THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 47
Court of Appeal Record No. 2019/276
High Court Record No. 2012/331 SP

Whelan J.
Noonan J.
Haughton J.

BETWEEN:

EVERYDAY FINANCE DAC

PLAINTIFF

-AND-

JERRY BEADES

APPELLANT

Judgment of Ms. Justice Máire Whelan delivered on the 18th day of February 2021

Introduction

1. This is an appeal from an order of the High Court (O'Connor J.) of 6 June 2019. Same was, in turn, integrally connected to orders made by the said judge on 24 May 2019, which are the subject matter of a separate appeal and for which judgment is delivered separately, and also to a notice of motion which was issued by the appellant seeking a stay from the Court of Appeal on the orders of the High Court made on 24 May 2019 aforesaid. The said motion seeking a stay was not required to be heard by this court for the reasons set out hereafter and by consent of the parties was struck out at the conclusion of the hearing of several appeals and motions in this court on 25 September 2020. This appeal was also heard together with, *inter alia*, related appeals bearing record numbers 2019/254 and 2019/487 from orders of the High Court made on 24 May 2019 and 29 October 2019, respectively.

2. The title page of this judgment reflects the most up-to-date details of the parties in the underlying High Court proceedings as recorded by the Central Office of the High Court. This should not be taken as a pre-judgment of the issues discussed herein or any other appeals brought by the appellant. For the purposes of the substance of this judgment, "the respondent" refers to Cheldon Property Finance DAC.

Background

3. The within proceedings were initiated by way of special summons on 12 June 2012 by Permanent TSB as mortgagee in respect of certain properties in Fairview pursuant to a mortgage of December 2002. Pursuant to the terms and conditions of the facility letter, a loan facility in the amount of €1,778,000 was made available to the appellant. Following judgment of McGovern J. delivered on 25 February 2014, [2014] IEHC 81, Permanent TSB was granted an order for possession of the properties on 6 March 2014.

4. By deed of conveyance and assignment dated 14 October 2015, Permanent TSB, the original mortgagee, transferred, conveyed and assigned to Cheldon Property Finance DAC (hereinafter "Cheldon") all of its rights, title, interest and benefits in the mortgage of December 2002. The appellant was notified of the transfer of the relevant loan facilities and rights to Cheldon in October 2015. The legal effect and consequences of that assurance is the subject of a separate judgment in the related appeal.

5. Meanwhile, by notice of appeal dated 23 April 2014, the appellant brought an appeal against the possession order. By order of the Court of Appeal dated 17 October 2016, Cheldon was joined as a co-plaintiff to the proceedings and as co-respondent to the said appeal. The special summons was amended accordingly on 9 November 2016.

6. The appeal against the possession order was dismissed by the Court of Appeal on 13 November 2017. In a determination of the Supreme Court of 22 November 2018, the appellant was refused leave to appeal against the decision of the Court of Appeal to the Supreme Court.

7. On 24 May 2019, the High Court (O'Connor J.) pursuant to notice of motion of 7 March 2019, following delivery of an *ex tempore* judgment on the same day, ordered that Cheldon be named as the sole plaintiff in the proceedings pursuant to O. 17, r. 4; that it be at liberty to issue execution on foot of the possession order pursuant to O. 42, r. 24(a); and, that the possession order be amended pursuant to O. 28, r. 12 so that Cheldon would be substituted for Permanent TSB as the plaintiff in the title thereof. That order is the subject of the appeal from the judgment given in the proceedings bearing record number 2019/254.

Notice of motion of 31 May 2019

8. Following the making of the orders of 24 May 2019, referred to above, by way of notice of motion of 31 May 2019, Cheldon applied to the High Court for, *inter alia*, an order pursuant to O. 44, r. 3 and/or pursuant to the inherent jurisdiction of the High Court, granting liberty to Cheldon to issue an order for the attachment/committal of the appellant by reason of his failure to comply with the orders of the court.

9. Insofar as it related to the appellant, the order made on 6 June 2019 *inter alia* extended the time to deliver up possession of the properties named in the order of McGovern J. of 6 March 2014 until 4 o'clock on Friday 21 June 2019; ordered that the appellant be attached on the grounds of non-compliance with the said order for possession unless it was indicated to the court before Friday 21 June 2019 that the appellant was volunteering to attend court at 11 o'clock on 4 July 2019; and, granted Cheldon liberty to issue an order of attachment against the appellant to have him attend before the court at 11 o'clock on 4 July 2019 to

answer for the alleged contempt of the said order of McGovern J. and to show cause why he should not be committed to prison for such contempt. This judgment concerns the appellant's appeal of the said orders.

