THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 215

Record Number: 2014/641

Peart J.
Edwards J.
McGovern J.

BETWEEN:

IRISH BANK RESOLUTION CORPORATION

PLAINTIFF/RESPONDENT

- AND -

PATRICK RAFTERY

DEFENDANT/APPELLANT

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JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 17TH DAY OF JULY 2019

1. This is an appeal from an order of the High Court (Hedigan J.) made on the 3rd October 2012 whereby it was ordered, *inter alia*, that the appellants deliver up possession of certain premises comprised in Folio 1769F of the Register of Freeholders County Roscommon to the respondent which were the subject of a deed of mortgage in favour of Irish Nationwide Building Society ("INBS") bearing the date 12th November 1992, thereby providing security to that bank for certain borrowings applied for by, and granted to, the appellants by letter of loan approval dated 18th December 1991.

2. When the proceedings commenced by special summons issued on the 28th March 1996, the way forward would have seemed straightforward to INBS given that there was no dispute that the repayments required to be made by the appellants had fallen into serious arrears, and under the terms of the mortgage the INBS was entitled to possession of the premises.

3. However, following the filing of a replying affidavit by the second named defendant in which she raised certain matters by way of defence, namely that the secured property was the family home of her and her husband, the first named defendant, that it was registered in his sole name at the time the mortgage was entered into, and that she had not given any consent to the registration of the said mortgage as a charge on the property, and that she had not been advised of the effect, meaning or consequences of the charge, and had not received independent legal advice in relation thereto, the High Court (Shanley J.) adjourned the case to a plenary hearing and directed the delivery of pleadings by the parties, and ordered discovery to be made by all parties. A brief statement of claim was duly delivered by INBS on 8th August 1996 to which a defence was delivered by the second named defendant only, on the 10th September 1996. The first named defendant did not enter an appearance until the 16th November 2005, and thereafter on the 19th April 2006 he eventually delivered a defence and counterclaim.

4. In her defence delivered on the 10th September 1996, the second named defendant made a number of denials:

- that INBS granted a bridging loan to her;
- that she agreed a repayment arrangement with INBS;
- that INBS advanced the sum of £69,000 to her;
- that the mortgage was registered on the folio against her interest in the folio;

- that she was in breach of covenants and the agreement as alleged; and

- that INBS was entitled to the reliefs claimed.

5. In addition to these denials, the second named defendant pleaded that if (which was denied) she entered into the said mortgage she did so without the benefit of independent legal advice, and that she was not informed or advised as to the meaning and effect and consequences of the said mortgage. She pleaded that she had not given her consent to the registration of the mortgage as a burden on the folio, and further that she was not afforded the benefit of independent legal advice or advised as to the consequences leading from the fact that the property the subject of the said mortgage was her family home. Finally, she pleaded that the mortgage and its registration as a burden on the folio were null and void for want of compliance with the Family Home Protection Act, 1976.

6. Some years passed thereafter with various notices of intention to proceed being filed by INBS. Eventually the first named defendant delivered a defence having been given time to do so under order of the High Court made on the 7th November 2005 following the hearing of a motion for judgment in default of defence against him on that date.

7. In his defence the first named defendant raised a counterclaim in which he levelled certain complaints against INBS. He pleaded that he was owed a duty of care and a fiduciary duty by INBS to act at all times in a manner consistent with their fiduciary duty, that INBS was under a duty to act in a reasonable and prudent manner, that INBS owed him "a duty of confidence", and that INBS "having exercised its right of re-entry to the secured property [referring to a licensed premises which also comprised the security provided to INBS] would obtain therefore in any or all subsequent sales a fair market price reflecting the true value of the property". He went on to plead that the said licensed premises had been sold at an undervalue, and that he had suffered loss as a consequence.

