THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 40
Court of Appeal Record No. 2019/458
High Court Record No. 2006/623 SP

Whelan J.
Noonan J.
Haughton J.

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

- AND –

JERRY BEADES

APPELLANT

JUDGMENT of Ms Justice Máire Whelan delivered on the 17th day of February 2021

1. This is an appeal against the *ex tempore* judgment and order of Reynolds J. made in the High Court on 14 October 2019 wherein the following orders were made:

1. an order pursuant to O. 17, r. 4 of the Rules of the Superior Courts ("RSC") and/or pursuant to the inherent jurisdiction of the High Court naming Beltany Property Finance DAC ("Beltany") as the sole plaintiff in the proceedings;
2. an order pursuant to O. 42, r. 24(a) RSC and/or pursuant to the inherent jurisdiction of the High Court granting the applicant, Beltany, liberty to issue execution on foot of an order for possession made by Dunne J. on 23 June 2008; and,

3. an order pursuant to O. 28, r. 12 RSC amending the possession order so as to name the applicant, Beltany, in place of "KBC Bank Ireland plc" as the plaintiff in the title thereof.

The said order on its face records that it was made "by consent" however I infer that that is erroneous.

2. The title page of this judgment reflects the most up-to-date details of the parties in the underlying High Court proceedings as recorded by the Central Office of the High Court. This should not be taken as a pre-judgment of the issues discussed herein or of any potential future appeals brought by the appellant.

The *ex tempore* judgment

3. A note was furnished of the proceedings before the trial judge. It notes that at first calling of the application on 14 October 2019 in the Chancery No. 1 Motion List before the High Court, the judge was informed by counsel on behalf of Beltany that the application could be dealt with by consent in circumstances where the solicitor acting for the appellant had indicated that this was the position by means of an email sent on 11 October 2019 at 5.22pm. Subsequent to counsel having departed the courtroom the appellant's solicitor and counsel attended before the High Court, in the absence of the solicitor and counsel for Beltany and informed the trial judge that the appellant had changed his position in regard to the application and was no longer willing to consent to the relief being sought. Prior to the said attendance an email was sent to solicitors for Beltany stating that the consent above referred to furnished on 11 October 2019 had been provided in error and that the matter would be re-mentioned before Reynolds J.

4. At the resumed hearing of the motion counsel on behalf of the appellant submitted that the application ought to have been brought before the Court of Appeal and not before the High Court in circumstances where the appeal bearing record no. 2018/378 was already pending. It was asserted that the Court of Appeal had seisin of the proceedings in those circumstances.

5. Beltany argued that the appeal pending was from an order made by Costello J. dated 25 July 2018 and it was incorrect to suggest that the Court of Appeal had seisin of the substantive proceedings save and except the appeal pending in the separate procedural matter aforesaid. It was further argued that O. 17, r. 4 and O. 42, r. 24 RSC clearly envisage that the relief at issue be sought from the High Court in the first instance. In a ruling Reynolds J. noted the nature of the 2018 appeal and the terms of O. 17, r. 4 and O. 42, r. 24 RSC. She further noted that no authority had been opened to the High Court to support a proposition that an application such as that at issue could be dealt with by the Court of Appeal. Thereupon she proceeded to grant the orders in terms of paras. (a) to (c) inclusive of the notice of motion and made an order reserving the costs of the application. The note of the judgment acknowledges that the perfected order, albeit suggesting that the reliefs were granted by consent, is incorrect in the circumstances outlined above.

Notice of appeal

6. The notice of appeal was lodged on 12 November 2019; the sole ground of appeal being that the trial judge erred in principle in accepting jurisdiction to make an order substituting the plaintiff in circumstances where the Court of Appeal was seised of appeals in connection with the same case.

