THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 335

Record No.: 2019/521

Whelan J.
Donnelly J.
Faherty J.

BETWEEN/

START MORTGAGES DESIGNATED ACTIVITY COMPANY

RESPONDENT

-AND-

PETER GAWLEY

APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered on the 30th day of November, 2020

1. The High Court (Simons J.) in a judgment dated the 9th December, 2019 gave leave to the respondent, pursuant to its application under Order 42, rule 24 of the Rules of the Superior Courts 1986 (as amended) ("the RSC"), to issue execution in respect of an Order for possession made by the High Court on the 7th March, 2011. It is against that Order for leave the appellant appeals. The wife of the appellant was a co-defendant in the High Court but she made no appearance in the High Court or before this Court and has not lodged a notice of appeal against the Order made against her. The appellant submitted to the Court that he had "instructions" from her to appeal on her behalf. In the absence of a notice of appeal emanating from the appellant's wife, I am satisfied that this appeal is brought by the appellant alone.

2. The application for leave to issue execution was made by Start Mortgages DAC (hereinafter, "Start Mortgages"). The original plaintiff in the special summons by which these proceedings were commenced was a different company, namely Nua Mortgages Limited. (hereinafter, "Nua"), who sought an Order pursuant to s. 62(7) of the Registration of Title Act, 1964, for possession of the appellant's property. That arose in circumstances where the appellant provided the property as security for a residential re-mortgage loan transaction on foot of an Indenture of Mortgage and Charge dated the 2nd April, 2008. That charge was registered as a burden on the relevant folio and the appellant defaulted on the loan repayment obligations. The High Court made an Order for possession of the property on the 7th March, 2011 in favour of Nua and placed a stay on execution for a period of six months.

3. No appeal was made against that Order but after attempts were made to execute the Order in 2014, the appellant issued a motion seeking to extend the time in which to

appeal the Order for possession. On the 28th July, 2014, the Supreme Court refused the relief sought by the appellant.

4. Start Mortgages Limited acquired from Nua by way of a loan book sale all rights, title and interest in the appellant's loan and security including the benefit of the Order for possession. On the 15th January, 2015, Start Mortgages Limited became the registered owners of the charge. Start Mortgages Limited brought an application for leave to issue execution pursuant to Order 42, rule 24. The appellant opposed that application and swore an affidavit. It is noteworthy that the appellant's replying affidavit in response to the respondent's present application for leave to execute is in exactly the same terms as the affidavit he swore in response to the earlier leave application.

5. On the 17th October, 2016, the High Court adjudicated upon Start Mortgages Limited's application for leave to issue execution and to be substituted in place of Nua. There was a full hearing before the High Court. The High Court (Baker J.) accepted the evidence of Start Mortgages Limited that they had discharged the onus upon them that they were entitled to issue execution and also to be substituted as plaintiff. Baker J. rejected the arguments of the appellant. The appellant did not appeal the Orders made on the 17th October, 2016.

6. A further Order was made on the 12th June, 2018 which substituted Start Mortgages DAC as plaintiff following Start Mortgages Limited's re-registration with the Companies Registration Office as a designated activity company. That Order was also not appealed by the appellant.

7. The respondent brought this second application for leave to execute because six years had elapsed since the making of the possession Order. The High Court had evidence before it in the form of an affidavit from Justin Nevin, litigation manager for the respondent and a replying affidavit from the appellant. The High Court also had the previous pleadings in the case concerning the granting of the Order for possession.

The High Court Judgment

8. Before the High Court, the appellant sought to resist the application on the basis that Start Mortgages was not entitled to the ownership of the charge. Simons J. held this was *res judicata* as no appeal had been taken against the Orders substituting Start Mortgages as the plaintiff. He also held that the argument of the appellant entailed an implicit challenge to the correctness of the Register of Title. Simons J. relied upon the decision of the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 which held that the correctness of the Register of Title cannot be challenged in possession proceedings. Simons J. quoted paragraphs 67 and 68 of that judgment as follows:-

> *"A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of*

the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification.

The challenge to registration is brought by other types of proceedings inter partes, or where the PRA is respondent, and in the manner I have described."

