THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 14

Finlay Geoghegan J.
Irvine J.
Hogan J.

BETWEEN/

No. 2015/381

PAUL McCANN

PLAINTIFF/

RESPONDENT

-AND-

J.M. AND Y.W. (No.2)

APPELLANTS/

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of February 2017

1. By a judgment delivered on the 8th December 2015 (*McCann v. J.M. (No. 1*) [2015] IECA 281), this Court permitted the second defendant, Ms. Y.W., an extension of time to appeal to this Court on three distinct grounds against the decision of the High Court (Donnelly J.) delivered on 27th April 2015, *sub nom. McCann v. A, B and C* [2015] IEHC 366. It should be said at the outset that the plaintiff/respondent is a receiver appointed by the EBS Building Society (now EBS Ltd.) in respect of certain properties located in Dublin. Ms. W. is the former partner of the mortgagor (and first defendant), Mr. M., and Ms. W. seeks to challenge on grounds I shall presently outline the appointment of Mr. McCann qua receiver in respect of these properties, along with the present status of EBS and its entitlement to be regarded as the mortgagee in respect of these properties.

2. The requisite appeal papers were not, however, filed by Ms. W. within the time permitted by the Rules of the Superior Courts and, hence, it was necessary for Ms. W. to bring this application for leave to appeal out of time: see *McCann v. YW* [2015] IECA 281. For convenience I propose to refer to that judgment as the first judgment.

3. In that first judgment the Court indicated that Ms. W. (who is a litigant in person) had demonstrated that she had formed the requisite intention to appeal and that her failure to lodge the notice of appeal had come about as a result of an uncertainty as to when the order of the High Court had been perfected. The real question, therefore, was whether she could satisfy the third leg of the *Éire Continental* criteria (*Éire Continental Trading Co. v. Clonmel Foods Ltd.* [1955] I.R. 170) and demonstrate the existence of arguable grounds. In the end the Court concluded that Ms. W. had established arguable grounds in respect of three of the five grounds advanced by her. While the Court rejected arguments based on alleged breaches of data privacy (ground 4) and general breaches of constitutional rights (ground 5), the Court nonetheless held that Ms. W. could advance an arguable case that she had standing to challenge the appointment of the plaintiff as receiver (ground 3); the proper status of the Educational Building Society ("EBS") (ground 1) and the validity of the appointment of the plaintiff as receiver (ground 2). In this judgment I propose, accordingly, to consider only the three grounds in respect of which leave to appeal was granted.

4. While I noted in the first judgment that the Court had, unfortunately, been obliged to proceed to hear the application for an extension of time "without having had actual sight of a number of key documents which clearly are of some importance to the resolution of this actual appeal", all members of the Court have now had the benefit of seeing all the relevant documentation for the purposes of this present appeal. This further documentation has proved to be of considerable assistance so far as the disposition of the substantive appeal is concerned. Although this judgment should be read in conjunction with the first judgment, for convenience I propose to repeat here much of the narrative relative to the underlying facts contained in that first judgment.

5. Before considering any of these issues it is, however, first necessary to set the background to this litigation.

The background to the litigation

6. Mr. M. and Ms. W. were formerly partners and they have two children now aged approximately 13 and 10 respectively. That partnership broke up at some stage in 2006/2007. Mr. M. has indicated that he has no wish to take part in these proceedings, so that Ms. W. is the effective defendant to the action.

7. In 2005 Mr. M. took out loans from the EBS Building Society for the purchase of eight different properties in Dublin in the sum of some €8.3m. The loans had a variable interest rate and the term of the mortgages was expressed to be for some 25 years. Seven of the properties are residential and one is a commercial premises in Dublin city centre. Mr. M. also charged a ninth property (which is a substantial property in its own right) for this purpose.

8. Mr. M. currently lives in one of these properties and Ms. W. lives in another. It is important to stress, however, that the property in which Ms. W. lives with her children is not a family home within the Family Home Protection Act 1976 since the parties were never married.

