THE COURT OF APPEAL

Irvine J.
Hogan J.
Whelan J.

Neutral Citation Number: [2018] IECA 294

Record Numbers: 2017/559

2017/560

BETWEEN/

SIMON COYLE

RESPONDENT

- AND –

ALAN GRAY

APPELLANT

Record Number: 2017/562

BETWEEN/

ALAN GRAY

APPELLANT

- AND –

BANK OF IRELAND MORTGAGE BANK, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND SIMON COYLE

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 28th day of September 2018

1. This judgment concerns three appeals all of which have been brought by Mr. Alan Gray. The appeals are brought in two different sets of proceedings which are identified in the title that appears on this judgment.

2. Proceedings bearing Court of Appeal Record Number 2017/559 (High Court 2015/3971P) were commenced by Mr. Simon Coyle, a receiver appointed by Bank of Ireland Mortgage Bank ("the bank"), over certain property owned by Mr. Gray. That property was provided by Mr. Gray as security for certain loan facilities provided by the bank.

3. According to Mr. Coyle, whose account of events is disputed by Mr Gray, he commenced his proceedings in early 2015 because Mr. Gray would not acknowledge the validity of his appointment as receiver and had instructed his tenants not to co-operate with the receivership apart from the fact that he had continued to collect rent from them.

4. On the 9th February 2016 Mr. Gray issued his own plenary proceedings bearing Court of Appeal Record Number 2017/560 (High Court 2016/1202P) wherein he claims damages, *inter alia*, for breach of contract and breach of duty against Bank of Ireland Mortgage Bank, Bank of Ireland and Mr. Coyle. Mr. Gray also claims a declaration that Mr. Coyle's appointment as receiver is unlawful.

5. In his proceedings, Mr. Coyle applied for interlocutory relief restraining Mr. Gray from interfering with his conduct as receiver and obtained that relief from Barton J. in the High Court on the 23rd November 2015. That order was appealed and later vacated in January 2016 on consent in circumstances which would suggest that the order may have been irregularly obtained in the High Court. That said, the Court of Appeal indicated its view that the facts of the case were such that an early hearing date in the High Court was warranted.

6. Both sets of proceedings have been the subject matter of case management in the High Court as a result of which directions and orders have been given with the objective of ensuring that both claims would be heard with reasonable expedition.

7. The first of the appeals to be considered in this judgment is Mr. Gray's appeal from an order of Gilligan J. made on the 15th November 2017 in Mr. Coyle's proceedings. That order was made as a result of a motion brought by Mr. Gray seeking to compel Mr Coyle to comply with an order for discovery made on the 12th July 2017.

8. From the terms of the said order it is clear that the High Court judge was satisfied that Mr. Coyle had fully complied with his discovery obligations. It is also worth noting that he gave Mr. Gray liberty to collect a supplemental affidavit of discovery that had

been sworn by Mr. Coyle in response to Mr. Gray's motion from the offices of his solicitors on the 17th November 2017 and also gave him a period of seven days within which to raise particulars in his claim against Bank of Ireland Mortgage Bank, the Governor and Company of the Bank of Ireland and Mr. Coyle.

9. The second and third appeals brought by Mr. Gray relate orders made by Gilligan J. in both sets of proceedings on the 22nd November 2017 whereby he refused Mr. Gray's application to strike out the notices of trial that had earlier been served by Mr Coyle in each action on the 3rd November 2017.

Mr. Gray's appeal against the order of Gilligan J. of the 15th November 2017 concerning discovery: (Court of Appeal 2017/559, High Court 2015/3971P)

10. The background to the order under appeal has its origin in an application made by Mr. Gray for discovery on the 26th day of June 2017. The discovery he sought was very extensive insofar as some twenty-three categories of documents were identified in his original notice of motion. On the 12th July 2017 the Court directed Mr. Coyle to make discovery of five categories of documents identified at para A(a) to (e) inclusive of the Court's order. It is not disputed that in his affidavit of discovery sworn on the 6th September 2017 Mr. Coyle did not fully comply with that order, a failure described by Mr. Gray in his written submissions to this court as "delinquent".

11. As a result of Mr. Coyle's default, Mr. Gray brought an application for further and better discovery. That motion, which was initially returnable before the Court for hearing on the 8th November 2017, was adjourned until the 15th November 2017. In the intervening period a supplemental affidavit of discovery was sworn by Mr. Coyle on the 13th November 2017. According to Mr. Coyle, his affidavit was posted to Mr. Gray on that date.