Submissions of appellant

7. In written submissions the appellant identified the key facts as being that on 23 June 2008 IIB Homeloans Limited obtained an order for possession of two premises, 31 Richmond Avenue and 21 Little Mary Street in Dublin pursuant to O. 54, r. 3 RSC, the said order made on foot of a mortgage dated 12 June 2003 and made between the parties aforesaid. The appellant appealed the said order for possession and judgment was delivered on 12 November 2014 dismissing the said appeal and affirming the order for possession made in the High Court by Dunne J. on 23 June 2008. By special resolution of 2 October 2008, IIB Homeloans changed its name to KBC Mortgage Bank. In 2009 KBC Mortgage Bank entered into a scheme of transfer with KBC Bank Ireland plc

for the purposes of the Central Bank Act 1971. By virtue of S.I. No. 125 of 2009 the Minister for Finance of the time being approved the said scheme of transfer of the banking undertaking of KBC Mortgage Bank to KBC Bank Ireland plc pursuant to s. 33 of the Central Bank Act 1971. On 18 May 2015 KBC Bank Ireland plc was granted leave to issue an execution order pursuant to O. 42, r. 24 in respect of the order for possession made in the High Court on 23 June 2008:-

> "When preparations were being made for execution of the order it became clear that 21 Little Mary Street, Dublin 1 was occupied by an organisation and three residential tenants. 31 Richmond Avenue was split into seven residential units which were also occupied." (para. 6 of the appellant's submissions)

8. The written submissions on behalf of the appellant range far beyond the ambit of the narrow ground of appeal identified above. The issues raised include that IIB Homeloans did not have a banking licence from 1999 to 2008. It was argued that the attempted transfer of the benefit of the possession order obtained in such a situation is void; that IIB Homeloans was "passing itself off as a bank"; and, that the order for possession is not assignable "being an attempt to assign part of an order". It was contended that there was non-compliance with O. 9, r. 14 which requires an affidavit of service of a summons in an action for the recovery of land to state that the deponent does not know of and does not believe that there is any person in occupation of same and in particular it was contended that the requirements of O. 9, r. 14 extended to execution orders. The submission contends that: -

> "It is submitted that it is an error of principle to state that a possession order having issued 'It is envisaged that the interests of those parties will be dealt with prior to the pronouncement of the order for possession and that account of their interests will be taken by the court in any terms attached to the order for possession. If persons subsequently go into possession of the lands they do so subject to the existing order for possession with

whatever consequences that may have for their right (if any) to remain in possession of the lands.'" (para. 11)

9. However I note that that quotation does not come from the note of the judgment of Reynolds J. made on 14 October 2019. I recognise it, however, as a passage from the judgment of Costello J. in *IIB Homeloans Ltd. (Formerly Irish Life Homeloans Ltd.) v. Beades* [2018] IEHC 390 which judgment was delivered on 29 June 2018 and which is the subject of an entirely separate and distinct appeal before this court from the orders made on 25 July 2018 and perfected on 23 August 2018.

10. This appeal however is confined wholly and exclusively to the issue as to whether the trial judge erred in principle in accepting jurisdiction to make the order sought. In substance what is being contended is that the appeal by the appellant against the orders made by Costello J. as referred to above operated to preclude the High Court from having any jurisdiction to make the orders sought in the notice of motion which issued out of the Central Office of the High Court on 10 July 2019 seeking, *inter alia*, the reliefs ultimately granted by Reynolds J. on 14 October 2019 at (i) – (iii).

Relevant events subsequent to the orders made in the High Court on 25 July 2018

11. In an affidavit sworn on 10 July 2019 by Donal O'Sullivan, a director of Beltany, in support of the motion for the orders sought, the procedural history between the appellant and the original mortgagee, IIB Homeloans Limited, in the litigation is outlined and the judgment handed down by Costello J. on 29 June 2018 is recited. It deposes to a mortgage sale agreement dated 9 August 2018 between KBC Bank Ireland plc, IIB Finance DAC and Premier Homeloans Limited as sellers and Beltany as buyer for the sale of "all the sellers' rights, titles, interests and benefits (whether past, present or future) of the sellers pursuant *inter alia* to the loan facility, the facility letter and the mortgage." The deponent further exhibited a copy of an "Irish Law Deed of Transfer (Excluding Property)" dated 30 November 2018 granting, conveying, assigning and transferring

unto Beltany all right, title, interest and benefit of the sellers in the security documents in the terms specified in the said deed. An excerpt from Schedule II Part 1 to the said deed clearly identifies the properties at Richmond Avenue and at Little Mary Street in Dublin as properties conveyed to Beltany under the instrument. At para. 22 the deponent avers: -

