



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 334

Record Number: 2017/388 and 389

**Peart J.
Irvine J.
Whelan J.**

BETWEEN:

CARLISLE MORTGAGES LIMITED

PLAINTIFF/RESPONDENT

- AND -

EUGENE COSTELLO

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 30TH DAY OF OCTOBER 2018

1. The efforts of the defendant/appellant to avoid the consequences of an order for possession by the High Court (Dunne J.) on the 20th November 2006 in respect of certain lands owned by him, and which he provided to the plaintiff/respondent by way of security for a loan of €400,000 in June 2004, have led to significant delay, and procedural confusion over many years. I hope that this judgment cuts through that confusion, and clarifies the situation from a procedural point of view, so that the plaintiff may achieve the certainty and finality to which it is entitled by law.

2. There are two orders of the High Court (Twomey J) under appeal by the defendant, each made on the 5th July 2017. The first order is made on foot of the plaintiff's motion whereby certain injunctions were granted against the appellant, restraining him from placing animals on the lands or allowing animals to stray onto the lands, requiring him to remove animals that he had put on the lands, and restraining him, and anyone having notice of the order from obstructing the sale of the lands by the respondent. The second order is one refusing the appellant's motion which sought to have the respondent's proceedings dismissed as being bound to fail or otherwise pursuant to the inherent jurisdiction of the Court.

3. To put these orders into context, it is necessary to provide a brief account of the background to the respondent's proceedings.

Background

4. On the 21st May 2004 the appellant accepted an offer of a loan from the respondent in the sum of €400,000. His signature, duly witnessed by his solicitor, appears below a paragraph in the letter of loan offer where he confirms that he has read every clause of the loan offer, that he was independently advised in relation thereto, and wishes to accept the loan offered. There are undoubtedly unusual features to this loan. It was repayable within 12 months of drawdown and by 12 monthly repayments – eleven in the sum of €8,000, and one in the amount of €408,000. The applicable interest rate was stated to be 26.7%. There is no doubt that these terms were arduous, and that the rate of interest was swingeing, but the appellant was willing to accept them.

5. The appellant agreed to provide security for the loan by way of a first legal charge over the lands, the subject of these proceedings, which was duly registered on the relevant folios.

6. The appellant defaulted on this loan, which resulted in the respondent issuing proceedings by way of a special summons in 2006 seeking an order for possession of the secured lands. When the matter came before the High Court (Dunne J.) on the 20th November 2006 there was no appearance in court by the appellant. His non-appearance is recorded in the court's order of that date. The Court ordered that the appellant deliver up possession of the lands to the respondent upon service of the order upon him, and went on, not unusually, to place a 3 month stay on the execution of that order from the date of the order.

7. On the 21st August 2007, the respondent obtained an execution order of possession (Form 5, Appendix F, Part II RSC) from the Central Office of the High Court on foot of the order for possession dated the 20th November 2006. This execution order of possession is directed to the County Registrar for the area in which the relevant lands are situated, and authorises him/her to take possession of the land. This method of enforcing an order for possession of land is provided for by Ord. 42, r.5 of the Rules of the Superior Courts.

8. Since it becomes relevant later to some of the parties' submissions, I should mention at this juncture that an order for possession is the primary order obtained in the High Court, such as that granted by Dunne J. on the 20th November 2006, on foot of a special summons. Somewhat confusingly, the execution order later obtained for the purpose of enforcing that order for possession under Ord. 42, r. 5 of the Rules of the Superior Courts is referred to in the rule as an order of possession. I will refer to this as an execution order of possession to avoid any confusion. This nomenclature has led to confusion in the present case, and I will come to that in due course.

9. Despite obtaining an execution order of possession on the 21st August 2007 directed to the County Registrar, no attempt was made by the respondent to obtain possession of the lands on foot of same. Instead, since the appellant's animals were on the lands in question despite the making of the order for possession on the 20th November 2006, the respondent issued a motion for attachment and committal of the appellant on account of his failure to comply with that order. When that motion came before the High Court (McGovern J.) on the 11th October 2010 the appellant appeared in person. The motion to attach and commit him was adjourned, but the Court made an order directing him to remove all animals by the 31st October 2010. The appellant did not comply with that order

within the period specified.

10. It is not contested that some 28 adjournments were granted to enable the appellant to comply with the order. Eventually, on the 1st July 2013 the High Court (Dunne J.) made an order allowing the respondent to bring an application to attach and commit the appellant "the Court being satisfied that the defendant has been guilty of contempt of this Court by disobeying the said order dated 26th November 2006 [sic]". This date is clearly an error and should refer to the order for possession dated 20th November 2006. I would draw attention to the fact that the contempt referred to is not the failure to remove the animals from the lands as directed by the order made by McGovern J. on the 11th October 2010, but the failure to deliver up possession of the lands pursuant to the earlier primary order for possession dated the 20th November 2006. This assumes some later relevance as will appear.