12. On the hearing of the appeal before this Court Mr. Gray claimed that he did not receive Mr Coyle's affidavit or copies of the documentation therein discovered prior to the hearing of his motion. While he accepted that he had been handed a copy of that affidavit in the course of the High Court hearing he nonetheless maintained that he had returned it to counsel for the receiver without having read it. Accordingly, Mr Gray submits that he did not have a proper opportunity to consider the adequacy of the supplemental affidavit of discovery sworn by Mr. Coyle before the judge struck out his motion. Thus, he argues, the judge's determination on his motion was premature.

13. For similar reasons, Mr. Gray submits that the hearing before Gilligan J. was not conducted in accordance with the principles of natural justice and fair procedures. He also complains that he was prevented from speaking on some sixty-eight occasions and that the receiver was allowed to take control of the hearing. Further, according to Mr. Gray, greater time was given to Mr. Coyle's submissions.

14. Counsel for the receiver submits that the High Court judge was correct in law and in fact to conclude that Mr Coyle's affidavit of the 13th November 2017 complied with the Court's earlier order for discovery. Counsel maintains that Mr. Gray has still not identified any documents which he maintains were not discovered by Mr. Coyle in his supplemental affidavit of discovery. Further, there was no evidence before the High Court to support Mr. Gray's contention that there were any further e-mails or documents caught by the original order for discovery which had not been discovered. That being so it cannot be said that the High Court judge erred in law in refusing to order Mr. Coyle to make further and better discovery.

15. Counsel submits that Mr. Gray fundamentally misunderstands the discovery process. His complaint to Gilligan J. on the 15th November 2017 was that he had not been given copies of the documents listed in Mr Coyle's supplemental affidavit of discovery. Further, in the course of the hearing Mr. Gray had advised the High Court judge that he would be satisfied if he were to be given copies of the seventy-nine documents referred to in Mr. Coyle's supplemental affidavit of discovery. In light of that agreement and Mr Coyle's subsequent compliance therewith, the appeal was misconceived. For the same reason it could not be said that what occurred on the 15th November 2017 did not accord with the principles of natural justice and fair procedures.

Discussion and decision

16. For the purposes of adjudicating upon all three of Mr. Gray's appeals the court has been furnished with helpful written submissions by both parties, albeit that a very significant part of Mr. Gray's submissions was directed to matters which were not material to the issues to be determined on the appeals. It has also been provided with the pleadings and affidavits concerning the discovery applications brought by Mr. Gray and the transcript of each of the hearings that preceded the making of the orders under appeal. In addition, in the course of the appeal the court was furnished with copies of two letters written by McDowell Purcell, the receiver's solicitors, dated the 13th November 2017, and which were addressed to Mr. Gray at two different addresses. The first was forwarded to his address in Dundalk and the second to his address in Newry.

17. From the aforementioned correspondence it would appear that the supplemental affidavit of discovery sworn by Mr. Coyle was indeed sent to Mr. Gray by certified post on the 13th November 2017 and that copies of the documents scheduled thereto were forwarded to him at his Newry address. However, that does not necessarily mean that Mr. Gray received those documents in advance of the hearing of his motion, albeit that from the transcript it seems that in the course of the hearing he accepted that he was served with the supplemental affidavit on the 13th November 2017.

18. In truth, the time and date upon which Mr. Gray received Mr. Coyle's supplemental affidavit is not of critical importance. What is important in the context of this appeal is whether Mr. Gray was in a position to properly deal with his application in light of the information he had to hand on the 15th November or whether he was unfairly forced to proceed with his application absent sight of an affidavit of further and better discovery which was clearly material thereto. In this regard I would observe that Mr. Gray did not seek to adjourn his application on the basis that he was not in a position to deal with it due to the fact that he had not seen Mr. Coyle's supplemental affidavit, or, having seen it, that he needed further time to consider its content. Instead, he engaged in a detailed manner with his application for further and better discovery maintaining as he did that the supplementary affidavit of discovery was not in compliance with the original order. That would suggest to me that, having had sight of Mr. Coyle's supplemental affidavit, Mr. Gray considered himself capable of dealing with his motion and was not materially disadvantaged by any delay in the delivery of Mr. Coyle's affidavit.

