THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2022/199

Costello J. **Neutral Citation Number [2023] IECA 50**

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT/
APPELLANT

- AND –

BALFORD CONSTRUCTION LIMITED

RESPONDENT

- AND –

RAHEENLEAGH POWER DAC

APELLANT/
NOTICE PARTY

JUDGMENT (*Ex Tempore*) of Ms. Justice Costello delivered on the 20th day of January 2023

1. This is a Notice of Motion brought by the appellant, Balford Construction Limited, seeking two reliefs – an Order adjourning the appeal of the judgment of Mr. Justice Ferriter in the High Court in proceedings number 2019/1051S delivered on 2 June 2022 pending the outcome of the High Court proceedings, Record No. 2023/122P, *Balford Construction Limited v. The Governor and Company of the Bank of Ireland*, and secondly an Order for the DAR of the hearing of the plaintiff's application for judgment before Mr. Justice

Ferriter in the High Court on 10 May 2022. The application is grounded upon the affidavit of Mr. Peter McNicholas who is a retired builder and a director of the company. He exhibits in his affidavit the Statement of Claim which has been delivered in the 2023 proceedings and from paras. 187 onwards he pleads as follows under a heading 'Alleged Fraud'.

2. "The bank deliberately and consciously misled the High Court to believe that Balford conveyed 27 houses in development land to Frescobol Holdings Ltd. The bank deliberately and consciously misled the High Court to believe that the Governor and Company of the Bank of Ireland did not transfer the property outlined 'Red' and marked 'A' on the Transfer Map referred to in the Deed of Transfer made between the bank on the one part and Frescobol Holdings Ltd. of the other part which is dated 21 December 2018. The bank deliberately and consciously misled the High Court to believe that the bank did not receive all of the consideration for the sale of 27 houses and development land from Frescobol Holdings Ltd. The bank deliberately and consciously misled the High Court to believe that the contents of the Diggin Statement were true when the bank knew them to be untrue". The Diggin Statement is a final statement in relation to the receivership of the company. " The bank deliberately and consciously misled the court to believe that Balford Construction in receivership paid VAT on the sale of 27 houses and development land in Folio MY46290F following a sale to Frescobol Holdings Ltd. when they knew this to be untrue. The bank deliberately and consciously misled the court to believe that Balford Construction in receivership claimed the VAT reclaim on the sales costs related to the sale of 27 houses and development land in Folio MY46290F following the sale of Frescobol Holdings Ltd. when they knew this to be untrue. The bank deliberately and consciously misled the High Court to believe that Ciaran Wallace was acting for Balford Construction Ltd. in receivership in relation to the bank transfer of 27 house and development land to

Frescobol Holdings Ltd. when they knew this to be untrue. The bank deliberately and consciously misled the court to believe that the houses sold to Frescobol Holdings were landlocked when they knew this to be untrue. The bank deliberately and consciously misled the High Court to believe that Folio MY45885 was not contained in one plot to the north and that Folio MY46290F when they knew this to be untrue. The bank deliberately and consciously misled the court to believe that Balford transferred the site entrance from Rathdubh Phase 2 to the development site adjacent to Rathdubh Phase 2 to Alan Lynskey when they knew this to be untrue. The bank deliberately and consciously misled the court to believe that Balford Construction did not have a right of way over MY45885 when they knew this to be untrue and the bank deliberately and consciously misled the bank to believe that the sale of Folio MY45885 to Alan Lynskey impaired the bank's access to the 27 houses in Folio MY 46290F charged in favour of the bank".

3. So, it is apparent from this that the gravamen of the 2023 proceedings revolve around claims relating to the realisation of the security for the company's loan and the access to the 27 houses built upon Folio MY46290F.

4. The claim is that the manner in which the bank presented its case to the High Court amounted to a fraud and in the 2023 proceedings it seeks to set aside the judgment obtained in the High Court on the basis that it was obtained by this fraud.