Disposal of application by appellant for a stay on the orders of 24 May 2019

10. When O'Connor J. made the orders in the High Court on 24 May 2019 pursuant, *inter alia*, to O. 17, r. 4; O. 42, r. 24(a), and O. 28, r. 12 the appellant sought a stay in respect of same for the purpose of pursuing an appeal. The application was refused. The appellant then by notice of motion issued on 31 May 2019 sought a stay from the Court of Appeal. The stay application formally travelled with the related appeals. Counsel for the respondent informed the court that there was no dispute that the stay motion had become moot since Cheldon no longer asserted the right to execute the underlying order sought to be stayed.

11. Counsel for Cheldon and Everyday Finance DAC stated as follows regarding the stay application:

> "…just to clarify exactly what the stay application is, the order of 24 May 2019 gave Cheldon liberty to execute the McGovern J. possession order of 6 March 2014. There was a subsequent transmission of interest. So Cheldon, although I am representing Cheldon for the purpose of the appeal today, does not suggest it has any entitlement to execute, because Everyday now has that entitlement by virtue of Reynold J.'s order of 24 October 2019. So the motion is manifestly moot and it's on that basis that I suggest it would simply be struck out and that the costs of it would be made costs in the cause of that appeal."

12. The application of the respondent at the hearing of the appeal was as follows: -

> "But perhaps in respect of that application the appropriate order is an order striking out that motion and an order making it costs in the cause in respect of that appeal, which is the appeal bearing record no. 2019/254. So just for the sake of formality, lest it be an outlier at the end or lest there be some suggestion there is still a stay application pending before the Court of Appeal…"

13. In response to an enquiry from the court as to whether the appellant was happy with that approach his counsel indicated "I think so yes". The court accordingly made the order striking out that motion and an order that costs in the matter be costs in the cause in respect of that appeal, bearing record no. 2019/254, and thereby disposed of the appellant's motion seeking the stay.

Notice of appeal

14. By notice of appeal filed 14 June 2019, the appellant raised five grounds, contending that the trial judge erred in fact and in law by:

    a) extending the time for compliance with an order of the court and then issuing an order for attachment before the extended deadline for compliance had passed;

b) leading the appellant's counsel and solicitors to believe that the matter had been adjourned to 21 June 2019 and not 6 June 2019 and that they would be contacted if Cheldon wished to have timings revised, and then proceeding to make an order for attachment in the absence of the appellant or his counsel or solicitors;

c) deeming the appellant to be in breach of a court order in the absence of an undertaking that he would personally appear in court on a date after that specified for compliance with the order;

d) holding, by implication, that non-attendance in court by a party who is legally represented can, without more, amount to a contempt of court;

e) holding that the appellant was in open breach of an order, which the trial judge had himself modified in terms which made a breach of such order impossible.

15. Cheldon in its respondent's notice opposed the appeal.

Post 6 June 2019 events

16. Significant events occurred subsequent to the order of 6 June 2019 being made. Particularly, Cheldon disposed of its interest in the secured properties and no longer has any right to enforce the underlying orders of 24 May 2019 as its counsel freely acknowledged to the court. Also Cheldon never sought to enforce the orders of 6 June 2019 and again acknowledges it is not entitled to do so.

Submissions of the appellant

17. The written submissions filed by the appellant appear to be substantially directed towards the related appeals bearing record numbers 2019/254 and 2019/487. The grounds of appeal in the notice of appeal filed 14 June 2019 and outlined above were not actively pursued or argued at the hearing of the appeals.

Submissions of the respondent

18. At para. 22 of the respondent's written submissions it is stated as follows: -

> "It should be noted that several of the grounds of appeal specified in the notices of appeal are not mentioned in Mr. Beades' submissions. These include, for example, an allegation of bias on the part of Mr. Justice O'Connor, who made the May order and the June order. It is assumed by the respondents that these grounds of appeal are not being pursued by Mr. Beades. Furthermore, no arguments whatsoever are contained in Mr. Beades' submissions which are directly referable to the second appeal, and therefore it is assumed that this appeal is no longer being pursued."

