APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/186

Costello J.
Collins J.
Allen J.

Neutral Citation Number [2022] IECA 274

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF/RESPONDENT

AND

JAMES OSBORNE

DEFENDANT/APPELLANT

EX TEMPORE judgment of Mr. Justice Allen delivered on the 28th day of November, 2022

1. By summary summons issued on 29th September, 2015 KBC Bank Ireland plc *("the Bank")* claimed to recover from Mr. James Osborne *("Mr. Osborne")* the sum of €6,217,162.27 for the balance said to be outstanding on foot of a number of commercial loan facilities made available to Mr. Osborne between 2002 and 2007. The Bank applied to have

the action admitted to the Commercial List of the High Court and for summary judgment. The action was admitted to the Commercial List and by order dated 21st December, 2015, for the reasons given in a written judgment delivered on 15th December, 2015 ([2015] IEHC 795]), the High Court (Barrett J.) granted the Bank's motion for summary judgment.

2. Mr. Osborne did not appeal against the judgment which had been given against him but by plenary summons issued on 18th December, 2015 commenced proceedings against the Bank claiming damages for alleged negligence and breach of contract by the Bank in advancing the loans without first checking that there was a fire safety certificate for the development the subject of the loan facilities. On 28th April, 2016, for the reasons given in a written judgment ([2016] IEHC 220), the High Court (McGovern J.) acceded to an application brought on behalf of the Bank to dismiss the action as being frivolous and vexatious and disclosing no cause of action; offending against the rule in *Henderson v. Henderson*; and being barred by s. 11 of the Statute of Limitations, 1957.

3. Mr. Osborne appealed to the Court of Appeal against the dismissal of his plenary action. When that appeal eventually came before the Court of Appeal on 3rd July, 2018 it was struck out by consent.

4. In the meantime, on 30th September, 2016, Mr. Osborne had filed a motion in the Court of Appeal seeking an extension of time to appeal the judgment of Barrett J. giving summary judgment. That application was refused by the Court of Appeal (Ryan P., Irvine and Faherty JJ.) on 15th May, 2017.

5. By notice of motion dated 28th August, 2017 Mr. Osborne applied to the High Court for an order for discovery by the Bank. On 22nd September, 2017 Mr. Osborne issued two High Court motions, one to set aside the summary judgment and the other, in the same terms as that which he had issued on 28th August, 2017, seeking discovery by the Bank. Those three motions were dealt with together by the High Court (McGovern J.) on 9th October,

2017. The motion to set aside the judgment was refused for the reason that the order of Barrett J. of 21st December, 2015 was final, leave to extend the time to appeal having been refused by the Court of Appeal on 15th May, 2017. Mr. Osborne's discovery motions were refused as being an oblique attack on the order for summary judgment.

6. In the meantime, by notice of motion dated 28th August, 2017 Mr. Osborne had applied to the Court of Appeal for an injunction restraining the Bank from executing the judgment it had obtained against him pending the determination of his plenary proceedings (as the appeal against the dismissal of the proceedings was still pending before the Court of Appeal) and on 20th October, 2017 he issued a further motion in the Court of Appeal seeking *"that the [summary] proceedings be reversed and remitted to the High Court"* and an order for discovery. His motion of 20th October, 2017 was refused by the Court of Appeal (Irvine J.) on 19th January, 2018 on the ground that the earlier decision of the Court of Appeal refusing an extension of time for appeal was final and the court had no jurisdiction to re-open the matter.

7. A further application to the High Court for a stay on execution of the summary judgment had been refused by the High Court (McGovern J.) on 13th November, 2017.

8. On 22nd March, 2018 Mr. Osborne commenced proceedings against Mr. Ken Tyrrell, a receiver who had been appointed by the Bank over the properties given as security for the borrowings. Mr. Tyrrell applied to have that action admitted to the Commercial List of the High Court and for an order vacating a *lis pendens* which Mr. Osborne had registered. The action was admitted to the Commercial List on 9th April, 2018 and on 17th April, 2018 an order was made by consent vacating the *lis pendens* and striking out the action against the receiver.