11. I should add that on the 1st July 2013, a second order was made by the High Court (Dunne J.) renewing the execution order of possession which had issued out of the Central Office on the 21st August 2007 for a period of 12 months. That renewal is provided for in Ord. 42, r. 21 of the Rules of the Superior Courts. Despite that renewal however, the respondent did not act upon it, and in fact has never sought any further renewal, preferring instead to proceed by way of injunction to require the appellant to remove his animals, and by way of application for attachment and committal for breach of the primary order for possession and/or orders to remove animals.

12. The appellant appealed both orders dated the 1st July 2013 to the Supreme Court, and sought a stay on each pending the determination of those appeals. By its orders dated the 6th December 2013, the Supreme Court struck out both stay applications.

13. On the 15th July 2014, an order was made by the High Court (McGovern J.) committing the appellant to prison for his disobedience of the order for possession dated the 20th November 2006. That committal was of indefinite duration until the appellant would purge his contempt and be discharged pursuant to another order of the High Court. The appellant was so committed to Mountjoy Prison.

14. Two days later on the 17th July 2014, on the appellant's own application, he appeared before the High Court for the purpose of purging his contempt. The order made releasing him from custody states, *inter alia*, as follows:

" ... And on the undertaking of the said [appellant] that no further cattle would be allowed on the lands the subject of these proceedings and that possession of the lands is being surrendered to the plaintiff;

And the Court being satisfied that [the appellant] has purged his contempt;

The Court doth direct the immediate release from custody of the said [appellant]".

15. Ten days previously on the 7th July 2014, the respondent had appointed Maurice G. Lyons, solicitor, to be Receiver and Manager of the lands in question under the deed of charge, and authorised him to enter upon and take possession of the lands, and to exercise all other powers conferred on him either by law or under the deed. By letter dated the 8th July 2014 solicitors acting for Mr Lyons had written to the appellant notifying him of Mr Lyons's appointment as receiver, and enclosed a copy of the deed of appointment, and further informed him that Mr Aidan Devlin of LAS Services Limited was duly authorised by Mr Lyons to take possession of the lands.

16. On the 17th July 2014, the same day as the appellant purged his contempt before McGovern J. and undertook that "possession of the lands is being surrendered to the plaintiff" as noted in the Court's order of that date, Mr Devlin of LAS Services Limited attended at the lands, and found them to be free of livestock. Possession of all the relevant lands was taken and secured by Mr Devlin by 2.50pm that day according to Mr Devlin's written report of the action he took on the receiver's authority. From that point onwards, even though there were later acts of trespass by the appellant including by placing animals on the lands, possession of the lands had been taken by the plaintiff on foot of the order for possession dated the 20th November 2006. The respondent was thereafter the mortgagee in possession. It follows in my view that on the 17th July 2014 the order for possession made on the 20th November 2006 was executed. This conclusion has relevance to the disposition of this appeal.

17. On the 22nd July 2014 McGovern J. made a further order vacating a *lis pendens* which the appellant had registered on the various folios comprising the lands in question. That *lis pendens* was in respect of proceedings which the appellant and his wife had issued under record number: 2013 No. 2083P. By the same order a further *lis pendens* registered by the appellant on the same folios in respect of proceedings 2014 No. 41M was also vacated. The appellant lodged an appeal to the Supreme Court against the making of those orders. However, he failed to ever prosecute those appeals, and it was not until January 2015 that each *lis pendens* was removed from the folios.

18. The said order dated the 22nd July 2014 went on to make a further order in the following terms:

"AND IT IS FURTHER ORDERED that the Order *for* Possession made herein and dated the 20th November 2006 be and is hereby renewed for a period of one year from the date hereof". [Emphasis provided]

The appellant was not present when these orders were made on the 22nd July 2014, though the Court was satisfied that he had been properly served with notice of the applications. The above order, though referring to the renewal of the order for possession dated 20th November 2006, was probably intended to refer to the renewal of the execution order of possession that had first issued from the Central Office on the 21st August 2007, as a primary order for possession does not require to be renewed as such. It is the execution order of possession which may require to be renewed. In that regard Ord. 42, r. 21 of the Rules of the Superior Courts provides:

"Where it shall appear just that an order of possession [i.e. an execution order of possession] should be re-executed, the same may, at any time after its execution, be renewed by leave of the Court for one year from the date of such renewal ... ". [Emphasis provided]

Nevertheless, that order dated 22nd July 2014 was never the subject of an application for amendment under the 'slip rule'.

19. In fact, the appellant lodged an appeal to this Court (Record No. 1347/2014) against the said order made on the 22nd July 2014. That appeal was heard and determined by this Court on the 19th December 2016 when the appeal was allowed in part as follows: "... that the order made *renewing the execution order* for a period of one year be vacated" [Emphasis provided]. For the purposes of that appeal it appears that the order of the 22nd July 2014 was treated as an order renewing the execution order *of* possession, whereas on its face it referred to the order *for* possession dated 20th November 2006. This confusion appears again in the affidavits filed by the appellant in the High Court when resisting the respondent's motion for further injunctive relief against him, and which is the

subject of the present appeal (388/2017) which I shall come to shortly.