5. I am going to take the second point of alleged fraud first. There is an affidavit of Paul Diggin sworn on 29 April 2022 and at p.76 of the Booklet, para. 47-49 Mr. Diggin avers as follows:

> *"Firstly, at para. 54 of the affidavit of Mr. McNicholas it is asserted that the Receiver's representatives incorrectly advised Mayo County Council on 27 April 2015 that the receiver had also been appointed to part of the lands comprised in Land Register 45885 of County Mayo, the Rathscallion Lands".*

He exhibits a copy of Folio 45885. So, the first important point is to note that Folio 45885 was before the High Court in evidence. In passing I note that the Rathscallion lands are situated between the property which is comprised in Land Registry Folio 46290F of the County of Mayo and is also referred to as the "Kilbride lands". Mr Diggin states that, as is recorded in the Land Registry Folio 45885, the Rathscallion lands were conveyed by the company to Mr. Lynskey by Deed of Conveyance which was registered on or about 15 May 2015. This conveyance interfered with the access to the property, that is the Kilbride lands, that is the land on Folio 46290F, over which the plaintiff held the first legal charge. It was registered just over one month after the plaintiff had demanded immediate payment by the company of its liabilities to the plaintiff by Letter of Demand dated 10 April 2015 and less than one month following the appointment of the receiver and Mr Diggin exhibits the Letter of Demand at Exhibit 8.

6. So that is the evidence which was before the High Court and it is important to note that what he said was that the conveyance interfered with access to the property and when one looks at the map attached to the Deed of Transfer it is abundantly clear that the original plan had none of this. Had all of this gone according to plan -rather than ending up in an insolvent situation with receivers appointed and banks suing the company- that development on what are called the 'Kilbride lands' – that is lands in Folio 46290F -would have been via the lands comprised in Folio 45885 over a bridge, over a river and that was the access point in respect of which planning permission was granted.

7. Then at para. 56 of his affidavit Mr. Diggin concludes: *"As is apparent from the aforesaid Valuation Report, it took account of the access issues affected property arising from the transfer of the Rathscallion lands to Mr. Lynskey as such insofar as any impairment existed to the value of the property, this was caused by the conduct of the company and its Directors, the guarantors."*

8. So, that is the evidence in relation to the access point. He does exhibit the Valuation Report and the Valuation Report was provided by Mr. McDonagh. Ms. McNicholas on behalf of the company placed considerable weight upon that report and it is important to note that it was before the High Court, as I say, exhibited by Mr. Diggin.

9. Now, at p.4 of the report there is a heading, *"Description"*, and I am going to read this in full.:

10. "The subject properties outlined herewith in Folio MY46290F basically comprise a partly completed residential development and a remaining portion of undeveloped lands which are currently zoned residential"- So, Mr. McDonagh clearly understood that there was, if you like, two-parts of the lands comprised in one folio- " In this regard the development could be divided into two independent but connected components – 27 residential developments which are located within Phase 2 of the Rathdubh development which comprises of 63 dwellings in total. Phase 1 of Rathdubh was developed in 1998 under Planning Number", he gives the number, "comprising 19 dwellings and it must be noticed that the Receiver had no charge or connection with the section of the development. The development for Phase 2 of the development outlines within MY46290F commenced in 2002 and comprised 44 dwellings in total. The receiver is appointed over 27 dwellings and the remaining properties have been sold and are privately owned. 23 of the dwellings are partially completed and were never occupied – details which are outlined in the appendices. The remaining 4 properties are completed and currently occupied. We did not inspect same but for the purpose of valuation we presumed that they were presented in moderate condition. The properties are of standard construction with concrete block walls, standard rendering facades, slate roofs supported by timber trusses and concrete and timber floors throughout. There is also double-glazed windows and the gardens, front and rear. The access road to the properties have been fully tarmacadamed and the area to the front

landscaped. (2) The undeveloped residential zoned portion of land immediately adjacent to the Rathdubh development comprises 0.54 hectares/1.38 acres contained in Folio MY46290F. The site is accessible through via the Rathdubh development along with accessive frontage onto the N26".

11. Now, I think, it is common case that it is not directly onto N26, it is onto a small road which accesses N26. There is no planning permission on the subject site however. It may have development potential subject to planning permission. The development in its total and including the common area stands on the site of approximately 2.81 hectares/6.94 acres and the same is outlined herewith.

12. So, it is quite clear that Mr. McDonagh was aware that the subject properties were comprised within one Folio and that effectively had been developed in two phases – one of which was developed and one of which had been left over and not yet developed but had development potential. He carried on to say, four pages on, under 'Accommodation', the subject folio comprises of 27 dwellings, 21 semi-detached and 6 detached with which 23 require completion work as outlined in the appendices. He sets those out. "Undeveloped residential zoned portion of land adjacent to the Rathdubh development comprises of 0.54 hectares at / 1.38 acres. Title: for the purposes of this valuation, we have assumed the property is held in freehold. As previously stated, the receiver is only appointed over MY46290F which is Phase 2 of Rathdubh development".

13. Now, Ms. McNicholas construes this to mean that he somehow therefore presumes that the receiver was not appointed over the entire of the MY46290 development and that therefore he completely misunderstood the position vis-à-vis the underdeveloped lands to the south notwithstanding the description which he carefully set out and which I have read out in full.