9. Also listed before the High Court on 17th April, 2018 was a motion which had been brought by the Bank seeking an *Isaac Wunder* order against Mr. Osborne. Theretofore, until

quite recently, Mr. Osborne had been acting for himself but he had recently engaged solicitors, who had instructed counsel. The application for an *Isaac Wunder* order was dealt with by Mr. Osborne's undertaking, by counsel, in the terms of the Bank's notice of motion, that he would not institute any proceedings, bring any appeal, or bring any application against the Bank, its servants, agents, or legal representatives other than by leave of the President of the relevant court.

10. As I mentioned earlier, Mr. Osborne's appeal against the order of the High Court dismissing his plenary proceedings against the Bank was withdrawn and struck out by consent on 3rd July, 2018.

11. On 10th March, 2020 Mr. Osborne discharged his solicitors then on record. He has since instructed and discharged four firms of solicitors.

12. By notice of motion issued on 30th October, 2020 Mr. Osborne applied to the High Court for *"an order removing his obligations of an undertaking as was provided by the plaintiff in lieu of a notice of motion seeking an Isaac Wunder order"*. The object of that application was to clear the way for new proceedings against the Bank but it was not immediately obvious precisely what order was sought. Following an exchange of affidavits, the motion was heard by the High Court (O'Moore J.) on 15th December, 2020.

13. In a written interim decision delivered on 5th May, 2021 O'Moore J. identified the core issue on the motion as being whether the undertaking which had undoubtedly been given by counsel on 17th April, 2018 had been given on Mr. Osborne's instructions. He found that Mr. Osborne's evidence on that simple, crucial issue was not unequivocal and he allowed Mr. Osborne an opportunity to adduce further evidence that he had not agreed to the undertakings which had been given to the High Court. By leave of the court, Mr. Osborne filed two further affidavits in which he categorically denied having instructed anyone to give the undertaking on his behalf but was contradicted by an affidavit sworn by counsel who had given the

undertakings. This precipitated a two day hearing in July, 2021 at which Mr. Osborne and counsel were cross examined. In a written ruling delivered on 30th May, 2022 ([2022] IEHC 343) O'Moore J. preferred the evidence of counsel. He was satisfied that Mr. Osborne had instructed counsel to give the undertaking and refused to vacate it. As to the second relief sought by the motion – liberty to issue fresh proceedings – O'Moore J. was satisfied that no cogent case had been made out why that relief should be granted and he refused it also.

14. In the meantime, by notice of motion issued on 18th May, 2022 and originally returnable for 25th May, 2022, Mr. Osborne applied to the High Court for:-

1. An order vacating the judgment delivered on 21st December, 2015;
2. In the alternative, an order setting up 120 monthly instalments of €5,025.00 from Mr. Osbourne to Pepper Finance DAC;
3. In the alternative, an order varying the High Court order of 21st December, 2015 on such terms not to afford any degree of priority to any interest that may be deemed to have become vested in Pepper Finance DAC in an agreement of 4th July, 2019 said to have been made with Pepper Finance DAC.

15. That motion was ground on an affidavit of Mr. Osborne which appears to have been previously filed on 5th May, 2022. That affidavit is extremely difficult to follow but it is neither necessary nor appropriate that I should attempt to untangle it. Inasmuch as Mr. Osborne seeks to challenge the judgment of Barrett J., the motion is plainly vexatious. But more to the point, the motion was issued in flagrant breach of Mr. Osborne's undertaking, by counsel, that he would not bring any motion or application against the Bank otherwise than by leave of the President of the High Court. So also was this appeal filed in breach of Mr. Osborne's undertaking, for it extended to the bringing of any appeal, other than by leave of the President of the Court of Appeal.

16. I note that Mr. Osborne's motion filed on 18th May, 2022 was filed shortly before O'Moore J. gave his decision on Mr. Osborne's motion of 30th October, 2020 but if anything that makes matters worse. At the time the motion of 18th May, 2022 was issued, the record of the High Court showed that Mr. Osborne, by counsel, had given an undertaking in the terms of the *Isaac Wunder* order sought by the Bank. And the terms of the earlier motion, however ambiguous, recognised that Mr. Osborne was not entitled to bring any motion, application or appeal unless either the undertaking on the High Court record was vacated or he had the permission of the High Court or the Court of Appeal, as the case might be. His application to be relieved from this obligation had been heard but not yet determined and so he could have been in no doubt that he was not entitled to issue the motion at that time without the leave of the President of the High Court which he neither sought nor obtained.