> "In view of the matters aforesaid, I believe and am advised that the applicant is the sole owner of the full legal and beneficial interest in the loan facility, the facility letter and the mortgage. In the circumstances, I believe and am advised that it is appropriate that the applicant should henceforth be the sole plaintiff in the proceedings.
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> 23. I believe and am advised that the applicant is the party entitled to enforce the possession order. As have been highlighted above, the defendant has exhausted all avenues of appeal which are available to him in the respect of the possession order."

Discussion

12. It is clear that under the Rules of the Superior Courts, Reynolds J. had full jurisdiction to entertain the application. Beltany had an entitlement in light of the deeds of 9 August 2018 and 30 November 2018 to invoke the jurisdiction of the High Court in the manner in which it did. Whilst Beltany could have awaited the outcome of the pending appeal before the Court of Appeal, it was not bound to do so. Were it to transpire that a determination be made in the pending appeal against the orders of Costello J. in the earlier proceedings then Beltany would have to accept the consequences of same. An application pursuant to O. 17, r. 4 is purely procedural and upon exhibition of certified copies of the aforementioned instruments there was *prima facie* evidence before the trial judge that a change of interest of the mortgagee had taken place. The trial judge was not concerned to carry out an investigation as to the efficacy or otherwise of the transactions in question.

13. Having regard to O. 42, r. 27 which provides: -

> "Any person not being a party to a cause or matter, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter…"

The granting of the order giving leave to issue execution pursuant to O. 42, r. 24 was discretionary and Reynolds J. had full original discretion in that regard. Another of the reliefs sought was pursuant to O. 28, r. 12 which provides: -

> "The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

I am satisfied that the trial judge was entitled to entertain that application and to make orders as she considered appropriate. The correctness or otherwise of the order she made in that regard is not the subject of any appeal; it being recalled once more that the appeal is confined to whether she "erred in principle in accepting jurisdiction to make an order substituting the plaintiff in circumstances where the Court of Appeal was seised of appeals connected with the same case."

14. Furthermore, it should be noted that O. 86, r. 7 provides:-

> "Subject to any provision of statute, whenever under these Rules an application may be made either to the Court of Appeal or to the court below, it shall be made in the first instance to the court below."

Conclusion

15. This court should be slow to interfere with steps taken by a High Court judge to entertain an application pursuant to the Rules of the Superior Courts pertaining to procedural matters in respect of which, pursuant to the said rules, they have full original jurisdiction and where it is demonstrated that there was clear evidence before the judge on foot of which they were entitled to rely as affording a valid legal basis for the exercise of the procedural jurisdiction in question.

16. A further point raised at the hearing of this appeal was that there had been non-compliance with the provisions of O. 9, r. 14 RSC. The operative rule provides: -

> "Every affidavit of service of a summons in other actions for recovery of land, shall state that the deponent does not know of and does not believe that there is any person, other than those who have been served, in the actual possession or in receipt of the rents and profits of the lands sought to be recovered, or any part thereof, and the said statement shall be verified by the affidavit of the plaintiff or of one of the plaintiffs, or of the solicitor for the plaintiff."

The ambit of that rule is discernible from the order of which it forms part; Order 9 Service of Summons. The summons in the instant case was served in the year 2006. Fourteen years have elapsed and Beltany acquired title to the charges and the mortgagee's interest in the secured property in 2018, some twelve years after the affidavit of service in question was sworn. It is clear from the sundry affidavits that it first emerged that there were persons in occupation and possession of the secured properties in 2015 after the order for possession, made in June 2008, had been the subject of an appeal to the Supreme Court which latter court had disposed of the appeal and affirmed the order. Were any issue to be made concerning a deficit in the affidavit of service of the special summons in this case or non-compliance with O. 9, r. 14 it behoved the appellant to raise same in the appeal to the Supreme Court instituted in 2008 and concluded in November 2014. That was not done.

