THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/179

Haughton J.
Ní Raifeartaigh J.
Allen J.

Neutral Citation Number [2022] IECA 169

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

BALFORD CONSTRUCTION LIMITED

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 25th day of July, 2022

Introduction

1. This is an appeal by the defendant – which was pressed after the determination by the High Court of the substantive action – against a judgment of the High Court as to the progressing of an interlocutory motion brought by the defendant, but which was later abandoned by the defendant.

2. The appeal was misconceived from the outset and progressively deteriorated. It was, from start to finish, a complete waste of time and money.

The proceedings in the High Court

3. By summary summons issued on 9th October, 2019 the plaintiff, Bank of Ireland, claimed judgment against the defendant, Balford Construction Limited, in the sum of €2,751,216.74, said to be due and owing on foot of two loan facilities, each of which was said to have been repayable on demand, and in respect of which demand was said to have been made. As at that time was, and for many years had been, the practice the special indorsement of claim did not set out detailed particulars of the sum claimed.

4. An appearance was entered on behalf of the defendant on 12th November, 2011. The defendant's solicitor is Ms. Marilyn McNicholas, who is the daughter of the directors of the defendant, Peter McNicholas and Nancy McNicholas.

5. On 29th November, 2019 the Supreme Court gave judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423. The judgment of Clarke C.J. addressed, *inter alia*, the requirement in O. 4, r. 4 of the Rules of the Superior Courts that the indorsement of claim should provide particulars of the sum claimed. The indorsement of claim on the summons in this case clearly did not meet the requirements set out in *O'Malley*.

6. By notice of motion issued on 11th February, 2021 and originally returnable for 22nd March, 2021 the plaintiff applied to the High Court for an order pursuant to O. 28 of the Rules of the Superior Courts giving it liberty to amend the special indorsement of claim so as to set out the required particulars, and for summary judgment in the sum of €2,661,194.73. The sum for which judgment was sought by the motion was less than that sought by the summons because of the application to the account in the meantime of the proceeds of realisation of security held by the Bank. Owing to COVID-19 restrictions, the Bank's motion

was adjourned from 22nd March, 2021 – which was a Monday – to 21st June, 2021 – which was also a Monday.

7. On 18th June, 2021 – the very eve of the adjourned date for the Bank's motion – a motion was issued on behalf of the defendant by which the defendant sought an order pursuant to O. 19, r. 27 of the Rules of the Superior Courts striking out so much of the special indorsement of claim as alleged that the loans were repayable on demand *"on the grounds that the said pleadings are untrue and prejudicial to the fair trial of the action"*. That motion had been assigned a return date of 8th November, 2021.

8. I pause here to recall that O. 19, r. 27 of the Rules of the Superior Courts sets out an express power to strike out or amend any matter in an indorsement of claim which is unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.

9. If the defendant wanted to make the case that the loans were not repayable on demand, I can see no reason why it should not have done so by way of defence. Indeed, to have successfully seen off the Bank's motion for summary judgment, the defendant needed to have done any more than show that it was arguable that the loans were not repayable on demand, or that it was not clear that they were. More to the point, if there was a real issue as to whether the loans were or were not repayable on demand, the effect of the order sought would have been to prevent rather than enable the High Court to decide the issue.

10. The defendant's motion issued on 18th June, 2021 was served on – or at least sent to – the Bank's solicitors by e-mail on the same day. The defendant's solicitor proposed that the Bank's motion would be adjourned until after the defendant's motion had been determined. The Bank's solicitors were not agreeable to this course and proposed, instead, that the court would be asked to adjourn the proceedings to the earliest available Thursday in the non-jury

list, so that directions could be sought and a hearing date fixed for both applications. The defendant's solicitor was not agreeable to that.

11. When the Bank's motion came back into the list on the following Monday, counsel for the Bank urged that the matter was not suitable for a Monday. He asked that it, and the defendant's cross motion, be listed together in the non-jury list on the following Thursday for directions. Ms. McNicholas suggested that the defendant would be prejudiced if its motion was not heard first, but did not say why. She said that she wished to reply to both of the Bank's motions – that is, to both parts of the Bank's motion, but wanted the defendant's motion heard first.

12. Hanna J. expressed the view that the one thing that was abundantly clear was that this was not a Monday morning motion matter. There were, he said, two conflicting motions which should be listed together for directions and he put them both into the non-jury list for Thursday 24th June, 2021.

13. When the motions came before Meenan J. on 24th June, 2021 there was no appearance on behalf of the defendant and the two motions were put back to 28th June, 2021. On 28th June the motions were further adjourned to accommodate a personal difficulty on the part of Ms. McNicholas until 12th July, 2021. On 12th July, 2021 there was again no appearance by or on behalf of the defendant and the court then gave directions for the exchange of affidavits and listed the motions for hearing on 15th March, 2022.