17. In the course of the oral hearing Mr. Osborne was asked by the court why, having regard to the undertaking which the order of McGovern J. of 17th April, 2018 showed to have been given on his behalf, he issued the motion which is now the subject of this appeal without leave. He indicated that by reference to whatever was happening on the ground, he felt the necessity for further proceedings but that, frankly, does not excuse the breach of his undertaking.

18. Mr. Osborne acknowledged that in hindsight, he had to agree that he ought not to have done what he did. But in my firm view the position is no clearer in hindsight than it must have been to him at the time he issued his motion on 18th May, 2022. If there was the slightest doubt about the position, it was unambiguously dispelled by the Bank's solicitors who, having been put on notice by Mr. Osborne of his intention to issue a motion, wrote to him on 19th May, 2022 pointing out that he was not entitled to do so without leave and enclosing a copy of the transcript of the hearing before McGovern J. On 19th May, 2022, after the motion had issued, the Bank's solicitors wrote again; protesting that the summary

judgment which had been granted against Mr. Osborne was *res judicata* and repeating that he had no right to have issued any motion without the leave of the High Court.

19. Mr. Osborne, by the way, appears not to accept the judgment of O'Moore J. later delivered on his motion to vacate the undertaking but he well knew at the time he issued his motion on 18th May, 2022 that he either needed to have the undertaking vacated or to obtain the leave of the High Court before issuing any further motion.

20. In response to Mr. Osborne's motion of 18th May, 2022 the Bank, quite rightly, did not file any replying affidavit but gave notice by letter of its intention to rely on the chronology of the proceedings as set out in the affidavit of Mr. Dylan Gannon which had been sworn on 27th November, 2020 in response to Mr. Osborne's motion of 30th October, 2020, and on the transcript of the hearing before McGovern J. on 17th April, 2018.

21. Mr. Osborne's motion of 18th May, 2022 was, as I have said, initially returnable for 25th May, 2022 when it was listed before Barrett J. Barrett J. declined to deal with it but transferred it into the Commercial List for 20th June, 2022, when it was dealt with by the Commercial List judge.

22. In a short *ex tempore* ruling on 20th June, 2022, McDonald J., with characteristic patience and politeness, explained to Mr. Osborne that he had no power or jurisdiction to vacate a judgment previously given by another High Court judge. In that the judge was unquestionably correct but I cannot forbear to say that I do not share the sympathy McDonald J. expressed for someone in the position of Mr. Osborne who was warned by McGovern J. in no uncertain terms of the potential consequences of a finding of contempt of court.

23. In the same way that it was not appropriate to attempt to unravel the affidavit filed in support of Mr. Osborne's motion, it is not appropriate to attempt to unravel his notice of appeal, which was filed in breach of his undertaking.

24. The Bank's respondent's notice starts by protesting that the appeal is an abuse of process; which it is. Having set out a careful chronology of the proceedings and the very many attempts to appeal, set aside, stay the enforcement of, and obliquely challenge the judgment and order of the High Court (Barrett J.), the Bank's position that its entitlement to the judgment which it long ago obtained is clearly *res judicata*; that the purported appeal is an abuse of process; and, for good measure, that any challenge to the judgment is out of time. If the respondent's notice does not highlight the fact, it is the fact that the motion and appeal were filed in breach of Mr. Osborne's undertaking to the High Court. In my firm view, the proper course is that this court should decline to entertain the appeal and should dismiss it on that ground alone.

25. In oral argument, Mr. Osborne sought to challenge the judgment entered against him on a variety of grounds, some of which appear to have predated the hearing before Barrett J. and some much later. In another case, it might be a difficult task for a defendant to convince a court to set aside a judgment by reference to arguments available but not made at the time, or to show how alleged shortcomings in the security obtained by a lender might be relevant to the borrower's liability to repay the money. In this case I pointedly do not engage with any of the arguments as to the substance but focus on Mr. Osborne's breach of undertaking.

26. Insofar as Mr Osborne seeks to rely on the *Greendale* jurisdiction (*In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514) as a basis to seek to set aside the order of 21st December 2015, this does not advance his position. He was still required by the terms of his undertaking to the court to obtain the consent of the President of the High Court to do so. No doubt had there been any basis for the engagement of this exceptional jurisdiction leave would have been granted. It was not open to him in the absence of such leave to issue the motion or to file the appeal.