8. On the 30th June 2008 the second named defendant obtained an order permitting her to deliver an amended defence, and she did so on the 17th July 2008. Therein, *inter alia*, she pleaded that the property in Folio 1769F, County Roscommon was her family home. She maintained her existing pleas that she was not afforded relevant independent legal advice in that regard, but she deleted the plea at para. 11 of her original defence that the said mortgage and registration of the mortgage as a charge on the folio were void for want of compliance with the Family Home Protection Act, 1976. She also included a counterclaim in which she alleged breach of duty to her in relation to the failure to ensure that she received independent legal advice prior to the execution of the mortgage, and negligence around the bank's sale of the licensed premises at what she contended was an undervalue, which has caused her loss and damage.

9. I should note in passing, because the respondent on this appeal has drawn attention to it, that at para. 8 of the amended defence and counterclaim, the second named defendant pleaded as follows:

> "8. The Indenture of Mortgage in respect of this loan was executed on the 12th day of November 1992, purportedly securing the aforesaid loan against the investment premises and the Family Home."

That pleading assumed some relevance on the appeal, and I will come to that in due course.

10. A reply to the amended defence and counterclaim was delivered in due course on the 7th December 2009, and notice of trial was served on 23rd March 2010. The matter eventually came on for hearing before the trial judge on the 18th July 2012 at which all parties were legally represented by solicitor and counsel, and oral evidence was heard, including from the second named defendant. On the 9th August 2012 the trial judge delivered his written judgment in which, having given a brief account of the background facts, and the arguments made by each side, he reached a number of conclusions, all adverse to the defendants in respect of the grounds advanced by way of defence, and the counterclaims based on an alleged sale of the licensed premises at an undervalue. He concluded that the IBRC (being the successor in title to INBS) was entitled to an order for possession of the premises comprised in the said folio.

The trial judge's conclusions

11. The trial judge concluded that the mortgage did not require the consent of the second named defendant because the mortgage was one in which "both co-owners participated as co-owners and … it did not require the consent of the second defendant because no formal consent to her own act is required". He referred to the judgment of Henchy J. in the Supreme Court in *Nestor v. Murphy* [1979] I.R. 326 from which he quoted extensively at para. 7 of his judgment.

12. Relevant to the second named defendant's averment in her affidavit, and to certain matters sought to be advanced on this appeal, that the family home was in the sole name of her husband at the time the loan was advanced by INBS in 1992, the trial judge stated at para. 8:

> "8. In this case, it is plainly evident that the mortgage was executed by both Mr and Mrs Raftery. They both signed it. They had on the same day previously executed a transfer whereby the house at Clonbracknagh was transferred from the ownership of the first defendant to the ownership of both of them as joint owners. This reflects the nature of their ownership of the house as represented by them to the Building Society in their application mortgage dated 22nd November, 1991. They both describe themselves in that form as owners of the house at Clonbracknagh. Moreover, in order to obtain the loan, John J Quinn & Co, solicitors, acting on behalf of the defendants and holding themselves out without contradiction from the defendants as solicitors in the transaction, gave on the defendants' instructions a formal solicitors' undertaking in the standard form in respect of the monies to be advanced. It was on the basis of that application that a letter of offer was made to both defendants and the bridging loan subsequently was afforded to them. Thus, the mortgage executed on 22nd November, 1992 was one in which both co-owners participated as co-owners and falls to be considered in the light of *Nestor v. Murphy*. It did not require the consent of the second named defendant because no formal consent of her own act is required. Section 3 (1) of the Family Home Protection Act 1976 does not apply to this transaction and the mortgage is thus valid. The equitable mortgage created in 1991 was displaced by the second legal mortgage which the plaintiff had not, surprisingly, sought in order to secure their position on the loan advanced to the defendants. It was a perfectly proper and sensible thing to do. The plaintiff's right to possession arises from charge."

