[2020] IEHC 99

THE HIGH COURT
CIRCUIT APPEAL

2019 No. 60 CA

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND
PETER CODY
HEATHER CODY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 28 February 2020

INTRODUCTION

1. The within proceedings have come before the High Court by way of an appeal against an order for possession granted by the Circuit Court pursuant to section 62(7) of the Registration of Title Act 1964. The second named defendant's appeal against this order was allowed for the reasons set out in a written judgment delivered on 31 January 2020, *Bank of Ireland Mortgage Bank v. Cody* [2020] IEHC 34 ("*the principal judgment*"). The proceedings were then adjourned for three weeks to allow the parties to consider the terms of the principal judgment prior to the issue of costs being determined.

2. When the matter next appeared before the High Court on 21 February 2020, an application was made on behalf of Bank of Ireland Mortgage Bank (*"the bank")* to have the appeal remitted to plenary hearing. This application was made notwithstanding that the appeal had already been conclusively determined against the bank by the principal judgment. The principal judgment had expressly recited the form of the (substantive) order to be made. The only reason that the formal order of the High Court had not yet been drawn up was that the issue of costs remained outstanding. That issue had been left over to the adjourned date to allow the parties time to consider the written judgment.

3. The application to remit the (already decided) appeal to plenary hearing was advanced with some skill by leading counsel for the bank. Ultimately, however, the application was hopeless. Accordingly, I delivered an *ex tempore* ruling on 21 February 2020 dismissing same. I provided a brief summary of my reasons at the time, but indicated that I would deliver a written judgment today (28 February 2020).

PROCEDURAL HISTORY

4. To assist the reader in understanding the application made on behalf of the bank to remit the appeal to plenary hearing, it is necessary to rehearse briefly the procedural history. The within proceedings were instituted before the Circuit Court pursuant to the Land and Conveyancing Law Reform Act 2013. The primary relief sought had been an order for possession pursuant to section 62(7) of the Registration of Title Act 1964. The bank is the owner of a charge registered as a burden against the title of a dwelling house owned by the first and second defendants, and previously occupied by them as their principal private residence. The defendants have since separated, and the dwelling house is now occupied by the second named defendant, Ms Cody, and her children.

5. The bank's case can be summarised as follows: (i) the charge registered on the folio is referable to a deed of mortgage and charge said to have been entered into between the defendants and the bank on 12 January 2007 ("*the mortgage*"); (ii) the mortgage is applicable to all "secured loans" as defined at Clause B.(20) of the mortgage; (iii) the bank had issued two loan offer letters to the defendants in September and October 2005, respectively; (iv) it was an express term of each of the two loan offer letters that the dwelling house was to be mortgaged; (v) the two defendants entered into the loan agreements in accordance with the terms and conditions of those offer letters on 24 October 2005; and (vi) the principal monies under the mortgage are now due in circumstances where the defendants failed to comply with letters of demand dated 10 June 2016.

6. The difficulty for the bank, however, is that Ms Cody disputes the validity of the loan agreements. More specifically, and as discussed in detail in the principal judgment, Ms Cody alleges that her estranged husband, Mr Peter Cody, had been in collusion with the bank during the years 1990 until 2010 to attain money by way of loans and mortgages in the joint names of Heather Cody and Peter Cody without Ms Cody's knowledge and consent. Ms Cody further alleges that the family home was being used as collateral without her knowledge and consent. Notwithstanding these very serious allegations, the bank chose not to cross-examine Ms Cody.

7. The practical consequence of this choice on the part of the bank was that it was not in a position to discharge the onus of proof which lay upon it as the moving party in the proceedings. Given the state of the affidavit evidence, the bank was not able to establish that Ms Cody had, in fact, knowingly entered into the two loan agreements on 24 October 2005. The bank's case thus broke down at point (v) above.

8. None of this should have come as a surprise to the bank. The legal principles in this regard are well established, and have recently been summarised with enviable clarity by Clarke C.J. in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63; [2019] 2 I.L.R.M. 273, [92] and [93].

