THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 271

APPEAL No. 2015/558

Ryan P.
Peart J.
Irvine J.

BETWEEN:

LEEDS BUILDING SOCIETY

PLAINTIFF RESPONDENT

- AND -

PATRICK BRADY AND MARARET BRADY

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 20TH DAY OF OCTOBER 2017

1. By Order dated the 2nd November 2015 the plaintiff/respondent building society ("Leeds") was granted an order for possession against the defendants/appellants (Mr and Mrs Brady) in respect of the property contained in Folio Number 19230F Register County of Cavan. Mr and Mrs Brady have now appealed to this Court against the said order upon grounds which I shall come to in due course.

2. Leeds claimed to be entitled to an order for possession of the said property on foot of a deed of mortgage and charge in respect of the said lands which was executed by Mr and Mrs Brady on or about the 29th November 2007, and duly registered in the Land Registry on the 12th August 2008 against the said folio upon which both Mr and Mrs Brady are the registered joint full owners.

3. Leeds claimed an entitlement to obtain such an order on foot of the said mortgage and charge because Mr and Mrs Brady had defaulted in respect of the repayments due on foot of a loan applied for by Mr Brady in the sum of €760,000, which loan was secured on the said lands by the said mortgage and charge which was executed by both Mr and Mrs Brady.

4. The loan in question was the subject of a letter of loan offer made to Mr Brady by letter dated the 19th of November 2007 in the sum of €760,000. Mr Brady accepted this loan offer by his acceptance signed on the 21st November 2007. The loan was drawn down by Mr Brady on the 29th November 2007, being the same date as that on which both he and Mrs Brady executed the said deed of mortgage and charge in order to provide security to Leeds (a condition of the loan) for the said loan, over their jointly owned property.

5. Mr and Mrs Brady do not dispute that the loan fell into arrears. Indeed it appears that on the 21st November 2012 Mr Brady attended a meeting with Leeds personnel and put forward an offer which was rejected. In addition, according to Leeds' grounding affidavit, as he was leaving the Leeds building at which the meeting had taken place, Mr Brady left behind him an envelope containing a promissory note for the sum of €900,000, even though the amount required to redeem the mortgage on that date was €811,119.59. He had not proffered this promissory note at the meeting itself. He simply left an envelope behind which contained it.

6. Leeds forwarded the promissory note to its solicitors who wrote to Mr Brady by letter dated the 6th March 2013 referring, inter alia, to the fact that the promissory note was for an amount more than was required to redeem the loan, and questioned whether Mr Brady was in a position to honour it. The solicitors concerned requested a bank draft in the sum of €811,119.59 within 14 days, indicating that if same was not received within that period, proceedings in existence at that time would be pursued.

7. On the 13th March 2013 Mr Brady filed a Form 57 B Requisition for Cancellation of a Charge with the Property Registration Authority stating therein that he had on the 21st November 2012 delivered to Leeds a "financial instrument" in full and final satisfaction of any obligation outstanding between himself and Leeds, and stating that the instrument had not been returned to him, and stating also that Leeds had not sent him a receipt "in respect of the payment made by myself by virtue of the financial instrument".

8. That cancellation application was refused by the Property Registration Authority, and Mr Brady and the solicitors for Leeds were so notified. The reason for refusal was stated to be that the Property Registration Authority was not satisfied that the charge in question had been discharged. The financial instrument upon which Mr Brady relied in relation to that application was of course simply the promissory note which he had left behind him at the offices of Leeds on the 21st November 2012.

9. On the 22nd August 2014 Leeds made a demand of possession by letter of that date which was not complied with by Mr and Mrs Brady. A special summons issued on the 8th September 2014 which eventually came before the High Court (Cross J.) on the 9th November 2015.

10. For the purpose of resisting the application by Leeds for an order for possession, Mr Brady swore a replying affidavit on the 28th November 2014. He first of all referred to an outstanding costs issue between Leeds and himself arising from earlier proceedings which were struck out. That issue has no bearing on the present appeal. He then referred to his without prejudice attempts to settle "any alleged debts with the plaintiff's". This refers to the promissory note already referred to. He complains that this without prejudice attempt to settle the matter was referred to by Leeds in its grounding affidavit, and requested that these proceedings be struck out, or alternatively that Leeds' deponent amend his grounding affidavit in such a way as to respect the 'without prejudice' rule.