14. He continues under the heading 'Title' – "as such the site entrance and roadway is registered under Folio MY45885 with no registered right of way to the subject Folio". Ms. McNicholas says he clearly misunderstands this and somehow seems to think that the access to the site entrance and roadway is via the undeveloped land which had been used as a service way access to the site for the developers while developing the land, whereas I clearly read that as referring to the planned and existing roadway through Phase 1 of Rathdubh over MY45885 and continuing over the river, over the bridge, into what was the Phase 2 of the development and he is clearly referring to there being no registered right-of-way to the subject folio over that lands.

15. He says, in essence, this would leave the subject Folio to be landlocked. Ms. McNicholas disputes this and says that this is clearly incorrect. He has misunderstood. He has misled the High Court. It amounts to fraud to say that the lands are landlocked in circumstances where it is acknowledged earlier in the Report that there was land which was part of the Folio and which had excessive frontage onto the N26 and that it might have development potential. I think it is overstating the situation to describe that as fraud. It may well have been that he has not expressed it as clear as it could have been expressed. But it is clear that, in any event, this document was before the High Court with the annexed maps which are the photos in Appendix 1 which clearly show the issue and then in Appendix 2, if there was any doubt, which shows the undeveloped land – the .54 hectares – with what was called the excessive frontage onto the small local road.

16. So, that was the evidence which was actually before the High Court and not the submissions of counsel which may have been, say, glossed with hyperbole, in saying that the lands were surrounded.

17. But however overstated the case may have been in the written submissions of counsel, they were clearly not evidence and they are submissions and I certainly do not

think that it can be said that there was evidence before the High Court which was inconsistent with the true state of affairs and, in fact, it seems to me that at best this argument might be described as an extremely unattractive argument for the company to be advancing in circumstances where Mr. Lynskey, the person to whom Folio 45885 had been conveyed in 2015, objected to the purchasers of the lands in Folio 46290F seeking access to the development lands on the basis that this would amount to an intrusion,-what was the wording- 'interfere with the amenity of the land', and he expressly said in his submission to the Planning Authority that the bank did not have a charge over the lands as it would be his Folio, and accordingly, it could not grant a way over the property. He himself says that the bank has no right of access over those lands that are his lands and he says in his submission:

> "The proposed access submitted by the appellant begins at the rear of houses 36 and 44 on a road which is significantly higher than the finished floor levels of the said houses and travels down between two houses before it enters the housing estate between two houses, driving towards the back of the houses 36-44 from an elevated position with impact upon the amenity value of the said properties and entering the estate through such a narrow gap between the two houses is also a potential hazard. As can be seen from the site layout plan, the applicant is unable to achieve the minimum kerb radius of 6 metres of a junction between the proposed roads and the existing housing estate road as set out in the recommendations for site building works for housing areas the kerb radius of this junction appear to be two metres. The proposal is contrary to planning permission 012622 and the related enforcement proceedings."

18. So, at the very least, they seem to be blowing hot and cold in relation to how that land to the rear of the development of the 27 houses is to be viewed. But, in any event, it

seems to me that it is difficult to say that the position advanced before the High Court reached the very high threshold necessary to establish that there was fraud, particularly in circumstances where all of the documents were actually before the High Court.

19. The second issue which was raised, which was the first this morning, is that the Diggin Statement is untrue because the Bank of Ireland and not the company in receivership sold the lands and it was submitted to me that the bank tried to disguise this as a sale by the receiver when it was not; that the Diggin submission was manufactured in support of this disguise; that the bank's case was inconsistent with the E9 Forms filed by the Receiver and that the bank did not dispute the validity of the E9 Forms.

20. And, in relation to these points, it is important to note that all of these issues raised in the Statement of Claim were, in fact, raised on its own case as set out in the Statement of Claim in the summary proceedings in the High Court and these documents were all before the High Court. None of the points were concealed from the High Court and they were, in fact, raised during the hearing and they formed part of the judgment of the High Court.