> [92] But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

[93] A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability.

9. The Chief Justice summarised these principles as follows at the conclusion of his judgment.

[113] However, in addition, I am also satisfied that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence by reference either to other sworn affidavit evidence or to documentary materials without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. *The onus is on a party who wishes to urge on a court that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court's final determination, to ask the court to take appropriate measures such as granting leave to cross-examine*,* so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned.

*Emphasis (italics) added.

10. No application was ever made to cross-examine Ms Cody on her allegations that loans and mortgages were created in her name without her knowledge and consent.

11. For the reasons set out in the principal judgment, I concluded that the bank had failed to discharge the onus of proof which lay upon it as the moving party in the application for an order for possession pursuant to section 62(7) of the Registration of Title Act 1964.

12. My conclusion was set out as follows in the principal judgment.

56. The Bank, as the moving party under section 62(7) of the Registration of Title Act 1964, bears the onus of proof. For the reasons set out above, the Bank has failed to establish the necessary proofs to allow this court to make an order for possession. Specifically, the Bank has failed to prove that Ms Cody executed the two loan agreements which the Bank seeks to rely upon. This omission is fatal to the claim for possession in that the Bank cannot prove that Ms Cody is indebted to it.

57. Ms Cody's appeal against the order made by the Circuit Court on 12 February 2019 must, therefore, be allowed. An order will be made setting aside the order for possession made by the Circuit Court.

13. As appears, the form of the order to be made was expressly set out in the principal judgment.

BANK'S APPLICATION FOR A PLENARY HEARING

14. The principal judgment had been delivered on 31 January 2020. As explained in the final paragraph of that judgment, the matter was then adjourned for a period of three weeks to allow the parties to consider the terms of the judgment. It was indicated that the court would thereafter hear submissions in relation to the appropriate costs order.

15. (It was also indicated that the court would hear submissions as to the appropriate directions to be given in respect of *separate* plenary proceedings between the same parties: *Heather Cody v. The Governor and Company of the Bank of Ireland & Ors*, High Court 2019 No. 1092 P).

16. On the adjourned date, the bank was represented by leading counsel. (It should be noted that the appeal itself had been argued by a different counsel). Counsel applied to have the appeal—which it will be recalled had *already* been determined against the bank in the principal judgment—adjourned to plenary hearing. This ambitious application was said to be made pursuant to Order 5B, rule 8(2) of the Circuit Court Rules as follows.

> (2) The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.

17. It was submitted that in circumstances where the High Court had not been able, in the absence of cross-examination, to resolve the factual disputes arising on the affidavit evidence, the court should now exercise its discretion to *adjourn* the matter to a plenary hearing rather than to dismiss the bank's application for an order for possession. It was further submitted that, although the High Court had delivered its judgment, the court would not be *functus officio* until such time as the formal order had been perfected, i.e. drawn up by the High Court Registrar.

DECISION

18. The application to adjourn the appeal proceedings to plenary hearing stands refused for the following reasons.

(i). Appeal has already been heard and determined

19. First, the appeal has already been heard and determined. The principal judgment found in favour of Ms Cody, and allowed her appeal in full. The principal judgment expressly states that an order will be made setting aside the order for possession granted by the Circuit Court. The only reason that the formal order of the High Court had not yet been drawn up is that the issue of costs remained outstanding. That issue had been left over to the adjourned date to allow the parties time to consider the written judgment.

20. It is correct to say that a court does have an exceptional jurisdiction to revisit an issue decided in a written judgment before the order envisaged by the judgment is drawn up and perfected. (See *Bailey v. The Commissioner of An Garda Síochána* [2018] IECA 63). However, there must be good grounds for exercising this jurisdiction as to do so tends to undermine one of the cornerstones of our legal process, namely that there must be finality in litigation. Parties are entitled to assume that a reserved judgment is final. This is especially apposite in the case of an appeal from the Circuit Court, where the legislation envisages that the judgment of the High Court should be final and conclusive (section 39 of the Courts of Justice Act 1936), subject only to the right to petition the Supreme Court for leave to appeal. (See *Pepper Finance Corporation v. Cannon* [2020] IESC 2).