11. Leeds filed a further affidavit in order to address this averment by Mr Brady regarding the 'without prejudice' rule. That affidavit stated that while the discussions at the meeting which took place on the 21st November 2012 were without prejudice, it was Mr Brady who had simply left behind him an envelope containing that promissory note as he was leaving their offices, and that this promissory note had not been proffered by Mr Brady at any time during the discussions that had taken place that day at the meeting.

12. I have included the above history of certain events simply because they formed part of the general factual background to the

matter when it came before the High Court on the 9th November 2015, and not because they have any particular relevance to the issues to be decided by this court on this appeal.

13. Following the making of the said order for possession by the High Court, Mr Brady, who at all times has represented both himself and Mrs Brady, filed and served a notice of appeal dated the 17th November 2015. That notice of appeal set forth the grounds of appeal intended to be relied upon by the appellants upon as follows:

> "I believe the learned trial judge erred in his decision and denied us natural justice in so far as we were not allowed/given an opportunity to cross exam [sic] the plaintiff as to what if any consideration was afforded to me, the second named defendant. I say I never at any time received a loan facility from the plaintiff. I say the information sought over a prolonged period relating to facilities the subject matter of the proceedings were and continue to be denied to me. We say further the learned judge was misled by the plaintiff and/or the plaintiff solicitors."

14. These grounds of appeal were not pursued by the appellants. Instead, the Court was informed by Mr Brady at a directions hearing that the appellants would rely on a single but new ground consisting of an allegation that the loan contract with the bank had been cancelled by them pursuant to what they considered to be their entitlement in that regard pursuant to EC Directive 577 of 1985 being a directive dated the 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises, to which effect was given in this State by European Communities (Cancellation of Contracts Negotiated Away from Business premises) Regulations, 1989 – S.I. 224/1989) ("the Regulations").

15. This new ground of appeal was raised for the first time on appeal. It was not a ground of defence that relied upon at all in the High Court. In fact it could not have been raised in the High Court as the notice of cancellation upon which the appellants seek to rely was served on Leeds only on the 12th July 2016, some eight months after the hearing in the High Court and the filing of their notice of appeal.

16. Mr and Mrs Brady represent themselves, and therefore cannot be expected to be as familiar with the rules and practices of the courts as would a solicitor or barrister. Nevertheless they must be bound by them and must conduct their case in accordance with recognised rules and practice. Litigants may not raise for the first time on appeal an issue that did not form part of the case heard in the High Court. If some new evidence is sought to be relied upon on an appeal the rules provide for an application to the Court of Appeal for leave to adduce new evidence. There are certain limited circumstances in which such leave may be granted. It is unnecessary to elaborate upon those circumstances here, save to say that they do not cover a situation such as we have here where the appellants takes some step after the hearing in the High Court and then seek to rely upon that step for their appeal against the order made in the High Court.

17. It appears that this appeal had been listed previously for hearing before this Court on the 25th July 2016, just 2 weeks after the service of the purported notice of cancellation referred to above. By that hearing date no books of appeal had been filed by the appellants, and the appeal was put back to another date. However Mr Brady had informed Leeds solicitors that he and his wife now intended to rely upon the notice of cancellation served pursuant to EC Directive 577/1985.

18. The notice of cancellation of the loan contract states as follows:

> "We are writing to you to make you aware that we have forwarded the following letter on to Leeds Building Society to cancel our contract regarding Greaghrahan, Ballyconnell, Co Cavan.
>
> I am writing to advise that pursuant to European legislation/directive 85/577 EEC being the European Communities Cancellation of contracts negotiated away from business premises Act 1989, that I am electing to terminate and cancel the above-mentioned contract with immediate effect. As you failed to advise my cancellation rights of contract, formation and have also failed to provide a cancellation form/notice, I am now seeking to exercise this option, which I have recently learned of. We need to agree a time and location so I can arrange the transfer of the property to yourselves.
>
> However, prior to this, you will need to reimburse me for all the monies paid on the contract to include interest on the same. The capital outlay and furniture and fittings we will need to agree on a final sum. I am suggesting a date of 25th August 2016 to formally hand over the property and would appreciate if you can respond with your response within 7 days'."