13. As for the appellants' claim that they entered into these transactions without independent advice, the trial judge concluded at para. 9 as follows:

> "9. … nothing I have heard in evidence satisfied me that there was anything untoward in obtaining this charge. The defendants had both been parties all the transactions involved herein. The mortgage application was signed by both parties, the letter of offer was addressed to both parties, the acceptance was by both parties. Both were represented by

their solicitor when he gave the letter of undertaking. Both parties committed themselves to repaying a substantial loan advanced to them to purchase a business and neither has ever made any effort to repay the loan. It is remarkable that not one single payment was ever made. The second defendant may well be a woman of limited education but she struck me as a sensible rational person who gave evidence clearly and without hesitation. She seemed a woman who in all probability understood very well what she was doing and what she was signing when she was involved in the various transactions herein."

14. Finally, the trial judge expressed himself satisfied from the evidence that the defendants had manifestly failed to adduce evidence to show that the sale of the licensed premises had been improvident, and dismissed the counterclaims.

15. The notice of appeal delivered by each appellant is in identical terms mutatis mutandis. It was contended that the trial judge erred in a number of different respects, including by holding that the property was lawfully mortgaged to INBS; in holding that the mortgage was valid; by holding that the mortgage was not void because of a failure to have complied with the Family Home Protection Act, 1976; by failing to distinguish the present case from the decision in *Nestor v. Murphy* [1979] I.R. 326 on the basis that the second named appellant was not a co-owner of the family home at the time that the loan application was made; in failing to have due regard to the delay between the monies being advanced and the execution of the mortgage document; and finally by holding that the licensed premises already referred to was sold by IBRC (as successor to INBS) at the best price reasonably obtainable.

The application to adduce new evidence

16. The notice of appeal by each appellant was filed on the 5th November 2012 in the Supreme Court. However, they were transferred to this Court under Article 64 of the Constitution following its establishment in November 2014. In her notice for directions filed in this court dated 19th November 2016 it was indicated therein that the second named appellant would contend at the hearing of the appeal that the High Court ought to have dismissed the plaintiff bank's application for possession on the basis of irregularities associated with the granting of the loan and mortgage and the Family Home Protection Act as it relates to [the second named appellant], as already set forth by reference to the contents of the notice of appeal, and further that the High Court erred in its reliance upon the decision in *Nestor v. Murphy* referred to above. It was also indicated that the second named appellant would pursue the appeal against the dismissal of her counterclaim related to an alleged undervalue sale of the licensed premises referred to.

17. Prior to the hearing date fixed for this appeal, the second named appellant issued a notice of motion pursuant to O. 86A, r. 4 RSC seeking leave of the court for the admission of new evidence on grounds set forth in an affidavit sworn by her solicitor, Mr Keigher. He stated therein that "since trial from the 31st day of July 2012 to 20 December 2018 I was handed some documents and letters received by my client and addressed jointly to her and her spouse, P.J. Raftery, including among others, three letters from John J Quinn & Co solicitors dated third day of January 1995 referring to and enclosing a copy letter from the Irish Nationwide Building Society dated 23 December 1994 together with copy letter dated 28th of August 1995, and subsequent reminders dated 12 September 1995 and 5th October 1995 respectively". Mr Keigher exhibited this correspondence which had been handed to him. He does not state who handed in these documents or the date on which this occurred. Nevertheless, he went on to state in his affidavit that while the respondent represented in the High Court that the transfer of the family home into the joint names of both appellants took place on 12th November 1992, a reading of the correspondence which was handed to him would indicate that this transfer into joint names was not signed until some date in 1995, but was backdated on the deed itself to 12th November 1992. He referred also to the fact that the transfer was lodged in the Land Registry for registration on the folio on the 27th November 1995 and was registered in December 1995. He went on to state that he believed from a reading of the folio itself it would appear that the registration of the deed of transfer into the joint names of the appellants did not pre-date the registration of the mortgage. He makes the point that he did not take over the original file from John J. Quinn & Co in relation to the transaction when he was consulted by the second named appellant with a view to protecting her interest in the family home when the bank was threatening repossession, and that the file in question continues to be held by Mr Quinn who was acting for the first named appellant at the time. Accordingly, he states, he was not aware, and could not have been aware, of the contents of the original file including the letters which he had been handed in more recent times. He believes that the correspondence demonstrates that the deed of transfer into joint names was executed only subsequently to the mortgage, and therefore contrary to what had been contended by the respondent in the High Court. In those circumstances he believed it was important that this new evidence be admitted for the purposes of the appeal to this Court.