In those circumstances he could not continue with the case he was making.

9. Simons J. went on to say that the only issue remaining to be determined on the present application is whether leave to issue execution should be granted by reference to the principles set out in *Smyth v. Tunney* [2004] 1 I.R. 512. In that case, the Supreme Court held that under O. 42, rule 24 RSC, it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation at least for the lapse of time. Even if a good reason is given, the Court must consider counterbalancing allegations of prejudice.

10. Having considered the evidence from Mr. Nevin and the replying affidavit he held that the delay was reasonable.

11. Simons J. went on to hold that:-

"Mr. Gawley has not identified any prejudice which he has suffered as a result of the lapse of time between 17 October 2016 and the issuing of the motion on 7 August 2019. Indeed, it seems that Mr. Gawley has been in residence in the mortgaged property during that period, and that no payments have been made pursuant to the mortgage since June 2014."

12. In the circumstances, the motion judge was satisfied that the test in *Smyth v. Tunney* had been met. There was a good explanation for the delay in executing the Order for possession, and there is no countervailing prejudice to the appellant or his wife.

The Grounds of Appeal

13. The appellant's Notice of Appeal contained 10 separate grounds of appeal. Not a single one of those grounds of appeal engages with the judgment delivered by Simons J. in any substantive manner nor do the grounds relate to any ground set out in the appellant's affidavit upon which his defence to the High Court application was mounted.

14. By way of an undated document heading "Grounds of Appeal" the appellant set out 9 more paragraphs which appear to be proffered as new grounds of appeal. Again, most of these appear to be new grounds apart from a single substantive ground that the trial judge erred in law and evidence in that the respondents had not met the burden of proof set out in *Smyth v. Tunney* on the basis that no reasonable explanation for the lapse in time has been given to justify such an Order. The appellant also asserts that he and his wife have suffered significant prejudice in damage to their life's prospects and financial situation. He does not offer any detail of that prejudice which of course was also not offered to the High Court.

15. On the eve of the hearing of the appeal, the appellant sent *via* email, a "Booklet of Authorities". This is in fact a list of cases under which he has listed a summary of the case. The manner in which those summaries are recited appear to be an expansion on earlier points and some further points. I will deal with these further below.

The Submissions

16. The appellant has acted as a lay litigant throughout these proceedings. He has sworn affidavits and made submissions. At the hearing of the appeal, the appellant submitted that he had no solicitor at present and was only told of his solicitor's unavailability last week. From what the appellant informed the Court, he was in contact with a barrister who is now in prison and with his solicitor who is now ill. No solicitor ever came on record in this appeal. No application for an adjournment was made to this Court for the purpose of obtaining legal advice.

17. The appellant also submitted that he could not read or write. He was assisted in Court by a McKenzie friend who was invited to address the Court and to read any document that the appellant wished to be read to the Court. The McKenzie friend addressed the Court briefly, especially with respect to what, it was submitted, was an absence or inability to obtain documentation from the Land Registry. He submitted that the appellant therefore did not know the basis upon which Start Mortgages based their claim.

18. In reply to a query from a member of the Court, the appellant confirmed that the document entitled Booklet of Authorities was written by a barrister for him. The appellant must also have had other assistance with his documentation in the circumstances. The appellant asked the Court to take into account his documentation and the Court has done so.

19. It is clear and has been clear from his documentation (and submissions through himself and his McKenzie friend) that his main point of contention is that the Order of possession should not have been made and in particular that Start Mortgages (or Start Mortgages Limited) had no entitlement to take over these proceedings. The appellant referred back to the request by the Master on six occasions that Nua produce the mortgage document, but they did not.

20. In response to a request from the presiding judge of the Court as to why he said that the trial judge was wrong, the appellant submitted that the trial judge misunderstood *Smyth v. Tunney*. He re-iterated that the point he was making was that Start Mortgages did not have the charge.