9. Following the break-up of the parties' relationship the Circuit Court (Her Honour Judge Flanagan) made a consent order on 11th March 2008 pursuant to a settlement which had been arrived at between the parties. The ultimate effect of that Court order was that the settlement provided that Ms. M. and her children were entitled to reside at the ninth property. Ms. W. maintains that an affidavit of judgment to this effect was registered at the Registry of Deeds on 15th June 2009 which incorporated the earlier Circuit Court order of 11th March 2008.

10. The EBS had, however, registered mortgages against the eight properties at various dates in 2008. The first mortgage was registered in favour of EBS Building Society in the Registry of Deeds on 30th April 2008. This mortgage extended from the second to the eight properties. While it also included the ninth property, it was subsequently accepted that this property was wrongly included, a matter made clear by a later deed of rectification. The EBS Building Society had also secured the registration of a mortgage against the first property on 7th October 2008.

11. Critically, therefore, both mortgages had been registered by the EBS Building Society in 2008 prior to what Ms. W. says was the subsequent registration of the affidavit of judgment incorporating the earlier Circuit Court order in the Registry of Deeds on 15th June 2009. This is of some importance in terms of the priorities affecting the first eight properties. It has been clear for the best part of 77 years that "a judgment mortgage is a process of execution and does not constitute a purchase for valuable consideration" so that a judgment mortgagee takes as a volunteer, i.e., subject to the rights and obligations of the judgment mortgagor: see In re Strong [1940] I.R. 382, 403, *per* O'Byrne J.

12. In the present case, those obligations of Mr. M. extended to the prior mortgages which had been secured on the property, so that Ms. W., as judgment mortgagee, took subject to those earlier mortgages in favour of the EBS Building Society. In September 2008 the EBS Building Society had issued a letter of demand to Mr. M. requiring repayment in full of the secured monies. In default of repayment EBS Building Society then issued proceedings against Mr. M. seeking possession of the eight properties. An order for possession was granted on 29th October 2009 in favour of the EBS Building Society by the High Court by order of Dunne J. The EBS Building Society did not, however, take possession of the premises, but by two separate deeds of appointment dated 26th May 2010 it instead purported to appoint a receiver, Mr. McCann, over the properties. Mr. McCann is not only the plaintiff in this action, but he is also a chartered accountant and a principal in the firm of Grant Thornton.

13. It appears that the receivership proceeded in an unexceptional fashion between 2010 and early 2014. As Donnelly J. stated in her judgment in the High Court (at para. 22) the "eight premises were managed in the usual manner and any rental profit was used to reduce the indebtedness of the first defendant to the EBS."

14. By early 2014 the EBS planned to place the first and second premises on the market. At that stage, however, both defendants separately objected to the plaintiff's proposal to sell these two properties. Ms. W. objected in particular to the deleterious condition in which she said these properties had been left by the EBS. There then followed acrimonious correspondence between the parties and Donnelly J. recorded in her judgment (at para. 26) that Ms. W. had admitted in oral submissions to the High Court that "she had changed the locks and was responsible for stopping the attempts by the receiver to sell the premises." There was also evidence to suggest that Ms. W. had facilitated or encouraged others to obstruct or impede the actions of the receiver and to hold herself out to the tenants of the properties as the person entitled to payment of the rent in respect of the third to the eight properties.

15. The plaintiff then commenced the present proceedings on 29th April 2014 in which he sought possession of the first and second premises. He also sought orders restraining the defendants from holding themselves out as the parties entitled to deal with and manage the third, fourth, fifth, sixth, seventh and eight premises and to cease demanding premises of the tenants in occupation of those premises. The first defendant took no active part in the High Court and, indeed, expressed concern that the costs of these proceedings might jeopardise the prospects of any surplus becoming available in the receivership. In a detailed and comprehensive judgment Donnelly J. rejected the challenge made by Ms. W. to the validity of the mortgages registered in favour of the EBS and the appointment of the receiver.

16. I now propose to consider in turn the three grounds raised by Ms. W. in respect of which this Court had given leave to appeal.