19. Further, it can be inferred from his exchanges with the trial judge concerning the content of the said affidavit that Mr. Gray had been afforded a reasonable opportunity to peruse the affidavit and the list of additional documents scheduled thereto. If the situation were otherwise, he would not have been in a position to engage with the trial judge as he did concerning the content of that affidavit and how it should be viewed in light of the order for discovery that had been made on the 12th July 2017.

20. I should also state that in light of the fact that the trial date had been fixed on the 1st November 2017 for the 18th January 2018, it was quite appropriate for the High Court judge to hear the application for further and better discovery notwithstanding the

late delivery of Mr. Coyle's supplemental affidavit of discovery once satisfied that Mr. Gray was in a position to deal with the application, as was clearly the case.

21. The transcript also clearly demonstrates that the trial judge conducted the hearing of the application in accordance with the principles of natural justice and fair procedures. It is clear from the exchanges between Mr. Gray and the High Court judge, that Gilligan J. was at pains to establish whether or not all of the documents which were necessary and relevant to the issues to be determined in the proceedings had been discovered by Mr. Coyle. It cannot be inferred from the fact that the judge interrupted Mr. Gray on innumerable occasions or let counsel for the receiver speak for longer than Mr. Gray, that the hearing was unfair. The transcript is testimony to the fact that the interventions made by the judge were designed to establish whether or not full discovery had been made. His interruptions were not to Mr. Gray's detriment or disadvantage. He gave Mr. Gray several opportunities to explain to him why he needed discovery of any documentation beyond that which had been scheduled to Mr. Coyle's supplemental affidavit. The High Court judge explained several times to Mr. Gray that any documents he was seeking had to be relevant and necessary for the disposal of the issues in the proceedings. Further, he fully engaged with Mr. Gray regarding his two major areas of concern namely a tranche of some eighty e-mails which he had referred to in his own grounding affidavit and certain insurance documentation concerning the property under the receiver's control. Accordingly, I would reject that aspect of Mr. Gray's appeal which is grounded upon a claim that the hearing of his motion was conducted otherwise than in accordance with the principles of natural justice and fair procedures.

22. I am also fully satisfied that the order made by the High Court judge was not premature. Mr. Gray's motion was initially adjourned for a period of one week during which Mr. Coyle swore his supplemental affidavit of discovery. That affidavit was available to Mr. Gray and to the High Court judge and was addressed in some detail by both parties in the course of the hearing in the 15th November 2017. Further, the significance of that discovery was assessed by the court in light of Mr. Coyle's original affidavit of discovery, the court order of the 12th July 2017, and the complaints made by Mr. Gray both in his grounding affidavit and in oral argument. Thus, it cannot be said the decision of the High Court judge on the motion was premature.

23. Further, in light of the fact that Mr. Gray ultimately conceded that he would be happy if he were to receive copies of the seventy-nine e-mails listed at Part 1, Schedule 1 to Mr Coyle's supplemental affidavit, it is difficult to see how he can maintain the decision of the High Court judge was premature. For these reasons I would reject this aspect of Mr. Gray's appeal.

24. It is also clear from the transcript that it became obvious to the High Court judge, in the course of the application, that Mr. Gray likely did not fully understand the nature of the discovery process and that he did not appreciate that the receiver was not obliged to furnish him with copies of the documents scheduled to his affidavit, but rather simply at that stage to identify and list them. This became apparent in the context of Mr. Gray's complaint regarding the seventy-nine e-mails which were listed in Mr. Coyle's supplemental affidavit of discovery. He complained that "he (Mr. Coyle) hasn't given them to me". In light of this protest the High Court judge explained to Mr. Gray that discovery did not entitle him to copies of the documents discovered. What he was entitled to, given that the documents identified, was inspection of those documents and the right to request that he be furnished with copies of them.

25. When Mr. Gray ultimately conceded that he would be happy with Mr. Coyle's discovery if he were to be given copies of the seventy-nine e-mails listed in his supplemental affidavit, the Court went so far as to direct Mr. Coyle to have copies of those documents available for collection by Mr. Gray at the office of McDowell Purcell later that week, regardless of the fact that he was not entitled to receive them as part of the discovery process. Having regard to Mr. Gray's agreement to the court's proposal, his appeal against the refusal of the court to direct further and better discovery must also fail. I would here observe that in his grounding affidavit Mr. Gray had sought discovery of some eighty e-mails, seventy-nine of which were scheduled to Mr Coyle's supplemental affidavit of discovery and which Mr. Gray ultimately accepted would meet his needs once copied and made available.