14. It is significant to note here that the order of Hanna J. was that the two motions should travel together in order than they might be heard and directed on the same occasion. The judge did not make any order as to the sequencing of the motions.

The appeal

15. On 20th July, 2021 the defendant filed a notice of appeal against the judgment and order of Hanna J. but not against the order of Meenan J. of 12th July, 2021 by which he had given directions and fixed the hearing date. The stated grounds of appeal were that the High Court judge (1) had erred in law in transferring the defendant's motion *"from the common law list to the summary judgment list without the consent of the common law list judge"* and (2) that he had erred in law when he ordered that the two motions should travel together and be heard on the same occasion. As was pointed out by the Bank in its respondent's notice, the grounds of appeal were bald assertions that the judge had erred in law and did not indicate how he had allegedly erred in law.

16. The defendant's appeal first came into the Court of Appeal directions list on 15th October, 2021. Costello J. then observed – as had been pointed out by the Bank's solicitors in correspondence, as well as in the respondent's notice – that the Court of Appeal will not interfere with the management by the High Court of its lists save in the most exceptional circumstances. By then, of course, the motions had been listed for hearing in the High Court. The Bank's solicitors, in a letter of 2nd September, 2021, had drawn the defendant's solicitor's attention to the relevant authorities and warned that if the appeal were pressed and failed, they would apply for indemnity costs.

17. The defendant acknowledges that the decision of the Supreme Court in *Weavering Macro Fixed Income Fund Ltd. (In liquidation) v. PNC Global Investment Servicing (Europe) Ltd.* [2012] 4 I.R. 681 is clear authority for the proposition that an appellate court will be very slow to interfere with a case management order and will only intervene if it can be demonstrated that the directions caused irremediable prejudice which could not be remedied by the trial judge.

18. The misunderstanding at the root of the appeal emerged in the course of the oral hearing. Ms. McNicholas suggested that the jurisprudence applies only to orders made by the

High Court in the course of the formal case management of cases which have been admitted to the Commercial List or have been the subject of formal case management under O. 63C the Rules of the Superior Courts. That is fundamentally mistaken. The underlying principle is that an appellate court will not lightly interfere with the management by the High Court of its own lists. This applies to the management by the High Court all of the business that comes before it and, if anything, applies *a fortiori* to routine decisions as to the progress of cases.

19. There was no judge available to deal with the hearing of the two motions which had been scheduled for 15th March, 2022 and they were adjourned until 10th May, 2022.

20. By letter dated 4th May, 2022 the defendant's solicitors notified the Bank's solicitors that the defendant would not be proceeding with its motion. It was then suggested that service of the defendant's motion *"was not completed"* – by all accounts by reason of the fact that the exhibits had not been served – and soon after, that the defendant's motion could not proceed on 10th May, 2022 because it had not been called on on the previous Thursday.

21. In any event, the defendant's motion was abandoned and the Bank's motion was heard by the High Court (Ferriter J.) who delivered a written judgment on 2nd June, 2022 [2022] IEHC 356. Incidentally, the High Court granted the Bank's application to amend the summons and gave judgment against the defendant for €2,661,194. I say incidentally because for present purposes the point is that the Bank's motion was heard and determined by the High Court and the defendant's motion was not, because it had been abandoned.

22. In the meantime, on 10th May, 2022 the Bank's solicitors had written to the defendant's solicitor suggesting that what they referred to as the pleadings motion – that is the defendant's motion – had been inextricably linked to the appeal and that now that the pleadings application had been abandoned the appeal should be struck out, with an order for the Bank's costs. The defendant's solicitor did not respond.

23. The defendant's appeal appeared again in the Court of Appeal directions list on 20th May, 2022. By then the Bank's motion had been heard and judgment reserved. The defendant's solicitors had not dealt with the Bank's solicitors' correspondence as to the disposition of the appeal. On the directions hearing Costello J. observed that there was nothing left in the appeal and allowed the matter to stand until after lunch to allow the defendant's solicitor to take instructions. Costello J., of her own motion, raised the issue of the possibility of a wasted costs order. It appears that the defendant's solicitor could not get instructions – or at least could not get instructions to abandon the appeal – and the appeal was adjourned to the directions list on 24th June, 2022.

24. On 26th May, 2022 the Bank's solicitors wrote a long letter to the defendant's solicitor rehearsing the history of the appeal and summarising the previous correspondence. The Bank's solicitors gave notice of their instructions to apply for an order for costs to be adjudicated on a legal practitioner and client basis, and for a wasted costs order pursuant to O. 99, r. 9 of the Rules that the defendant's solicitor should be made personally liable to discharge such order as to costs as might be made.