21. With respect, the bank has failed to put forward any convincing reasons as to why the High Court should exercise its exceptional jurisdiction to reopen the principal judgment. There is no suggestion, for example, that the principal judgment had been reached *per incuriam*, i.e. that the judgment was decided in ignorance of the relevant statutory provisions or case law. Rather, as appears from the terms of the principal judgment, express reference was made to Order 5B of the Rules of the Circuit Court and to a relevant judgment of the Supreme Court. Nor can there be any suggestion that the bank did not have an opportunity to present its case. The bank had the benefit of solicitor and junior counsel at the hearing, an advantage not enjoyed by Ms Cody herself who appeared as a litigant in person.

22. To accede to the bank's application would be to reopen an appeal, which had been the subject of a final and conclusive determination by the High Court, for no other reason than to allow the bank to mend its hand. This would not be a proper exercise of the court's exceptional jurisdiction to revisit a reserved judgment. The principal judgment therefore stands.

23. The second and third reasons (below) for finding that the bank's application, i.e. to adjourn the appeal proceedings to plenary hearing, should be refused are subsidiary to this first, fundamental objection to the application.

(ii). Onus on moving party to employ procedural measures

24. The bank's application to have the appeal adjourned to plenary hearing is predicated on Order 5B, rule 8(2) of the Circuit Court Rules. Rule 8, in full, reads as follows.

> 8.(1) If at any stage during the course of proceedings instituted by Civil Bill in accordance with this Order it appears to the Judge or the County Registrar that the determination of any issue is necessary for the proper decision or ruling as to the relief to be granted in such proceedings or as to any matter arising therein, the Judge may, or the County Registrar may on consent, settle such issue to be tried, and evidence as to any issue of fact may be given either orally or by affidavit or partly orally and partly by affidavit as the Judge in the circumstances thinks proper.

(2) The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.

(3) Without prejudice to the power exercisable by the Court, of its own motion or on an application by the plaintiff, to adjourn proceedings under section 101(1)(a) of the Land and Conveyancing Law Reform Act 2009 or to grant relief in accordance with section 101(1)(b) of that Act, an application by a defendant to the Court for such an adjournment or such relief, shall, unless such evidence has previously been given on affidavit in the proceedings, be grounded on an affidavit, which shall:

(a) where the defendant is seeking time to pay any arrears, including interest, due under the mortgage—

(i) set out and verify the assets and liabilities of the defendant or verify a statement of the assets and liabilities of the defendant which is exhibited to such affidavit and

(ii) set out detailed particulars of the defendant's proposal to make such payment, or

(b) where the defendant is seeking time to remedy any other breach of obligation arising under the mortgage, set out detailed particulars of the defendant's proposal to effect such remedy.

25. I will return to highlight certain aspects of the wording of rule 8 presently.

26. Order 5B, rule 8 must be read in conjunction with Order 5B, rule 6(2) as follows.

(2) Any party desiring to cross-examine a deponent who has sworn an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court.

27. As appears, this rule empowers a party to require the production of a deponent for cross-examination.

28. The gist of the bank's argument appears to be that where a judge forms the view that there is a conflict on the affidavit evidence which can only be resolved by cross-examination, then the judge has a discretion either (i) to adjourn the proceedings to plenary hearing, or (ii) to dismiss the proceedings on the basis that the plaintiff has not discharged the onus of proof. It is next suggested that the principal judgment merely finds that there is a conflict on the affidavit evidence. The implication being that the High Court in this case has only gotten as far as the procedural crossroads under Order 5B, rule 8(2), and that a decision is still awaited as to whether to adjourn or to dismiss.