26. Even if Mr. Gray had not made the aforementioned concession, it is, in any event, clear from the transcript that the trial judge provided Mr. Gray with an adequate opportunity to identify any particular documents which he considered remained outstanding notwithstanding the supplemental affidavit of discovery sworn by Mr. Coyle. The transcript is replete with exchanges between the High Court judge and Mr. Gray destined to establish whether or not all relevant e-mails and insurance documentation had been discovered by Mr. Coyle.

27. In the course of his exchanges with the High Court judge Mr. Gray did not identify any additional documents which he was in a position to establish were necessary and relevant to the issues in the proceedings. Having heard both parties as to the sufficiency or otherwise of the supplemental affidavit sworn by Mr Coyle, it cannot be said that the High Court judge erred in law or in fact in concluding that there were no further insurance or other documents that were relevant and necessary in order that the issues in the proceedings might be fairly determined at the hearing of the action. That was the correct test for the Court to apply on the hearing of the application for further and better discovery and the High Court judge cannot be criticised for engaging in dialogue concerning the relevance of the documentation sought by Mr. Gray, as is the position adopted by Mr. Gray in his written submissions. Further, in the course of this appeal, Mr. Gray did not identify any documents which were not discovered by Mr. Coyle in his supplemental affidavit such as might entitle him to seek to undermine the order made by the High Court judge. Accordingly, for these additional reasons I would reject Mr. Gray's discovery appeal.

Mr. Gray's second and third appeals: The order of Gilligan J. striking out his two motions to set aside the notice of trial filed by the receiver in each action

Mr. Gray's submissions

28. Mr. Gray submits that the order of Gilligan J. of the 22nd November 2017 striking out his motions to set aside the notices of trial in each set of proceedings was made in breach of the principles of natural justice and fair procedures. It is common case that those orders were made in Mr. Gray's absence.

29. Whilst Mr. Gray does not dispute that he was in attendance on the 15th November 2017 when the High Court judge brought forward the original return date for his motions from the 11th December 2017 to the 22nd November 2017, due to the proximity of the trial date, he states that he told the judge he would not be in a position to attend that day. Mr. Gray submits that the court and the receiver were aware that he would not be present yet matters proceeded in his absence. According to Mr. Gray he was entitled to have the motions heard either on the return date initially allocated or on some other date when he was available.

30. Mr. Gray submits that the reasons why he was unable to attend were never requested. Had he been so requested he would have provided the necessary information. He also maintains he was treated unfairly and was subjected to a harsher regime than would be applied to counsel in similar circumstances. When counsel advises a court that he or she is unable to attend on a particular date,

they are not, Mr. Gray submits, interrogated as to why they cannot do so. It is assumed that they have good reason to support their unavailability and the matter is deferred to a later date. He, on the other hand, was afforded no such accommodation.

31. Mr. Gray submits that he has been prejudiced by the order of the Gilligan J. refusing to strike out the notices of trial. He brought his application against Mr Coyle because he had not complied with discovery. It was unjust for the court to strike out his applications in such circumstances.

32. As to why he did not seek to set aside the orders under appeal, he considered that his appropriate remedy was to appeal the court's decision. He relied in this regard on the decision of the judgment of Hogan J. in *Danske Bank v. Macken* [2017] IECA 117.

The respondent's submissions
33. The respondent submits that the High Court judge appropriately exercised his discretion in striking out Mr. Gray's motions. The proceedings were under active case management and the Court of Appeal had directed that they be heard with all due diligence. In light of the imminent trial date of the 18th January 2018, the High Court judge had acted within his discretion in bringing forward the hearing date assigned to Mr. Gray's motions. The court had jurisdiction to give Mr. Gray's motions an earlier hearing date than the original return date advised by the Central Office of the High Court.

34. Counsel relies upon the fact that when Mr. Gray advised Gilligan J. on the 15th November 2017 that he would be unavailable on the 22nd November 2017, he did not furnish any reason as to why he could not attend on that date. Neither did he furnish any reason when he later wrote to the court and to the respondent to advise that he would not be in attendance. He simply chose not to attend.

35. Counsel for the receiver further submits that Mr. Gray has not established that he was prejudiced by reason of the fact that the notices of trial were not set aside. His conduct was consistent with obfuscation and delay. Counsel further submits that if Mr. Gray was taken by surprise by the fact that the court proceeded in his absence, he could have sought to set aside the orders of Gilligan J. Instead, he chose to appeal, an approach which would further delay the proceedings.