17. Further, it is significant that there is no evidence and nothing advanced to suggest that any such person demonstrated to have been in occupation and possession of either of the mortgaged properties at the date of institution of the proceedings in 2006 was prejudiced. Having regard to the exceptional effluxion of time, the fact that the point was not taken in the initial appeal in 2008 and was never raised before the Supreme Court when the matter came to hearing in 2014, it is not now open to the appellant to seek to agitate this point afresh. Further there is ample authority for

the proposition that in the absence of evidence of prejudice to such a person, and particularly where it is clear that the mortgagee only became aware of the presence of such a person in possession subsequently (a matter not in dispute in this case) then notwithstanding evidence of clear non-compliance with O. 9, r. 14 the court will not nonsuit the mortgagee.

18. To compel Beltany to bring the application in the first instance before the Court of Appeal would in effect be to trench upon the appellate structure ordained by Article 34.4.1° of the Constitution which at least implicitly contemplates that the Court of Appeal will enter into a consideration of and pronounce on the correctness or otherwise of a High Court decision having due regard to the nature of the application, the evidence before that court and the processes and reasoning of the trial judge.

19. The Rules of the Superior Courts do not confer on a party to litigation the right to compel a litigant to institute procedural applications such as those under consideration in this appeal before the Court of Appeal simply by reason that there is pending before that court a discrete appeal concerning a matter in which the moving party before the High Court is not directly involved. Such a right would run counter to the constitutional order. As is clear from O. 86A, r. 2(1)(a) there are concurrent jurisdictions in relation to such applications exercisable as appropriate. The jurisdiction of the High Court is not diminished in the exercise of its discretion to grant such order where it is satisfied that it is appropriate to do so. The existence of the O. 86A, r. 2(1)(a) jurisdiction is not to be viewed as undermining the full original jurisdiction of the High Court in any respect.

20. Whilst of course in exceptional circumstances and where demonstrated to be in the interests of justice such a motion might be brought before the Court of Appeal, that should not reflect the norm. The appellant did not identify any relevant provision of statute which operated to disapply O. 86, r. 7.

21. In light of the facts of this case and in particular the fact that Beltany only acquired an interest in the mortgaged properties in late 2018 and following the conclusion of the High Court motion

now under appeal to this court, no exceptional circumstance or basis has been identified which warranted Beltany initiating the motion in the Court of Appeal seeking the reliefs as it did. The jurisdiction of this court as provided by the Constitution and statute is exclusively appellate in nature and in general it is prudent that this court refrain from entering into a determination of issues or procedural matters which have not been the subject of a trial and determination by the High Court in the first instance.

22. Accordingly, I would dismiss this appeal for the reasons stated.

23. Beltany disposed of its interest in the mortgage and all subsisting rights it held *qua* mortgagee prior to the hearing of this appeal. However, given that the assertions advanced in the notice of appeal and arguments trench on its title and the devolution of its title and enforceability of its rights by its successors it has been necessary to determine the above issues to obviate further unnecessary litigation by it or its successors in title.

24. Insofar as the issues determined in appeals 2019/254, 2019/487, 2019/276 and 2018/378 overlap with the issues to be determined herein the said judgments are intended to be read herewith.

25. With regard to costs, as Beltany has been entirely successful in opposing this appeal, my provisional view is that Beltany is entitled to its costs of the appeal. Since the appellant was wholly unsuccessful in this appeal and having regard to O. 99 (recast) and ss. 168 and 169 of the Legal Services Regulation Act 2015, costs follow the event.

26. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

27. As this judgment is being delivered electronically, Noonan and Haughton JJ. have indicated their agreement with it.