18. This Court dealt with that application prior to the date of hearing of this appeal. For reasons set forth in the judgment of McGovern J. dated 12th April 2019 ([2019] IECA 119) the application was refused. Having referred to *Murphy v. Gilligan* [2014] IESC 43 (Clarke J.) and *Fitzgerald v. Kenny* [1994] 2 I.R. 383 (Blayney J.) McGovern J. noted that the second named appellant had not sworn an affidavit in support of the application and that the affidavit of Mr Keigher 's "remarkably vague as to when the evidence sought to be introduced first became available". He went on to state that was no satisfactory explanation had been offered as to why the applicant could not have obtained this evidence for use at the trial. He stated also that "any of the documents now sought to be admitted where available at the time of the hearing before Hedigan J. and could have been obtained by reasonable diligence". At para. 13 of his judgment, McGovern J. stated:

> "The "new" evidence now sought to be admitted would involve the applicant making a significantly different case to that which was made in the High Court. Its admission would involve an enquiry and the implications of the alleged execution of the deed of transfer after the execution of the mortgage. Such matters could not be dealt with by this Court but would necessarily involve sending the matter back to the High Court (where witnesses would be cross-examined) in circumstances where judgment was delivered as long ago as 9th August 2012 and the motion to admit new evidence was filed on 20th March 2019. That would give rise to a wholly unacceptable situation".

19. At paras. 14 et seq, McGovern J. concluded as follows:

> "14. The power of the Court to permit new evidence is discretionary. The following facts are relevant to the exercise of the Court's discretion:
>
> (1) The evidence is not "new" and was discoverable by the exercise of reasonable diligence prior to the trial.
>
> (2) No satisfactory explanation has been given for the delay in bringing the application to adduce new evidence and the failure to seek it from the former solicitor of the appellants.
>
> (3) The loan which underlies the High Court proceedings is dated 18th December, 1991and the special summons commencing these proceedings was issued on 28 March 1996 which is twenty-three years ago.
>
> (4) The judgement of the High Court was delivered on 9 August, 2012, six and a half years before this application

was brought to adduce new evidence.

15. Counsel for the applicant on this motion has informed the Court that she is not relying on the defence of *non est factum*. The appellants accept they signed the mortgage relied on by the respondent. Indeed, the correspondence between Mr John Quinn solicitor and the appellants exhibited in the affidavit of Mr Keigher establishes clearly that it was the intention of the appellants to have the family home put in joint names, and that there would be a deed of transfer and a mortgage deed executed. Furthermore, the loan offer dated 28th November, 1991 was in the form of confirmation of "mortgage facilities" which was signed and accepted by the appellants and provided for the creation of a mortgage of the appellants' bar and family home as security.

16. Weighing up all these factors, the absence of special circumstances shown in the affidavit of Mr Keigher and the absence of any affidavit from the applicant herself, I would refuse the application of the second named appellant to admit new evidence and direct that the appeal must proceed on the basis of the evidence before the High Court judge."

20. That therefore is how matters proceeded before this Court when the appeal itself was heard on the 3rd May 2019. The appeal proceeded on the basis of the evidence that was before the High Court judge.

21. It should be recorded also that on the 30th April 2019 an application was made to this Court to adjourn the hearing of the appeal due to take place on the 3rd May 2019 because the second named appellant wished to bring a further application to admit further new evidence that had not been before the High Court. That adjournment application was refused, as was an application for short service of a notice of motion seeking to have that further new evidence admitted.