21. For instance, at para. 67 in following Judge Ferriter held:

> *"67. A separate argument was advanced by Mr. Lynskey at the hearing to the effect that an arguable defence arises from the fact that the Bank sold the secured property as mortgagee in possession and not as receiver. In his written submission, Mr. McNicholas submitted that that there was no evidence to show that the receiver (Kieran Wallace) sold the asset over which he was appointed as receiver, and rather that the evidence (being the documentation filed with the PRA associated with the folio) showed that the property was sold by the Bank directly itself.*
>
> *68. The Bank accepts that the conveyance of the secured property was executed by the Bank in its capacity as mortgagee thereof. There is nothing at all surprising, still*

less inappropriate, about a bank selling as mortgagee in possession a property which may also be the subject of a receivership appointment, particularly where the receiver does not have a power of sale. In his own affidavit, Mr. McNicholas sates [sic] that the 2008 mortgage deed included a power of sale for the Bank and also power for the Bank to appoint a receiver "of rents and profits of the mortgaged property" supporting the view that in the event the property was to be sold, the Bank would be the appropriate party to sell it. No arguable defence arises from this point.

69. Mr. McNicholas went on to contend that the Bank had failed to deal with the sale of the secured property in its pleadings and failed to set out the sums calculated or to refer to a document to show the sum was calculated.

70. This is factually incorrect. Mr. Diggin averred that the liabilities of the company have been reduced in accordance with all distributions arising from the receivership and the sale of the property. He exhibits a final outcome statement from the receivership to support this averment. This shows a breakdown of the sale proceeds for the property and the costs of the receivership. Mr. Diggin averred that the Bank received two distributions arising from the receivership and the sale of the property, the first being an interim distribution of €750,000 which was applied to loan account number 53858158 on 20th December 2018 and the second being a final distribution of €90,022 on 20th December 2019 which was applied to loan account number 301231341."

22. So, the trial judge was perfectly aware of -and had the Transfer Deed exhibited before him - of the fact that the bank transferred the property exercising its power of sale as mortgagee in possession but, nonetheless, accepted that it was entirely appropriate for

the receivership to receive the monies and to make the distributions from the receivership from the sale of the property as set out in Mr. Diggin's affidavit.

23. Now, whether the High Court was right or not in relation to that is the matter for the appeal. But the High Court was clearly aware that this is what occurred and dealt with the matter in its judgment.

24. Then, in relation to the second argument about whether or not there was access to the lands, this was dealt with by the High Court in paras. 74 onwards. Judge Ferriter says:

> *"74. The reference to property in folio 45885 is to a piece of property owned by the company which surrounded the secured property and access over which was necessary to enable access to the houses built on the secured property."*

25. Now, one could argue, and no doubt it will be argued on appeal, that 'surround' might be an inappropriate way to describe it. But it certainly isn't a case of being misled because the High Court had the Folio and could see the extent of Folio 45885 as well as Folio 46290F.

> *"74….The company had transferred the property in folio 45885 to Mr. Lynskey on 15th May 2015 i.e. just over a month after the Bank had demanded immediate payment by the company of its liabilities to the Bank (by letter of demand dated 10th April 2015) and less than one month following the appointment of the receiver (on 20th April 2015). The company's position appears to be that the Bank should have gone about procuring a right of way from Mr Lynskey in order to enhance the value of the secured property and that its failure to do so is a breach of the duty to obtain the best price. This is a rather remarkable proposition in circumstances where the transaction had been carried out by the company with a clearly connected party in the face of the Bank taking steps to enforce the loans and security.*

75. Mr. Diggin on behalf of the Bank exhibited an independent "red book" valuation by O'Donnell & Joyce estate agents which valued the secured property at €1,020,000. This value expressly took into account that the secured property was landlocked and therefore a discount to what might otherwise be its market value was justified. The evidence before me is that the Bank sold the property at a price (€1,026,000) consistent with this independent market value."

26. So, the Judge clearly accepts that it is the bank who sold and the proceeds were dealt with through the receivership and he clearly accepted that the access issues, which he described as landlocked, in reference to the O'Donnell and Joyce valuation, provided a justification for reducing the value of the lands. At para. 76 the trial judge records that:-

"76. Mr. McNicholas stated in an affidavit that "I have been building and selling houses in the Swinford area since 1980 and I believe the true value of the subject property in 2018 was well in excess of €3.5 million". This is a mere assertion. No prima facie evidence has been advanced as to why the independent valuation obtained by the Bank was incorrect or should not have been relied upon by the Bank or to otherwise support the contention that the sale was at an undervalue.

77. Accordingly, no arguable defence has been raised on this ground."

27. So, the trial judge clearly addressed these issues as part of his decision. And, then, it is important to record that Mr. McNicholas raised a review application seeking to asking the Court to review its judgment on the grounds of errors in the judgment. And, quite remarkably, none of the points that are now sought to be advanced were raised either before Judge Ferriter on 19 May or at the review application on 27 June. At the very latest they should have raised these arguments at this point.