Ground 1: The status of the EBS

17. The first permitted ground of appeal relates to the status of the Educational Building Society, the original lender. In effect, Ms. W. seeks to challenge the present status of the EBS in view of (i) the demutualisation of the EBS and (ii) the possible transfer of some mortgages from EBS to another entity, EBS Mortgage Finance Ltd. It may be convenient if these issues are considered in turn.

18. As appears from paragraph 4 of the affidavit of Mr. Mark Hughes, a senior manager attached to the Commercial Unit of EBS Ltd., dated 15th April 2014, EBS was formerly known as the EBS Building Society. With effect from 1st July 2011 EBS demutualised and it is now known as EBS Ltd. As it happens, Part XI of the Building Societies Act 1989 ("the 1989 Act") had always contemplated that building societies might de-mutualise in this fashion. Thus, s. 100 of the 1989 Act provides that:-

> "A building society may, subject to this Part, convert itself into a company."

19. Section 100 of the 1989 Act then defines the term "successor company" as simply "the company into which a society converts itself." "Company" is then further defined by s. 100 (as substituted by Item 2 in the First Schedule of the Credit Institutions (Stabilisation) Act 2010) ("the 2010 Act") as meaning a company limited by shares within the meaning of the Companies Acts.

20. This conversion procedure itself requires the approval of the Central Bank which is required to evaluate the application by reference to certain stated criteria: see s. 104(4) of the 1989 Act. Section 104(5) of the 1989 Act then provides:-

> "Where the Central Bank confirms a conversion scheme it shall register the scheme and the conversion resolution and send to the applicant a certificate of registration which shall be sufficient evidence unless the contrary is proved that the requirements of this Part in relation to the conversion scheme have been carried out."

21. Mr. Hughes has averred without contradiction that pursuant to its powers under these provisions of the 1989 Act the Central Bank approved and registered an acquisition conversion scheme which had been submitted for this purpose by the EBS Building Society, the effect of which was to convert EBS Building Society into a company limited by shares to be named by EBS Ltd.

22. It will thus be seen that the 1989 Act essentially provides for a change of status and change of name, provided that these conversion procedures are duly followed by the de-mutualising building society and that the conversion scheme is approved by the Central Bank. This, in effect, is what has happened here. What was the EBS Building Society has now converted itself from a mutual building society into a company limited by shares which is now known as EBS Ltd. There is nonetheless an essential continuity as between the erstwhile EBS Building Society and EBS Ltd. which remain the same entity, so that there is no question of any transfer of assets from one entity to another.

23. Much of this is not disputed by Ms. W. She, however, maintains that the application of these provisions to the present case would infringe Article 15.5.1 of the Constitution, contending that neither the EBS nor the receiver can rely for this purpose on legislation which had not been enacted at the time the mortgage deeds were executed in 2006.

24. Article 15.5.1 provides that:

> "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission."

25. In this regard it is sufficient to say that, as the very language of Article 15.5.1 itself makes clear, this prohibition precludes the Oireachtas from making retrospective criminal offences or otherwise providing retrospectively for liability in the sphere of civil law by, *e.g.*, creating a retrospective tort: see *Dublin Heating Co. Ltd. v. Hefferon* [1993] 3 I.R. 177. But Article 15.5.1 is not otherwise to be construed as containing "any general prohibition on retrospection of legislation": see *Magee v. Culligan* [1992] 1 I.R. 233, 272, *per* Finlay C.J.

26. It is perfectly clear that in none of the amendments effected by either the 1989 Act or the 2010 Act has the Oireachtas sought to declare acts to be infringements of the law with retrospective effect. All that has occurred is that the Oireachtas has provided a statutory procedure whereby one corporate entity can change its name and status and that is simply what has occurred here. It follows, therefore, that what was the EBS Building Society is now EBS Ltd. Accordingly, Ms. W.'s objection to the current status of EBS Ltd. is not well founded.

The transfer of some mortgages from EBS to EBS Mortgage Finance Ltd.