22. There was evidence before the trial judge that the loan application form had been signed by both Mr & Mrs Raftery, and it stated *inter alia* that they were the joint owners of the property comprising the family home. There was evidence that following approval of the loan the loan offer had been accepted by both of them. What is also not disputed is that Mr Quinn was acting as solicitor for both the appellants, and gave the usual undertaking to the bank that he would perfect the title and ensure that the bank's security was put in place. To that extent he was acting for the bank also. Before the trial judge also were copies of the mortgage itself dated 12th November 1992, and which was executed by both Mr and Mrs Raftery, and the deed of transfer also dated the 12th November 1992 transferring the family home premises into the joint names of the appellants, also executed by both of them. It is a fact also that the second named appellant actually executed a declaration for the purposes of the Family Home Protection Act, 1976 declaring *inter alia* that she and her husband were the joint owners of the family home comprised in Folio 1769F, County Roscommon.

23. The bank did not place reliance on any consent to the mortgage by Mrs Raftery, but rather relied upon the fact that the family home was in the joint names of the borrowers as indeed had been stated by them both in the loan application form, and in circumstances where the acceptance of the loan was signed by each of them. The trial judge was satisfied that *Nestor v. Murphy* applied, as already set forth.

24. The trial judge was satisfied that both appellants had the benefit of legal advice at all times from their solicitor, Mr Quinn. He also found the second named appellant to be "a sensible, rational person who gave evidence clearly and without hesitation [and] seemed a woman who in all probability understood very well what she was doing and what she was signing when she was involved in the various transactions". That is not finding of fact with which this Court could interfere in circumstances where the trial judge was uniquely in a position to observe her during the course of her giving evidence before him. As I have already noted, the trial judge stated in relation to the claim that the second named appellant had entered into these transactions without the benefit of independent legal advice, that he had heard nothing in evidence which satisfied him that there was anything "untoward" and that "both were represented by the solicitor when he gave the letter of undertaking "on their behalf.

25. In my view the trial judge was correct to reject the submission that the second named appellant should not be bound by the terms of the mortgage loan because she had not received independent legal advice. There was evidence before the trial judge that Mr Quinn was acting for both her and her husband. She clearly had access to him for the purposes of seeking advice should she have wished to do so. As far as the bank was concerned, both she and her husband had applied for the loan and had both accepted the loan when it was approved, and the bank was provided with an undertaking on behalf of both borrowers by Mr Quinn in the usual way. There was nothing in the circumstances of this transaction to put the bank on constructive notice of undue influence, and in my view they were not under any obligation to ensure that in fact the second named appellant had obtained independent legal advice before entering upon the transaction. The bank was not put on enquiry in this regard such as was the position in a case relied upon by the second named appellant, namely *ACC Bank v. Connolly* [2015] IEHC.

26. Another issue raised on appeal is whether the trial judge was correct to hold that the transfer of title of the family home on the same date as the execution of the mortgage deed was sufficiently proven on the basis of the evidence before the Court. The trial judge had before him a copy of the deed of transfer and a copy of the deed of mortgage, and each on their face bore the same date, namely 12th November 1992. But in fact the second defendant in her evidence on day 2 of the hearing agreed, when it was put to her, that she executed the documents in the presence of Mr Quinn and further that she understood not only that the family home was put into joint names on 12th November 1992 but that the licensed premises was also being put into joint names. In those circumstances, the trial judge, in my view, was entitled to accept her evidence, and in such circumstances it cannot be said that there was no evidence before the trial judge, or insufficient evidence, to justify a finding that the transfer of the family home into joint names was executed on the same date as the mortgage deed. That was the evidence given to the trial judge, and he was entitled to accept it. If the new evidence sought to be introduced on foot of the application to adduce new evidence already referred to had been permitted, it would no doubt have assisted an argument that in fact the deed of transfer into joint names, possibly because it was overlooked by Mr Quinn in November 1992, was not in fact executed until 1995. However, that same evidence indicates that it was always the intention that in November 1992 the family home would be transferred into joint names. That indeed is consistent with the manner in which the loan application form was completed by both appellants, and the loan accepted. However, this court has already determined that such new evidence should not be admitted under the principles applicable to applications to adduce new evidence. If that was the case which the appellant wished to rely on in the High Court, the evidence could have been obtained by them and adduced at first instance.