29. Counsel further submits that the procedure under Order 5B is analogous to that governing summary proceedings before the High Court under Order 37 of the Rules of the Superior Courts. Under that procedure, a court hearing an application to enter judgment may (i) give judgment for the relief to which the plaintiff may appear to be entitled; (ii) dismiss the action; or (iii) adjourn the case for plenary hearing.

Findings of the court

30. The bank's submissions overlook the fact that, as the moving party in the application for an order for possession, the onus of proof lay with it at all times. The bank had to prove to the satisfaction of the court that the principal monies had become due. Order 5B, rule 8 simply provides a procedural mechanism by which proceedings might be adjourned to plenary hearing. It is not intended to absolve the moving party from having to discharge the onus of proof which lies upon it. It certainly does not oblige a judge to come to the rescue of a plaintiff who has failed to establish its proofs. This is especially so where the plaintiff is legally represented but the defendant is not.

31. It is evident from the judgment of the Supreme Court in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63; [2019] 2 I.L.R.M. 273 that it is incumbent on the party, who bears the onus of proof in establishing the contested facts in its favour, to use appropriate procedural measures to ensure that potentially conflicting evidence is challenged by way of cross-examination. The onus is on a party, who wishes to urge on a court that sworn affidavit evidence should not be accepted, to ask the court to take appropriate measures, such as granting leave to cross-examine. (The relevant passages from the Supreme Court judgment have been cited in full at paragraphs 8 and 9 above).

32. The bank signally failed to make any attempt to rely on the procedural measures open to it under Order 5B of the Circuit Court Rules. The bank made no application to either the Circuit Court or the High Court for leave to cross-examine Ms Cody on her affidavits (rule 6), still less did the bank make an application to adjourn the proceedings to plenary hearing (rule 8). Indeed, when I suggested to junior counsel at the hearing on 21 November 2019 that this might be a case which should be remitted to plenary hearing, her response was to say that this was "not correct" and that this was a "straightforward" possession case. (DAR, 12.55 pm).

33. A formal application for a plenary hearing was only made for the first time on 21 February 2020, that is subsequent to the delivery of the principal judgment.

34. In addition to the difficulties identified above, it should also be noted that the wording of Order 5B, rule 8 tells against the bank's application. The rule is only applicable where proceedings are pending before the court. This is evident from the use of the phrases "*at any stage during the course of proceedings" and "may, where he considers it appropriate, adjourn*". Both of these phrases are predicated on extant proceedings. One cannot "*adjourn*" a case which has already been heard and determined.

35. For the sake of completeness, I should record that I do not think that the analogy which leading counsel sought to draw between (i) an application for an order for possession under Order 5B of the Circuit Court Rules, and (ii) an application to enter judgment in summary proceedings under Order 37 of the Rules of the Superior Courts, holds good. The latter procedure is much more structured, and provides for a number of distinct stages. For example, the possibility of judgment being entered at various points is provided for, e.g. judgment may be entered in the Central Office in the absence of an appearance, and in the Master's Court in the event of consent. The concept of an application for "leave to defend" is well established, and there is a considerable body of case law setting out the test to be applied in this regard. By contrast, Order 5B of the Circuit Court Rules does not expressly provide for the granting of "leave to defend".

36. Finally, at the risk of belabouring the point already made under heading (i) above, it is evident from the terms of the order proposed in the principal judgment that this court had decided to dismiss the application for an order for possession on the basis that the bank had not discharged the onus of proof. Put otherwise, the court had not become stuck at the procedural crossroads under Order 5B, rule 8(2), procrastinating between the two alternatives like Buridan's ass.

(iii) Special leave to adduce further evidence not sought

37. The appeal from the Circuit Court had been subject to the provisions of section 37 of the Courts of Justice Act 1936, as follows.