36. Finally, counsel for the respondent submits that the decision in Danske v. Macken affords no support for Mr. Gray's appeals.

Discussion and decision
37. Having regard to the nature of these two appeals it is perhaps worth re-stating that an appellate court should be slow to interfere with orders made by a High Court judge in the exercise of his or her discretion, particularly when such orders concern the manner in which the proceedings are to be conducted or managed. The judge making such orders, particularly where the litigation concerned is being actively case managed, as was the position with these proceedings, will invariably have a much more detailed knowledge of the facts and circumstances of the case than the appellate court and must be assumed to have acted in furtherance of the proper administration of justice. For example, it should be assumed that where a trial judge brings forward the hearing date for a particular motion, that there is a good reason for doing so, such as, perhaps, to avoid the potential adjournment of proceedings to which a trial date has already been allocated.

38. That is not to say that an appellate court will never interfere with the exercise of the type of discretion just referred to, particularly if it can clearly be established that the decision or order made was not in accordance with the proper administration of justice or was contrary to natural justice and fair procedures.

39. The exercise by Gilligan J. of his discretion in the present case has to be viewed having regard to the particular circumstances surrounding these two sets of proceedings. Important in this regard is that on the 1st November 2017 the parties agreed on consent that the actions would be heard together. Further, on the same day, the date of 18th January 2018 was fixed as the trial date. The fact that the court also directed the parties to serve their respective notices of trial with immediate effect is also relevant.

40. In response to the Court's aforementioned directions, the receiver served a notice of trial in both actions on the 3rd November 2017. However, with almost immediate effect, on the 8th November 2017 Mr. Gray moved to set aside those notices of trial notwithstanding the court's direction the previous week concerning the service of the notices of trial and the proximate hearing date. He did so on the basis that Mr. Coyle had not complied with the court's order for discovery made on the 12th July 2017, a matter to which I will later return, and on the basis that the pleadings were not closed in his own action.

41. In such circumstances, it is hardly surprising that when the High Court judge who had given the directions earlier mentioned was made aware of the motions that had been issued by Mr. Gray returnable for the 11th December 2017, that he brought forward the hearing date for those motions to the 22nd November 2017.

42. Having considered the submissions of Mr. Gray, I reject his contention that as a matter of law he was entitled to have his motions heard upon the date originally allocated *i.e.* the 11th December 2017 or some other date which was agreeable to him. His motions could have been heard by the High Court two clear days after service, subject to availability within the Court's diary. The only reason the date of the 11th December 2017 was given as the return date was presumably because of the pressure on the court's own resources. Further, Ord. 122, r. 7. provides as follows: –

> "Subject to any relevant provisions of statute, the court shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."

43. Accordingly, it is quite clear that the High Court judge enjoyed the discretion to bring forward the date for the hearing of Mr Gray's motions to set aside the notices of trial.

44. Further, in circumstances where the trial judge had fixed the trial date for the 18th January 2018 and had on the 1st November 2017 directed the immediate service of those notices of trial, it was also clearly just and fair to both parties to make such an order. It was in the interests of both parties that they should know, as soon as possible, whether or not the hearing was going to proceed as scheduled on the 18th January 2018.

45. I also reject Mr. Gray's submissions to the effect that the court was obliged to provide him with an alternative date for the hearing of his motion without requiring him to provide reasons as to why he was unable to attend on the date proposed by the court. In my view his argument, which is based upon the facility often afforded to counsel when they state that they have a conflict in their diary for a particular date, is misplaced.

46. It is true that judges try, where possible, to facilitate counsel who profess difficulty in attending to a hearing on a particular date without seeking details as to why they will not be available. Important in this regard are the professional obligations of a member of the bar. Counsel must never deceive the court. Their overriding duty is to ensure, in the public interest, the proper and efficient administration of justice and they must always act independently and free from the influence of their clients. Counsel are obliged to act with integrity and must never bring the profession into disrepute. Thus the court may assume there are good reasons which underlie an application by counsel to postpone a hearing date due to their unavailability. Of further relevance is the fact that counsel have nothing to gain from the postponement of any hearing date.