19. Leaving aside for the moment the merits of the argument now being put forward by Mr and Mrs Brady that they have by this notice cancelled the loan contract pursuant to the Directive and therefore may call upon Leeds to simply take back the property, I would dismiss this appeal on the basis that the only ground being relied upon by the appellants is one which was not argued in the High Court, and is one that is being brought forward now based on an action taken by them only after the hearing in the High Court, and in circumstances where they were in as good a position to have served this notice of cancellation prior to the hearing in the High Court, but they did not did so. There was nothing to prevent them having done so in time to argue the point at first instance. The fact that they may have only discovered the existence of this Directive and/or the Regulations in July 2016 is neither here nor there. They cannot be permitted to rely on the point for the first time in this appeal. In this regard I refer to the judgment of O'Donnell J. in *Lough Swilly Shellfish Growers Co-operative Society Ltd & ors v. Bradley & ors* [2013] 1 I.R. 227. I would dismiss their appeal on that ground alone.

20. I would however go on to state that even if it was permissible for them to raise this entirely new ground for the first time on appeal it is devoid of merit. It is a misconceived ground. Council Directive 85/577 has no application to the facts of the present case, and the appellants misunderstand it.

21. The Directive's objective is to protect consumers who agree to purchase goods or services from what is commonly referred to as a door-to-door salesman. The recital to the Directive makes this clear when they make reference to protecting consumers against unfair commercial practices in respect of doorstep selling. The recital goes on to state that *"the special feature of contracts concluded away from the business premises of the trader I is that as a rule it is the trader who initiates the contract negotiations for which the consumer is unprepared …"*.

22. The text of Article 3 of the Regulations is very specific as to the nature of the contracts to which they apply. It provides:

> "3.(1) These Regulations apply
>
> (a) to contract under which a trader supplies goods or services to a consumer and which are concluded:-–

(i) during an excursion organised by the trader away from his business premises, or

(ii) during a visit by a trader –

(I) to the consumer's home or to that of another consumer, or

(II) to the consumer's place of work,

where the visit does not take place at the express request of the consumer,

(b) to contracts for the supply of goods or services, other than those referred to in paragraph (a) of this Regulation, concerning which the consumer requested the visit of the trader; provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities,

(c) to contracts in respect of which an offer was made by the consumer under conditions similar to those described in subparagraphs (a) or (b) of this paragraph where the consumer is bound by his offer."

23. Even on Mr Brady's own affidavit it is clear that the circumstances in which he requested the loan for which he and his wife later provided security in the form of the mortgage/charge on foot of which Leeds now seek possession of the property do not come within Regulation 3(1) (a) or (b). It is clear that at a time when Mr Brady was under great financial pressure he met a mortgage broker as he was walking along Fitzwilliam Square, Dublin 2. The broker appears to have indicated that he would arrange a loan for him. A loan offer letter issued very shortly thereafter in the amount of €760,000 which was accepted by Mr Brady, and some eight days later in the presence of their solicitor Mr and Mrs Brady executed the mortgage/charge documentation in the normal way and drew down the loan.

24. This loan was not sold to Mr and Mrs Brady while Leeds, or (for the sake of completeness in the event that the broker in question was the agent of Leeds on that occasion) the broker, were on an excursion away from their business premises. Neither was it the result of a visit by Leeds/the broker to their home or place of business. There was therefore no requirement on Leeds to provide a form of cancellation notice to Mr and Mrs Brady, or for that matter, a cancellation form as provided for in Article 3 of the Regulations. The purported cancellation of the mortgage by Mr and Mrs Brady purports to be issued pursuant to the Directive. Since neither the Directive nor the Regulations which give effect to it, have any application to the loan, the purported cancellation notice issued by them is of no legal effect.

25. For the sake of completeness I should add that I leave over to some other case in which it may properly arise for determination the question of whether a mortgage/charge over immovable property constitutes a contract "concerning other rights relating to immovable property" as referred to in Article 3(2)(b) of the Regulations. Nothing I have said herein should be taken as any indication one way or the other in relation to that question.

26. For all the reasons stated above, I would dismiss this appeal.