> 37(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given.
>
> (1A) Notwithstanding subsection (1), an appeal shall lie to the High Court sitting in Dublin from every judgment given or order or decision made (other than a decision to which section 169 (4) of the Personal Insolvency Act 2012 applies) by the Circuit Court in the performance of any function or exercise of any power or jurisdiction conferred on that court by that Act, whether or not oral evidence was given at the hearing or for the determination of the proceedings or matter concerned.
>
> (2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.

38. As appears, where the proceedings before the Circuit Court at first instance did not involve oral evidence, then the general position is that the appeal before the High Court is heard on the same affidavit evidence as had been before the Circuit Court.

39. Special leave would have been required under section 37(2) to cross-examine a witness, for the first time, at the appeal hearing before the High Court. This is because the oral evidence elicited by cross-examination is not evidence which had been "given and received" in the Circuit Court.

40. Not only did the bank not apply for special leave to cross-examine Ms Cody, its counsel successfully opposed an application on the part of Ms Cody to file further affidavit evidence. The position adopted on behalf of the bank before the High Court on 21 November 2019 was that the appeal should be heard and determined solely on the affidavit evidence which had been before the Circuit Court.

41. The bank has since committed a *volte face*. The position now adopted by the bank, subsequent to the delivery of the principal judgment, is that the appeal should have been determined by way of a plenary hearing. The purpose of such a plenary hearing is, presumably, to allow for the giving of oral evidence and the cross-examination of witnesses. The hearing would, therefore, be on an entirely different basis than that which had taken place before the Circuit Court. The hearing before the Circuit Court, it will be recalled, had been determined solely on affidavit evidence.

42. The "special leave" of the High Court is required under section 37(2) where an appeal is to be determined other than on the evidence given and received before the Circuit Court. In order to grant special leave, the High Court would have to be satisfied that the further evidence which it is sought to admit (i) had been in existence at the time of the trial, and (ii) is such that it could not have been obtained with reasonable diligence for use at the trial.

43. The procedure for seeking to submit fresh evidence upon the hearing of an appeal is provided for as follows under Order 61, rule 8 of the Rules of the Superior Courts.

> 8. Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, *he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court*.* Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court.
>
> *Emphasis (italics) added.

44. No explanation has ever been provided by the bank as to the reasons for not seeking to submit oral evidence to the Circuit Court.

CONCLUSION AND FORM OF ORDER

45. Towards the end of his submission, counsel for the bank refined his position by suggesting that the High Court should now make an order, not merely adjourning the appeal to a plenary hearing, but remitting the matter to the Circuit Court with a direction that the proceedings be reheard by plenary hearing.

46. With respect, this refined position simply serves to expose the audacity of the bank's application. The bank, having failed in its proceedings for an order for possession because it came up short in the requisite proofs, now wishes to rewind the clock to the very start of the proceedings. It wishes to rerun its application before the Circuit Court, on the basis of new evidence, with a right of appeal thereafter to the High Court. In effect, the proceedings before the Circuit Court and the High Court to date would be set at naught, and Ms Cody would be dragged through the courts a second time. Such a result would be an affront to the proper administration of justice.

47. The bank's application for an order for possession has already been heard and determined by the High Court by way of a rehearing as provided for under section 37 of the Courts of Justice Act 1936. Had the bank wished to cross-examine Ms Cody or to adduce fresh evidence, then it should have applied for the "special leave" of the High Court as required under section 37(2) of the 1936 Act. This application should have been grounded on an affidavit as prescribed under Order 61, rule 8 of the Rules of the Superior Courts. The bank did none of these things. It was only when a final and conclusive judgment was given against it on 31 January 2020, that the bank sought to rewind the clock to the very start of the proceedings.

48. The bank's application to remit the (already determined) appeal proceedings to plenary hearing before the Circuit Court stands refused for the reasons set out herein.

49. The orders stipulated in the principal judgment will now be drawn up and perfected. In particular, an order will be made setting aside the order for possession granted by the Circuit Court on 12 February 2019. A further order will be made allowing Ms Cody, as a litigant in person, to recover her expenses of the proceedings before the Circuit Court and the High Court as against the bank.