47. The aforementioned considerations, however, do not apply to the litigant who represents their own interests. They are under no equivalent obligation to the court and in any case may have much to gain in terms of advantage by seeking to defer a particular application or proceeding. One might also observe that whilst the court might facilitate counsel by deferring a particular application, no such accommodation would be afforded if the result would be to postpone proceedings which the court had determined should be heard with all due expedition, as was the case here.

48. For the aforementioned reasons I am satisfied that the court had jurisdiction to bring forward the date for the hearing of Mr. Gray's motions and he was not entitled to have the court defer his motion without providing good reason to demonstrate why it would be unjust to oblige him to attend on a particular date.

49. In relation to Mr. Gray's submission that he was not afforded natural justice and fair procedures, in that the court proceeded to deal with his motions in his absence, that is a ground of appeal which I would reject.

50. The first matter of significance is that it is clear from the transcript that the court initially indicated its intention to list Mr. Gray's motions for hearing on Tuesday 21st November 2017. When he stated that he would not be in a position to deal with the applications on that date, because he was before the Master of the High Court, the High Court judge stated that he was prepared to facilitate Mr. Gray and would instead list them for the following morning i.e. Wednesday the 22nd November. In doing so Gilligan J. warned Mr. Gray of his obligations to attend when he stated "I am not changing that date".

51. What is also clear from the transcript is that notwithstanding the fact that the Court moved the hearing date proposed to facilitate Mr. Gray, he did not inform Gilligan J. that he would not be available to attend on the 22st November 2017.

52. The next matter of relevance is that when Mr. Gray wrote to the solicitors acting on behalf of the receiver on the 16th November 2017, he stated that he was unable to attend on either the 21st and/or the 22nd November 2017 and in doing so furnished no reasons as to why he would not be in a position to attend on either date. Neither did he seek to explain his intended absence to the court in correspondence.

53. Material also is the fact that even on the hearing of these appeals Mr. Gray was not able to explain why he was not in a position to attend court on the 21st or the 22nd November 2017. Whilst he referred momentarily to being unwell, no medical certificate was furnished to establish this was so.

54. In circumstances where, for reasons that are still unexplained, Mr. Gray failed to attend court to move his own motions on the 22nd November 2017, it simply cannot be said that the orders made by Gilligan J. on that date offended the principles of nature justice or fair procedures. Indeed, it is apparent from the transcript that, prior to striking out Mr. Gray's motions, the history of the proceedings, particularly in relation to discovery, was brought to the court's attention. Gilligan J. was made aware of Mr. Gray's contention that at the time he issued his motions Mr. Coyle had not complied with the court's earlier order for discovery on the 12th July 2017 and that this omission had been rectified on the 13th November 2017. The High Court judge was also reminded that on the 15th November 2017 the court had concluded that the receiver had fully complied with his discovery obligations. Accordingly, it is difficult to see how Mr. Gray, even if he had appeared before the court on the 22nd November 2017, could have convinced the High Court judge that the notices of trial ought to be set aside.

55. Finally, Mr. Gray's efforts to rely upon *Danske Bank v. Macken*, are in my view misplaced. In *Danske* the plaintiff bank had issued proceedings claiming possession of Mr. and Mrs. Mackens' family home. As defendants, Mr. & Mrs. Macken had a history of attending all interlocutory applications. Danske's application for possession was due to be heard on the 2nd November 2015. On that morning Mr. Macken sent an e-mail to Danske's solicitors requesting an adjournment. The solicitor managing the proceedings was on holiday with the result that the e-mail went unnoticed and was not brought to the Court's attention. The e-mail only came to the attention of the bank's solicitors on the following day by which stage Danske had obtained the order for possession.

56. Dismayed to find that such an order had been made, the Mackens immediately issued a motion under Ord. 36, r. 33 seeking to set aside the order of the High Court judge (Cross J.) on the basis that they were taken by surprise. They also appealed his order to the Court of Appeal in what was described by Hogan J. in his judgment as a "belt and braces" approach which was warranted given the high stakes involved.

57. In his affidavit grounding his application to set aside the judgement, Mr. Macken stated that he had attended his G.P. on the 2nd November 2015 but he gave no details regarding his medical condition or any treatment that he had received. Nonetheless, the transcript of the hearing of the 7th December 2015 demonstrated that he had advised Cross J. that his G.P. had told him he was unfit to attend court on the 2nd November 2015.

58. Cross J. refused to entertain Mr. Macken's application to set aside the order for possession under Ord. 36, r. 33. He stated that he was *functus officio* and that the Mackens remedy was to appeal the Court's order for possession.