25. The appeal came back into the Court of Appeal directions list on 24th June, 2022. Although – subject, I suppose to the possibility of an appeal – the substance of the High Court action had been decided, the defendant's solicitor insisted on a hearing date and a date was assigned.

26. The defendant's written submissions were filed on 5th July, 2022 and the Bank's written submissions followed on 11th July, 2022.

27. The defendant's written submissions do no more than chronicle progress of the High Court proceedings and the appeal. The defendant's objection to the transfer of the proceedings to the non-jury list is recalled but not – anymore than it was at the time – explained. More than a page is devoted to the defendant's motion to *"strike out pleadings"*

notwithstanding the fact that that motion was abandoned. The corporate defendant invoked its right under Article 6 of the European Convention on Human Rights to a fair trial and an effective judicial remedy and asserted that the order made by Hanna J. was an interference with its rights: but, again, without saying why. Doing the best I can, the proposition seems to be that the defendant was entitled in principle to have its later motion heard before the Bank's earlier motion and that the refusal of the High Court to facilitate that rendered the defendant's motion *"ineffective"*.

28. As a principled argument, the defendant's argument is utterly without merit. Neither party is entitled to dictate the progress of litigation against the wishes of the other. If the defendant's complaint is that what was conceived as a cunning plan to thwart the progress of the litigation was itself thwarted, it goes to show that the order complained of was entirely correct.

29. And what, then, is it that the defendant hopes to achieve by the appeal? According to the notice of appeal what was sought was:-

1. An order setting aside the order of Hanna J. made on 21st June, 2021;
2. An order directing that the plaintiff's application for leave to amend be heard and decided before a hearing date is set for the motion for summary judgment;
3. An order directing that that the defendant's motion be heard and decided before a hearing date is set for the application for judgment.

30. By the way, what the Court of Appeal was asked to order in lieu of what the High Court ordered is not what the High Court judge was asked to do. The defendant's application in the High Court was to put the Bank's motion back (in both parts) until after the hearing of the defendant's motion. From the outset, the defendant's solicitor could articulate no reason why the judge should not have done what the Bank asked he should do. It was unsurprising,

then, that the grounds of appeal could not articulate any basis upon which it might have been sensibly suggested that the judge had erred in law.

31. It is difficult to say with any degree of certainly that an appeal about nothing might have been inextricably linked with the defendant's motion to be allowed to dictate what case the Bank might be permitted to make against it, but inasmuch as the order under appeal related to the progress in the High Court of the defendant's motion, I agree with Mr. Byrne that whatever, if anything, there ever was in the appeal fell away once the defendant's motion in the High Court was abandoned.

32. I have previously set out the reliefs sought by the notice of appeal. According to the appellant's written submissions, the relief sought is (1) an order setting aside the order of Ferriter J. – which has not been appealed – and (2) *"an order directing that the appellant's motion to strike out certain pleadings be heard in the High Court"* – that is, this court is asked now to direct the High Court to hear a motion which was long ago abandoned. That, in my firm view, is a completely untenable position.

Decision

33. This is an appeal which is moot. The determination of the appeal could not have any practical impact or effect on the resolution of any live controversy between the parties.

34. The decision of the Supreme Court in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 clearly establishes that the general rule is that an appellate court will not hear an appeal in which the issues are moot. Having conducted an exhaustive review of the authorities, McKechnie J., starting at pp. 298, summarised the legal principles. It is unnecessary to go beyond the first two.

35. At para. 82, McKechnie J. said that:-

"From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para 102, infra et seq.*), the legal position can be summarised as follows:-*

(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;

(ii) (ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined; …"*

36. It is not necessary to dwell on the considerations that might justify the making of an exception to the general rule. This appeal has already wasted enough time and effort.

37. This appeal was misconceived from the start. The defendant's solicitor's misunderstanding of the law appears to have given rise to a belief that the defendant was entitled to have its motion determined before the plaintiff's motion was heard. The defendant had no such entitlement.

38. In any event, if the defendant's solicitor thought that the question of sequencing of the motions had been decided by Hanna J., that was mistaken. Hanna J. did not decide the sequencing of the motions. If he had, the defendant could have asked the non-jury list judge to revisit the question on any of the numerous occasions on which it was listed for directions. At the latest, in principle, the sequencing of the motions might have been addressed on the hearing date: but by then, the defendant's motion had been withdrawn.

39. The appeal was misconceived from the start and was rendered moot by the withdrawal of the defendant's motion on 4th May, 2021.

40. For these reasons, I would dismiss the appeal.