28. Now, I appreciate that Mr. McNicholas is sued as a guarantor and that he has a separate interest in these proceedings. However, I cannot close my eyes to the fact that he is the Director of the company and a shareholder and the deponent of the company and clearly the moving party behind the company in these proceedings. And that everyone involved in this case is part of his family. So, I am not at all persuaded that anything turns upon the fact that it was he rather than the company who sought a review and it seems to me that it was entirely inappropriate to wait until January 2023 to raise points which it was clearly open to the parties to argue, more fully, before the High Court if they so wished.

29. Finally, I should say that the issues raised in fact could be said to form part of the appeal because at Grounds 12-14 of the Notice of Appeal it is said that the learned High Court judge erred in fact and in law when he inferred that Balford Construction Limited In Receivership receive the consideration from Frescobol Holdings Limited for the sale of part of Folio MY46290F and in 13 the learned High Court judge erred in fact and in law when he found that Balford Construction Limited in Receivership did not have a right of way over Folio 45885 and 14 that the learned High Court erred in fact and in law when he found that the plaintiff/respondent as mortgagee in possession did not have a duty of care to the defendant/appellant to obtain the best possible price in circumstances of the case permitted the plaintiff as mortgagee in possession transferred part of Folio MY46290F to Frescobol Holdings Ltd.

30. So, clearly the panel hearing this appeal are going to be dealing with these issues which have been raised here and it seems to me that it is going to be open to the appellant to argue that these matters afford the company a defence at the hearing of the appeal. Procedurally it is not appropriate to grant the reliefs sought in this motion.

31. The appeal should proceed.

32. If it is appropriate, it is open to the panel hearing the appeal to allow the appeal and remit the matter to plenary hearing in the High Court. It is also possible that the panel may remit the matter for rehearing before the High Court.

33. In my judgment, it is not in the interests of justice to proceed in the manner suggested. I refuse the relief and direct that the appeal should continue as listed.

34. In relation to the second relief sought, that is that the DAR of the hearing be released to the applicants. I note that they made no application apparently to Judge Ferriter, to whom you would normally expect the application for the DAR to be raised. I also note that there exists a transcript which was duly furnished to the appellants. Completely baselessly and without any explanation, Mr. McNicholas at para. 45 of his affidavit says: *"In circumstances where Balford has concerns that the transcript provided by the bank to Balford by e-mail has been tampered with, Balford require an Order for DAR for the hearing of the plaintiff's application for judgment before Mr. Justice Ferriter on 10 May 2022."*

35. A number of points arise from that. Firstly, if Balford had wished to have the DAR and thought it was important to have it for their appeal they should have applied for this far earlier, given the fact that they knew they were intending to appeal early in the summer and they could well have applied to Judge Ferriter as early as the hearing on 27 June for the DAR.

36. So, that is the first point.

37. The second point is that the transcript has been furnished and I asked Ms. McNicholas to indicate to me where she had concerns, where it was incomplete, where it might have been tampered with and there was one gap in the pages and it is not at all apparent what occurred. It may be that there – it is even possible that there was a printing issue – rather than anything else because one page is missing most of the typing.

38. But she could point to nothing else.

39. So, what I am going to do in relation to this matter, in relation to the DAR, I am going to make two orders as follows.

40. I will direct that the DAR be released but I expressly do so on the basis that the absence of the DAR does not afford a basis for seeking to adjourn the appeal because in my judgment there is absolutely nothing wrong with the transcript that I have seen and I have not been showed anything wrong with it. I am directing the release simply because it has been sought and I see no prejudice in allowing it, but I will not permit it to be used for delay, if there is any delay, in procuring the DAR as a basis for seeking an adjournment of the hearing. I know there are procedures where you can get expedited transcripts – that is a matter for the parties – and if it is too late to get it, that is the fault of the company for not seeking to move far sooner. So, I am reiterating again, the non-availability of the DAR, if it is not available in time for the hearing of the appeal is not a basis for seeking an adjournment in my view and I direct that my Ruling in that regard be expressly brought to the attention of the panel if there is an application for an adjournment made.

41. Secondly, I make that Ruling because I am completely satisfied that nothing has been shown me to me which suggests that there is anything wrong with the DAR other than what occurs on p.26 and I am going to ask that the respondents' solicitors contact the stenographers, Gwen Malone, and ask if they are in a position to rectify the omission or the gap in the DAR that appears in p.26. If they are in a position to fill that gap, I would ask that that be furnished to the other side and to the court as soon as it becomes available.

42. So, that is my Ruling in relation to the two reliefs.