21. Another member of the Court raised with the appellant the issue of the charge of Start Mortgages over the property. He confirmed that a principal concern of his related to a company called Investec Bank plc. It appears from the original grounding affidavit in the first application for leave to execute and to substitute Start Mortgages Limited as the plaintiff, that the agreement of the 4th December, 2014 had been between Nua and Start Mortgages Limited of the first part and Investec Bank plc ("Investec") and LSF Irish Holdings 54 Limited ("LSF") of the second part transferring to Start Mortgages Limited

and LSF in exchange for valuable consideration, all of the sellers' rights, title and interests in, *inter alia*, the loan at issue and all ancillary rights and claims related to that loan facility ("the assets"). From the documentation exhibited it appears that Nua transferred its legal interest in the assets to Start Mortgages Limited and Investec transferred its beneficial interest to LSF. This evidence was cited by Simons J. in his judgment.

22. Counsel for the respondent in written and oral submissions relied upon the trial judge's identification of the correct legal principles on the application for leave to issue execution outside the six year period and his application of the facts to those principles. Counsel also submitted that the vast majority of the grounds of appeal were inadmissible or otherwise without merit having regard to the very net issues that were before the High Court judge.

23. Counsel relied upon the unappealed Orders of the High Court in 2011, 2016 and 2018. He submitted that many of the appellant's grounds of appeal raised issues that were *res judicata* and/or were precluded from determination on grounds of issue estoppel. Some of the grounds raised did not relate to the actual case at hand or to Orders actually made. He submitted that the point regarding Investec and Nua is a matter that was dealt with at hearing in October 2016 by Baker J. There were two transfer documents because of the nature of the transaction. This, counsel submitted, was an issue that cannot be revisited but in any event there was nothing untoward in the matter.

24. Counsel also relied on the finding of Simons J. that there was another reason these grounds should not be allowed to proceed. He referred to the law which was that the certification by the Land Registry were conclusive in the absence of mistake or fraud which were not alleged in any of the affidavits and did not feature in the hearing before Simons J. It was not possible to go behind the registrar when seeking to challenge possession proceedings.

25. Counsel submitted that the appellant's other grounds amounted to a collateral attack on the making of the Order in 2011 and he was estopped from so doing. In so far as he claimed breach of fair procedures, counsel submitted that there was no basis for alleging same.

26. Counsel went through each of the grounds in the document of April 2002 and rejected them.

Analysis and Determination

27. The appellant has raised many and varied grounds in the course of this appeal. There are three substantive documents before the Court and I will deal with these in the Order in which they were received.

Notice of Appeal

28. In his Notice of Appeal, under the heading of Grounds of Appeal, the appellant sets out 9 (unnumbered) paragraphs. I will refer to them as grounds in the order they appear as paragraphs.

29. Grounds 2, 3, 4, and 5 all deal with the issue of fair procedures or lack of a remedy. These are made by the appellant in very general terms. At no point has the appellant particularised these. I am satisfied that on their face they appear to be without any foundation whatsoever. For example, ground 4 is a claim that the appellant was "not afford[ed] the benefit of adversarial plenary proceedings fair procedures with the associated rights and opportunities". That this is without foundation can be seen from the fact that the judge's decision was made only after a contested hearing of a motion in which the appellant had filed an affidavit, made submissions and a reserved judgment was delivered which engaged with each of the points made by the appellant.

30. I will not list all the other fair procedures "grounds" that he has raised save to say that I have considered each of them and I reject them as being without foundation.

31. Grounds 1, 6, 7, 8, 9 and 10 all raise issues which were not raised in the High Court. The appellant has given no explanation as to why this was not done. These grounds can only be described as wildly speculative. They were never particularised in the grounds of appeal or in written or oral submissions to this Court. A flavour of these grounds can be seen from the very first ground:

> "The Learned High Court Judge erred in fact and in law in failing to take into account, breach of contract, breach of the Central Bank or Ireland Codes, negligence, economic torts, breach of data protection laws, breach of privacy laws, breach of consumer protection laws, constitutional law, the law of the European Union, human rights law, banking law and international law."