59. Hogan J., on the hearing of the appeal, concluded that Cross J. should have engaged with the application under Ord. 36, r. 33 and ought to have made a determination as to whether or not the Mackens' application might be entertained on its merits. In so doing he described Ord. 36, r. 33 as a mechanism to permit the court deal with a special category of case such as where, through oversight or *force majeure*, a litigant was prevented from attending court. It is important to record that Hogan J. expressed no view as to whether, on the facts of that case, the Mackens should in fact succeed in having the order for possession set aside.

60. In my view the aforementioned judgment of Hogan J. lends support to only one submission made by Mr. Gray, namely, that his remedy was not confined to bringing an application to set aside the orders of Gilligan J. and that he was entitled, in the alternative, to appeal those orders. The decision of Hogan J. in *Danske v. Macken* and that of Dunne J. in *Nolan v. Carrick* [2013] IEHC 523 are authority for the proposition that where a party takes a deliberate decision not to attend court they should not be able to avail of the mechanism provided in Ord. 36, r. 33 or, by analogy, the court's discretion to set aside an order made in their absence on an interlocutory application. Thus I am satisfied that there was nothing procedurally irregular about Mr. Gray's appeals. His right of appeal

is one which he enjoys in addition to his entitlement to seek to set aside the orders of Gilligan J. As Hogan J. stated, the two remedies might be regarded, depending on the circumstances, as potentially complimentary rather than exclusive.

61. Notwithstanding the fact that Mr. Gray did not apply to set aside the orders of Gilligan J., and instead opted to appeal, the decision in Danske nonetheless provides some guidance as to the approach that this court should adopt when determining these appeals.

62. I would first observe that notwithstanding much more sympathetic background facts and much greater prejudice to the Mackens by reason of the nature of the order made in their absence, the Court of Appeal did not in fact set aside the order for possession but merely referred the matter back for consideration by the High Court judge. Second, the court in *Danske* emphasised the need for the party seeking to set aside a judgment obtained in their absence, to provide reasons for their non-attendance and to demonstrate why they should be afforded a re-hearing. In particular Hogan J. referred to the judgment of Legatt L.J. in *Shocked v. Goldschmidt* [1998] 1 All E.R. 372 where he observed: -

> "Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court would be unlikely to allow a rehearing."

63. Although the *Shocked* judgment concerned an application to set aside a judgment and was not an appeal against an interlocutory order made in the absence of one of the parties, the observations of Leggatt L.J. are equally relevant in such circumstances. A party who deliberately decides to absent himself from a hearing, particularly if, as in the present case they were advised by the presiding judge that the date was set in stone, must provide a satisfactory explanation for their absence and, where appropriate, to prove by evidence the truth of their explanation. I cannot avoid observing that Mr. Gray has failed miserably in this regard.

64. Further, while there would not be huge costs implications if this court were to allow these two appeals, as would have been the case in *Shocked* where a full second set of trial costs would have followed, nonetheless, before I would be prepared to countenance such an approach, I would have to be satisfied that the orders under appeal had subjected Mr. Gray to significant prejudice. However, having considered all that was advanced by Mr. Gray on the hearing of this appeal, I am not convinced that he was in any way prejudiced by the failure of Gilligan J. to set aside the notices of trial in both sets of proceedings. I say this particularly in light of the order of Gilligan J. of the 15th November 2017 whereby he expressed himself satisfied that the receiver had fully complied with his discovery obligations. In those circumstances there was, in my view, no valid or obvious reason as to why the notices of trial should have been set aside.

Conclusions

65. For the reasons earlier advanced in this judgment I am satisfied that Mr. Gray's appeal against the order of Gilligan J. of the 15th November 2017 concerning discovery must fail. The High Court judge did not err in law or in fact in making the order which he did. Neither was the hearing conducted otherwise than in accordance with the principles of natural justice and fair procedures and the order was not made in circumstances which can be described as premature.

66. I would also reject Mr. Gray's appeals against the orders of Gilligan J. of 22nd November 2017 whereby he refused to set aside the notices of trial served in the proceedings in the title hereto. Mr. Gray failed to demonstrate any satisfactory explanation for his failure to attend the hearing of the relevant applications and has further failed to establish any or any significant prejudice as a result of the making of the said orders.

67. Accordingly, I would reject each of Mr. Gray's three appeals.