if there is to be one) of whether there is to be a consolidated action and the nature of same.

[41] Within the Ground 2 submissions, we note the argument that the appellant has effectively lost his presumptive right to trial by jury in each action in circumstances where the judge found that he was entitled to such a trial if each case was being considered in its own right. We find some force in this submission. At the very least a litigant should have the right to make this point in defence of any application to consolidate the two actions.

Overall conclusion

[42] Accordingly, we allow the appeal on Ground 1 which is that the judge erred in his interpretation of the special reasons provision under the statute. We dismiss the cross appeals.

[43] This outcome is in line with the previous decision of this court in *Stokes* and accords with established principles of statutory interpretation. The two orders that have been made by the judge of 29 June 2022 will be rescinded.

[44] The parties can consider whether to make an application under Order 33 of the Rules. If such an order is made, it would be open to any of the parties to bring an application under section 62(2) of the 1978 Act. We express no concluded view as to the potential merits of any such application. It would have to be considered by the trial judge in the light of the outcome of any order made under Order 33 applying the provisions of section 62(2). We will hear the parties as to costs if required.