32. The first thing to be said about these grounds is that they should have been raised in the court below. There has been no explanation for this. An appellate court's function is limited. In general, it is a review of the decision of the lower court, arising out of the issues that were before the lower court. The basis upon which new grounds of appeal can be considered must now be considered in the light of O'Donnell J.'s *dicta* in *Lough Swilly Shellfish Growers Co-operative Society Limited*. *& Atlanfish Limited. v. Bradley* [2013] 1 I.R. 227 as follows:

> *"At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K D. (otherwise C.) v. M.C.* [1985] I.R. 697 *for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News Ltd. v. Galway County Council (Unreported, Supreme Court, 25th July, 1977)); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments*

already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retains the power in appropriate cases to permit the argument to be made. Here the defendants attacked s. 19A with a blunderbuss of legal arguments, but nevertheless contrived to miss this particular point. It may be that in such cases there is no reason in principle why the Court may not properly permit the argument to be made. The question whether the Supreme Court is precluded from exercising such a jurisdiction either by the terms of the Constitution or the weight of authority, is however a matter which it is not necessary to resolve in this case, since I would not extend time for the appeal and the point which it was sought to argue on this appeal is misconceived".

33. In my view, this is a case where there is a strong basis for considering Grounds 1, 6, 7, 8, 9 and 10 as arguments that were not before the High Court. This was a case which was decided in the High Court on the basis of the evidence placed before it and the submissions made. These grounds were not advanced. In so far as it might possibly be argued that they are a form of variation of his argument before the High Court concerning the validity of the transfer of the mortgage to Start Mortgage and the validity of the substitution of Start Mortgage as the plaintiff especially with regard to the issue of Investec, these grounds of appeal must fail because of the correctness of the decision of Simons J. that these issues were *res judicata*. They had been decided already by Baker J. in her decision of the 17th October, 2016. Simons J. had identified as a matter of fact that the affidavit of the appellant before him and that which was before Baker J. were substantially the same. Furthermore, Simons J. was correct to find that the registration of Start Mortgages as owner of the mortgage was conclusive evidence of ownership for the purpose of possession proceedings. He correctly relied on the passage from *Tanager DAC v. Kane* cited above. I therefore consider that these grounds of appeal must be rejected.

34. In so far as any of the grounds may be said to raise a separate issue regarding the Order of possession in March 2011, these grounds must be rejected as amounting to a collateral attack on that Order. The appellant never appealed that Order and his late attempt to appeal was rejected by the Supreme Court. For that reason, I reject these grounds of appeal.

35. It is worth remarking that Ground No. 10 is as follows: "The intended applicant reserve the right to make a reference to the Court of Justice of the European Union and asks this Honourable Court to consider a reference where appropriate". In so far as the appellant considers he has a right to make a reference, he is mistaken, that power lies with the Court. In so far as he asks the Court to make a reference, this Court refuses that request. There is no basis for such a request as the requirements set out in Article 267 of the TFEU have not been met in this case.

The "Grounds of Appeal" April 2020

36. It appears that in an undated document in April 2020 the appellant filed what presumably were to be his submissions. This document is in the format of grounds of appeal and indeed is headed "Grounds of Appeal". Many of them ought not to be considered at all as they constitute entirely new grounds which were not before the High Court. In ease of the appellant I will address them so that he can be sure that all and any potential points have been considered.

37. Grounds 2, 4 and 5 are grounds which relate back to the argument that the respondent had no entitlement to hold a legal mortgage over the property. While I will later address Ground 2, these points were to all intents and purposes the same as those before Baker J. in 2016 and 2018. He makes a claim that the judgment of the 17th October, 2016 was "void ab initio due to previous failings by the Plaintiffs". As stated above, this point is *res judicata*. Even if the point he wishes to make is slightly different or has a different emphasis, the appellant must fail because an issue estoppel also lies. He ought to have raised these points before Baker J. and followed through by way of appeal. Moreover, the grounds he raises are not based on evidence that only came into existence afterwards or was not available to him at the time. They are claims arising out of the same material he has always had in his possession and knowledge. There must be a finality to litigation and these grounds are attempting to make a collateral attack on the Order of October 2016 in circumstances where there was no appeal.

38. Ground No. 1 baldly states there was no compliance with the requirements set out in the case of *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. In advancing this point, the appellant has misunderstood that decision. It relates to the requirement to particularise the debt in a summary summons. This is a special summons and the principles set out in *Bank of Ireland Mortgage Bank v. O'Malley* simply do not apply. It also must be said that in so far as it seeks to undermine the original Order of possession, it is an impermissible collateral attack on that Order.