These points were not addressed in legal argument by the appellant. In fact no oral or written submissions at all were addressed to the specific grounds raised in this notice of appeal.

Discussion

Mootness

19. The authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) at para. 23-191 observe: -

> "In *Murphy v. Roche* [[1987] I.R. 106, 110] Finlay C.J. noted the longstanding practice of the Supreme Court to decline to decide any question which is in the form of a moot in respect of which a decision is not necessary for the determination of the rights of the parties before it. So, as a general principle, where the issues between the parties to litigation have become moot by the time an appeal comes on for hearing, an appellate court will not proceed to hear and determine the matter. However, this principle is not applied inflexibly and, in exceptional circumstances where the overriding interests of justice require it, an appellate court may proceed to hear an issue or appeal that is moot."

The authors further observe at para. 23-194: –

> "In the course of his judgment in *Goold v. Collins* [[2005] 1 I.L.R.M. 1], in which the Supreme Court concluded that the issue before it had become moot, Hardiman J. quoted the following passage from Tribe's *American Constitutional Law*:
>
> > 'A case is moot, and hence not justiciable if the passage of time has caused it completely to lose "its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions on abstract propositions of law" (*Hall v. Beals* 396 US 45 (1969). Thus, the Supreme Court has recognised that mootness can be viewed as "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)". (*US Parole Commission v. Geraghty* 445 US 388, 1980).'"

20. A leading authority in relation to the appropriate test for mootness is *Lofinmakin v. Minister for Justice* [2013] IESC 49 [2013] 4 I.R. 274 where McKechnie J., having reviewed the relevant authorities, distilled the following legal principles therefrom at para. 82 of his judgment: -

> "…
>
> (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) 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;

(iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;

(iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions;

(v) that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness;

(vi) in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice;

(vii) matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient, depending on its significance, for the case to retain its essential characteristic of a legal dispute;
(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;
(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example, *certiorari*;
(d) the opportunity for further review of the issue(s) in actual cases;
(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;
(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;
(g) the impact on judicial policy and on the future direction of such policy;
(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the *status quo*;
(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and
(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework."

21. Turning then to the appeal in hand I attach significant weight to the fact that neither in written legal submissions required to have been submitted to this court in support of the appeal nor in the oral arguments made in the course of the hearing was any argument directed towards this specific appeal. Significant circumstances have occurred in the aftermath of the notice of appeal being served, particularly Cheldon has disposed of its interest in the properties.

22. Cheldon acknowledges that it has no entitlement now to enforce the orders of the High Court including those of 24 May 2019. It necessarily follows that it has no entitlement either to enforce the orders of 6 June 2019. There has ceased to be any live controversy subsisting between the parties regarding the enforceability by Cheldon of the orders of 24 May 2019 or indeed 6 June 2019 as against the appellant. Bearing in mind the approach of the Supreme Court in *Lofinmakin*, referred to above, and the later decision of O'Donnell J. in *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246, I am satisfied that this appeal is now substantially moot.

23. No arguments were advanced directed towards the exercise of the special jurisdiction which can only ever be exercised in limited circumstances and where it is warranted by the overriding requirements of justice.

Conclusions

24. I am satisfied that subsequent events and developments have rendered the issues in this appeal moot since Cheldon no longer has any beneficial interest in the underlying mortgage and acknowledges that it has no enforceable rights on foot of the orders of 24 May 2019 or 6 June 2019. Cheldon no longer asserts an entitlement to execute the order for possession made by McGovern J. on 6 March 2014. Consequently, there is now no live controversy or dispute between the parties concerning the matters raised in the notice of appeal.

25. No line of argument was advanced to suggest circumstances existed to warrant exercise of the court's discretion or as to the existence of some special jurisdiction to embark on a determination of the appeal in the circumstances.

26. The issues between the parties concerning the stay on the order of 24 May 2019 also became moot and was disposed of by consent at the appeal hearing as outlined above.

27. The appeal ought to be dismissed.

28. With regard to costs, as the appeal is moot and given that no court time was expended arguing this appeal my provisional view is that there ought to be no order as to costs in the circumstances. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

29. As this judgment is being delivered electronically, Noonan and Haughton JJ. have indicated their agreement with it.