27. At the hearing of the appeal, Ms. W. contended that at least some of the mortgages at issue in the present proceedings were – or, at least, might have been – transferred to another entity, EBS Mortgage Finance Ltd. In the first judgment leave was granted to raise this point because by reason of the paucity of documentation before the Court for the purposes of that application to extend time we could not say that this point was unarguable. In that first judgment, however, I was at pains to stress that at a full hearing "any possible issue regarding the status and entitlement of the EBS and EBS Ltd. in respect of these mortgages can be fully documented and explained."

28. This is what has ultimately come to pass. It is clear from the affidavit of Mr. Hughes that the original mortgages were executed by EBS Building Society (now EBS Ltd.). The relevant letters of offer and loan documentation and mortgage deeds are all duly exhibited. While it is clear from the material put before this Court that some EBS mortgages may well have been transferred to EBS Mortgage Finance Ltd. pursuant to s. 58 of the Asset Covered Securities Act 2001, there is no evidence at all that the mortgages at issue in the present case (or any of them) were so transferred. More particularly, it is clear from the affidavits of Ms. W. which had been filed in the High Court that this case was never advanced by her in the High Court.

29. In these circumstances this Court cannot but conclude that the plaintiff has discharged the requisite onus of proof of demonstrating that EBS Building Society/EBS Ltd. at all times remained the lender in respect of these loans and mortgagee in respect of these mortgages.

The execution of the deed of appointment by the EBS Building Society

30. The second permitted ground of appeal was that the two deeds of appointment of the receiver by the EBS Building Society dated 26th May 2010 were invalid. The EBS Building Society was not then a company within the meaning of the Companies Acts and it only acquired that status following the operation of the conversion procedure in July 2011. As I pointed out in the first judgment, s. 64(2)(b)(iii) of the Land Law and Conveyancing Law Reform Act 2009 ("the 2009 Act") provides that in the case of a corporate body (other than a company) registered in the State, a deed shall be valid "if it is executed in accordance with the legal requirements governing the execution of deeds by such a body corporate."

31. At the time of the first judgment the copies of the mortgage deeds available to the Court did not establish that a seal had been affixed to the deeds of appointment of the receiver. At a subsequent directions hearing before Ryan P. in January 2016, the original deeds were produced and they clearly showed that the seal had been affixed in both instances. This was accepted by Ms. W., so that any issue in relation to a seal now no longer arises.

32. Furthermore, it is clear from the provisions of Clause 8.01 of the standard terms of the EBS Building Society's mortgage deeds that the Society was entitled to appoint a receiver by deed under seal or, for that by matter, under the hand of any director, general manager or secretary for the time being of the Society. These standard provisions are contained in the two mortgage deeds dated 6th January 2006 and 11th January 2006 respectively.

33. In these circumstances, it is clear that the receiver was indeed validly appointed for the purposes of s. 64(2)(b)(iii) of the 2009 Act. In both instances the receiver was appointed by deed under seal and this was the method of executing the deeds of appointment which was expressly provided for in the mortgage deeds themselves.

Conclusions

34. In these circumstances, it is now unnecessary to consider the first ground in respect of which leave to appeal was granted, namely, whether Ms. W. has the requisite standing to challenge the appointment of the receiver. Even if she enjoyed such a standing, it is clear that the two other substantive grounds of appeal must be resolved against her. As I have already pointed out, the EBS Ltd. is the corporate successor to the EBS Building Society. It remains the same entity: all that has happened is that its name has been changed in the wake of its change of status from that of a mutual building society to that of a limited company. There is no evidence that any of the mortgages at issue in the present proceedings were transferred to the EBS Mortgage Finance Ltd. Finally, it is now clear that the deeds of appointment of the receiver were appropriately sealed and that the relevant mortgage deeds expressly provide for the appointment of the receiver by deed under seal, so that the appointment of the receiver must be regarded as valid for the purposes of s. 64(2)(b)(iii) of the 2009 Act.

35. In these circumstances, I consider that the appeal must be resolved adversely to Ms. W. I would accordingly dismiss the appeal.