39. Ground No. 6 relates to fair procedures and for the reasons set out above, I reject this ground of appeal.

40. Ground No. 7 states that the High Court erred in law in not making several points of law, case stated "to the Superior Courts" for a detailed determination. One obvious error in this is that the High Court is a Superior Court. Of course, the High Court made a detailed determination. There was no basis in this straightforward case dealing with the application of established legal principles to state a case to the Supreme Court.

41. Ground No. 8 stated that the trial judge erred in law in not placing a stay on his judgment of the 10th December, 2019 pending the outcome of the appeal and any other appeals these matters may give rise to. No application for a stay was made but, in any event, this seems entirely moot where the leave granted has not, on the evidence before this Court, been acted upon to date.

42. Ground No. 9 was an appeal against an Order for costs but this must be rejected out of hand as no Order for costs was made against him in the High Court.

43. Ground No. 3 relates to O. 42, rule 24 RSC and the principles set out in *Smyth v. Tunney* and I will return to this below.

The document of the 8th November 2020, "the Booklet of Authorities".

44. The "Booklet of Authorities" is a document that could not be considered under any circumstances a notice of appeal or notice to amend grounds. It is a list of cases with certain explanations underneath which seem to indicate possible arguments that might be made. It is this document that the appellant says was drafted by his barrister.

45. Even construing the "Booklet of Authorities" as further grounds of appeal which the appellant wishes to advance, or as an adjunct to his prior grounds, I would make the following observations. Reference is made in the "Booklet of Authorities" to consumer rights jurisprudence under EU law. The appellant does not explain why this jurisprudence would be relevant to the issue which fell to be determined in the court below. The "Booklet of Authorities" also addresses other matters which were either not canvassed before the trial judge or relates to matters which, as already outlined in this judgment, must yield to the principles of *res judicata*, issue estoppel and the necessity to guard against previously decided matters (which were either not appealed in the context of earlier determinations of the High Court or were in fact determined on appeal), being made subject to collateral attack. For example, issue is taken by the appellant with the summary nature of the possession proceedings. The time for challenging the order for possession has long since passed. It bears repeating that the Order for possession was granted in 2011, there was no appeal against it until an attempt was made to launch a later appeal in 2014 after certain attempts were made to execute the Order. The arguments raised in this "Booklet of Authorities" constitute an impermissible attack on the Order of possession of March 2011. The issue has long since been decided. These grounds, even if they could ever have amounted to arguable ones (and I am not convinced on that) must be rejected on that basis.

46. The "Booklet of Authorities" also refers to the decision of the European Court of Human Rights in *Steel and Morris v. UK* (2005) 41 EHRR 403. The point being raised appears to relate to the issue of legal aid. From the papers before us, this was not an issue raised before the High Court, nor in the grounds of appeal. In any event, there is no evidence to show that the appellant has an entitlement to legal aid and indeed, from his submissions it appears that he was at least able to afford to consult with a solicitor and barrister in respect of this appeal.

47. The "Booklet of Authorities" makes reference to a large number of cases concerning the void Orders and concepts of nullity of Orders. They appear to argue that it is never too late to raise in a defence that an Order is void. These cases have no relevance to the point at issue in these particular proceedings. In these proceedings Orders of the High Court were obtained after contested hearings. They became final when they were not appealed. It is not open to the respondent to reopen those Orders save in exceptional

circumstances, none of which he has put forward in this case. All the appellant advances in this document are either the same points as he made previously or other wild suppositions of law without any evidential or legal basis.

48. Finally, Ground No. 2 of the April 2020 document is the only ground that appears relevant to the decision that the High Court actually made. This ground claims that the trial judged erred in law and in fact as the burden of proof set out in *Smyth v. Tunney* had not been met as the respondent had not shown a reasonable explanation for the lapse of time to justify extending the time to issue execution. It was also submitted that the appellant and his wife had suffered significant prejudice in damage to their life's prospects and financial situation.