27. On the basis of the evidence before the trial judge, I am completely satisfied that it was open to him to conclude as he did.

28. It is worth referring also to the contents of folio 1769F, County Roscommon. A copy of that folio was among the papers before the trial judge. That copy folio records that the first named appellant, Patrick Raftery, became the registered full owner of the property comprised in that folio on 10 May 1976, and that he remained the sole registered full owner until 12th December 1995, the latter being the date on which the transfer into joint names was registered so that from that date he and the second named appellant

became joint full owners. The copy folio also indicates that the mortgage deed, although executed by both appellants on 12th November 1992, was registered as a burden on the folio on 5th September 1994 – in other words while the first named appellant was still the sole registered full owner. Neither this Court, nor the High Court, are privy to what documentation was lodged in the Land Registry when the application to have the mortgage registered on the folio was launched prior to its registration on 5th September 1994. But it is clear, as a matter of law, that there was nothing to prevent the mortgage being registered against the interest of the sole registered full owner, even though the mortgage was also executed by the second named defendant. Whether or not the family Home declaration also signed by the parties was among the documents lodged when that application for registration of the mortgage was made in the Land Registry is not something that arose during the course of evidence in the High Court. It was a matter for the Land Registry to have raised any queries in relation to the application for registration. Neither this court nor the High Court has any evidence in relation to such queries, if any.

29. Section 31 of the Registration of Title Act 1964 provides that the folio is conclusive evidence of the ownership of both the property, and of any burdens registered, subject to any question of fraud arising. But there is no such issue arising in the present case. There is no allegation of fraud. The mere fact that the mortgage may have been registered as a burden on the folio at a time when the first named appellant was, according to the register, the sole registered owner, does not mean that when the deed of transfer into joint names was later lodged to alter the record of ownership to show the appellants as both being full owners does not disentitle the bank from relying on the mortgage in proceedings for possession against both appellants. On the date of the execution of the mortgage the first named defendant was the sole registered owner. The mortgage document, albeit executed by both appellants, was sufficient to have the mortgage registered as a burden on the folio against the interest of the first named appellant, he being the sole registered owner at that point. In due course when the transfer into joint names was lodged, and registered on the 12th December 1995, that burden was already registered on the folio, and the second named appellant's joint ownership was subject to that burden also thereafter.

30. The case made by the second named appellant at trial was that she had not had the benefit of independent legal advice before entering into the mortgage and transfer into joint ownership, and the lack of consent by her to loan approval in December 1991. and the related issue that the provisions of the Family Home Protection Act, 1976 had not been properly complied with. She did not rely upon the doctrine of *'non est factum'*. The case was not advanced in the High Court that there had been no transfer into joint names of the family home prior to entering into the mortgage. As I have stated already, it is also the case that the correspondence upon which the second named appellant had sought to have introduced as additional evidence on this appeal was in existence prior to the delivery by her amended defence. It is an argument that she could have sought to plead at that point if she truly believed at the relevant time that at the time she executed the mortgage she was not the joint owner of the property, as she had stated was the position when the loan application and acceptance of the loan was signed by her.

31. In my view the trial judge's conclusions are correct, and I would dismiss the appeals.

32. The appeal against the dismissal of the counterclaim related to the alleged sale of the licensed premises at an under value was not relied upon on the appeal, and there is therefore no need to address that aspect of the appeal as lodged.

33. After the conclusion of the hearing of this appeal, and reservation of the Court's judgment, the Court requested the parties to address the question of whether the second named defendant was in fact estopped by her own conduct from raising any issue related to whether the deed of transfer into joint names was executed only after the execution by her of the deed of mortgage, or that there was insufficient evidence before the trial judge to support the finding by the trial judge that the deed of transfer was executed before the deed of transfer or on the same date. Submissions were made on that question on the 15th May 2019 as the Court had requested. I am grateful for the helpful submissions made by both parties to the appeal on that occasion. However, in the event, it is unnecessary to reach a conclusion on that discrete estoppel question, given my reasons for considering that the appeal should be dismissed.