27. Besides orders dismissing the appeal and awarding the Bank its costs, the Bank, in its respondent's notice, asks the Court of Appeal in the exercise of its inherent jurisdiction to make an *Isaac Wunder* order and ancillary orders.

28. The jurisdiction invoked by the Bank is well established.

29. In *Riordan v. Ireland (No. 4*) [2001] 3 I.R. 365 Keane C.J. said:-

> *"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."*

30. *Riordan* was a case in which a serial litigant had applied to the Supreme Court for a stay on costs orders which had been made against him by that court and to have various orders made against him set aside on the ground that they had been made by a court consisting of three, rather than five, judges. It is of some significance to note that the High Court had not previously made an *Isaac Wunder* order against the appellant. It is also of some significance to note that the order made by the Supreme Court restrained the appellant from instituting any proceedings, whether by way of appeal or otherwise, in either the High Court or in the Supreme Court, except by prior leave of the Supreme Court, to be obtained by application in writing addressed to the registrar of the Supreme Court.

31. In this case, on 17th April, 2018, the High Court (McGovern J.) was persuaded to accept Mr. Osborne's undertaking in the terms of the Bank's notice of motion seeking an *Isaac Wunder* order. That occurred in circumstances in which Mr. Osborne, who had theretofore been representing himself, had recently engaged solicitors and counsel. McGovern J. noted that Mr. Osborne had been engaged in what could only be described as vexatious litigation in an attempt to frustrate a judgment of the High Court which was no longer appealable but thought that he then understood that the courts simply cannot allow orders which are final to be challenged by way of collateral attack.

32. I want to emphasise, as McGovern J. explained, that the potential consequences of a breach of an undertaking are no different to the potential consequences of a breach of a court order and were the issue simply whether the restraint on further proceedings should be by way of the undertaking or an order I would be disinclined to make an order. However, as the transcript of 17th April, 2018 shows, the motion issued on behalf of the Bank had sought, besides the primary order restraining further proceedings, an ancillary order that in the event that the primary order were to be breached, that any such proceedings would be void, so that the Bank could ignore them. Moreover, the making of an order, as opposed to the acceptance of an undertaking, may make it more difficult to issue proceedings, applications or appeals in the relevant court office. Mr. Osborne has been on notice of the Bank's application since the service on him of the respondent's notice at the time it was filed on 28th July, 2022.

33. I am satisfied that this is an appropriate case in which to exercise the inherent jurisdiction of the court to restrain further proceedings or appeals and that the undertaking which is in place can be usefully supplemented by an order. I am satisfied, also, that the order should extend to any assignee of the Bank as well as to Mr. Tyrrell.

34. I would make an order striking out the appeal as an abuse of process and orders:-

1. Restraining Mr. Osborne from initiating further proceedings against KBC Bank plc or any assignee of the interest in the indebtedness of Mr. Osborne to KBC Bank plc directly or indirectly on foot of Mr. Osborne's borrowings the subject of these proceedings, including the judgment of the High Court of 21st December, 2015, or in respect of the security given to KBC Bank plc in respect of those borrowings or against Mr. Ken Tyrrell and/or against any of their respective servants, agents or legal representatives in respect of any of these matters, or issuing any motions or filing any appeals in these proceedings, without the prior leave of the President of the High Court (or such judge of the High Court as may be nominated by him or her) or the President of the Court of Appeal (or such judge of the Court of Appeal as may be nominated by him or her), as appropriate;
2. Directing that any such application for leave to be supported by an affidavit referring in full and complete detail to all previous applications, motions, actions, proceedings and appeals which Mr. Osborne has previously brought against KBC Bank plc, its successors and assigns, and Mr. Tyrrell;
3. Directing that a copy of this order be furnished to the Chief Registrar of the High Court and of the Court of Appeal with a further direction that appropriate steps be taken to ensure that the attention of staff in the Central Office of the High Court and of the Office of the Court of Appeal is drawn to this order.
4. Rather than an order in the terms sought by the Bank at para. 46(d) of its written legal submissions, declaring that any such steps taken by Mr. Osborne without the necessary prior leave should be null and void and of no legal effect, I would propose to make an order permitting KBC Bank plc, its successors and assigns and Mr. Tyrrell in the event of a breach of this order, to

write to the Chief Registrar of the High Court or the Registrar of the Court of Appeal, as the case may be, drawing attention to this order.

[Costello and Collins JJ. expressed their agreement with the judgment and the form of order proposed.]