49. I have carefully considered the judgment of Simons J. and the evidence before him as contained in the affidavits of Mr. Nevin and the affidavit of the respondent. Simons J. correctly identified the legal principles in *Smyth v. Tunney* as follows:-

> *"… it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation a least for the lapse of time. Even if a good reason is give, the court must consider counterbalancing allegations of prejudice."*

He correctly identified that the burden was on the respondent to establish there was an explanation for the lapse of time.

50. Simons J. also referred back to the earlier application for leave to execute that had been made on the 17th October, 2016 and held that the focus would be principally, but not exclusively, on the period between the date of that Order and the date of the motion seeking a further extension of time in August 2019. In doing so he was correct. He had to take cognisance of the fact that the High Court had previously ruled on the issue up to a certain point in time. He had been given an explanation as to those previous difficulties.

51. Simons J. referred to the evidence of Mr. Nevin which indicated that Start Mortgages had sought to engage with the appellant and his wife during the period between the date of the High Court Order of the 17th October, 2016 and the filing of the motion seeking leave to issue execution on the 7th August, 2019. He also recited the previous difficulties encountered by the Sheriff in enforcing a writ in the year 2014. Simons J. then held:-

> *"It is reasonable for a mortgagee (creditor) to engage with a mortgagor (debtor) to ascertain whether measures short of the enforcement of an order for possession can be agreed between the parties. Start Mortgages had written to the defendants on 28 June 2018 and had offered the option of an assisted voluntary sale or supported voluntary surrender. One of the issues which could be addressed in such an arrangement was, seemingly, an 'agreed shortfall balance'. It appears that the defendants were being offered an opportunity to at least discuss a form of 'debt*

forgiveness', whereby any outstanding balance owing over and above the proceeds of sale of the mortgaged property might be written down in part.

The 'delay' in seeking to execute against the mortgaged property pending this approach to the defendants was reasonable. Were the court to refuse to issue leave to execute in circumstances where the lapse of time in seeking to enforce an order for possession is explicable, in part at least, by the taking of such steps, it would create a disincentive for mortgagees to engage with mortgagors. This would not be in the public interest, and would, ultimately, be to the detriment of mortgagors."

52. Simons J. went on to deal with the allegations of the appellant and considered whether the delay amounted to countervailing prejudice to the appellant and his wife. He considered what had been put before him in relation to the entitlement of Start Mortgages to maintain the proceedings and to enforce the Order for possession. He dismissed the appellant's arguments on the basis of *res judicata* but also held that there was a separate second reason as to why they were not valid objections. That was on the basis of the decision in *Tanager DAC v. Kane* as set out above which dealt with the correctness of the Register of Title.

53. Simons J. also held that the appellant had identified no prejudice that he had suffered as a result of the lapse of time between the 17th October, 2016 and the issuing of the motion on the 7th August, 2019. He noted that the appellant had been in residence in the mortgaged property during that period and that no payments had been made pursuant to the mortgage since June 2014.

54. The analysis carried out by Simons J. of the evidence before him was an exemplary example of how the principles in *Smyth v. Tunney* should be applied to the facts. There is no error in law or in fact. There was a reasonable explanation for the delay and no countervailing prejudice had been identified by the appellant. In so far as the appellant stated in his "Grounds of Appeal" in April 2020 that the appellant and his wife have suffered significant prejudice in damage to their life's prospects and financial situation, there is no evidence or explanation of how such a sweeping claim can be made in circumstances where it appears they have lived in the property without paying any amount towards the mortgage for six years. It is inconceivable that this period of unilateral "mortgage break" has caused significant prejudice in damage to their life's prospects or financial situation. This ground of appeal must also be dismissed.

Conclusion

55. By reason of the foregoing I am satisfied that the motion judge did not err in fact or in law in granting the respondent leave to issue execution in accordance with Order 42, rule 24. I would therefore dismiss this appeal.

56. The respondent sought its costs of this appeal in its notice responding to the notice of appeal. As the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs of this appeal. If the appellant wishes to contend for

an alternative form of Order, he will have liberty to apply to the Court of Appeal Office within 14 days from the date this judgment is delivered 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 appellant 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.

57. As this judgment is being delivered electronically, it is necessary to record that Whelan J. and Faherty J. have indicated their agreement with it.