20. On the 14th October 2014 the appellant issued further proceedings in the High Court, this time naming Maurice G. Lyons (the receiver) and Carlisle Mortgages Limited as defendants. He registered these proceedings as a *lis pendens* against the lands. Those proceedings were never served. The respondents discovered their existence in January 2015 when their solicitor carried out a folio search to make certain that the previous *lis pendens* had been removed from the folios pursuant to the order of McGovern J. dated the 22nd July 2014.

21. Further difficulties arose in 2015 when the appellant again placed animals on the lands in breach of his undertaking to the Court not to do so which he gave on the 17th July 2014 when purging his contempt. It appears that in different proceedings, the appellant gave further assurances to the High Court both in November 2015 and again in December 2015 that he had removed his animals from the lands, and he repeated his undertaking not to place animals thereon again.

22. However, once again on the 11th January 2016, when the respondent was endeavouring to sell the lands, it was discovered by estate agents whom he had engaged that there were again animals on the lands. At this point the respondent issued its notice of motion dated the 15th January 2016 seeking the injunctive reliefs which were granted by Twomey J. on the 5th July 2017, and which are the subject of the first appeal herein (Appeal No. 388/2017). That order restrained the appellant from obstructing the sale of the lands, and directed him to remove any animals from the lands, and restrained him from placing further animals on the lands.

23. In addition, the notice of motion sought an order for attachment and committal of the appellant in respect of his breach of his undertaking given to the High Court on the 17th July 2014. The respondent's motion was adjourned on a number of occasions by different judges of the High Court to enable matters to be resolved without the need for any order for attachment and committal. The appellant was given many opportunities to remove his animals, and to explore the possibility of the appellant himself engaging estate agents to sell the lands on an undertaking to either lodge the proceeds of sale into court, or to pay them directly to the respondent. Nothing came of that opportunity.

24. The respondent swore a further affidavit in support of its motion on the 15th October 2016 in order to provide updated information to the Court ahead of the motion for attachment proceeding. The appellant filed a replying affidavit on the 14th March 2017 wherein he referred to the fact, to which I have already referred in para 19 above, that the Court of Appeal had ordered "that the order made renewing the execution order for a period of one year be vacated". He stated at para. 3 of his affidavit:

"3. In the circumstances I say that the plaintiff has no Order of Possession/Execution Order. Nor has the plaintiff applied on notice to your deponent to renew its Order of Possession. I say and believe that under Order 42 of the Rules of the Superior Courts the plaintiff must apply by Notice of Motion to renew an Execution Order after 6 years". [Emphasis provided]

25. That affidavit goes on to say that on any application to renew the order of possession/execution order, the Court has a discretion, and that it must on such an application take into account the judgments of the CJEU which indicate that the national Court must take account of any breaches of "European consumer law" when dealing with enforcement applications. In that regard, the appellant stated that he wished to raise, by way of objection to renewal, the 26.7% rate of interest which was applied to the loan made to him by the respondent which he describes as extortionate and unlawful, and the enforceability of the loan itself. He considers that such a renewal application would be the first opportunity that the High Court would have to address these issues. He goes on to state that the respondent has never obtained a judgment for the principal sum and any interest, and that the alleged debt is statute-barred, more than six years having elapsed. He also complained that the respondent was guilty of *laches*. He went on to state that any application to renew the order for possession/execution order would have to have been made prior to the 22nd July 2015, and that no injunctions should be granted as sought by the respondent, because his view is that such an application is simply an attempt to avoid the need to renew the order of possession/execution order. He concluded by saying that the respondent's proceedings should be dismissed as being bound to fail, as would any application to renew the order of possession/execution order, and that the debt was statute barred.

26. The respondent filed an affidavit of Eoin Martin in response. He accepted that the Court of Appeal had set aside the renewal of the execution order of possession as the appellant had stated, but went on to state that when so ordering, the Court had made it clear that it did not in any way affect the underlying order for possession made on the 20th November 2006. Mr Martin made the point that the execution order of possession is simply an administrative order that allows the sheriff for the relevant area to take possession of the lands in accordance with the order for possession.

27. Mr Martin also stated that the respondent's motion dated the 15th January 2016 sought the attachment of the appellant for his breach of his undertaking given to the High Court (McGovern J.) on the 17th July 2014 not to place animals on the land, and injunctive relief to restrain the appellant from obstructing the respondent in its efforts to sell the lands, and placing further animals on the lands.

The judgment of the trial judge:

28. In his *ex tempore* decision on the 5th July 2017, Twomey J. stated:

"The critical factor in this case is that there is a High Court order of Ms. Justice Dunne dated 20th November 2006 for possession of the lands in question, that the defendant has not complied with since there is uncontroverted sworn evidence on behalf of the plaintiff to that effect. There is also a High Court order dated 11th October 2010 from Mr justice McGovern that the defendant remove his animals from the lands and again there is uncontroverted sworn evidence to the effect that he has similarly not complied with that order".

29. The trial judge went on to refer to the finding of contempt of court made by Dunne J. on the 1st July 2013, and to the fact that the appellant had been imprisoned for his breach of the order for possession, and stated "but yet he is still in breach of that order". He went on to refer to his breach of the undertaking given to the High Court (17th July 2014, McGovern J.) that he would remove his animals and not place further animals on the lands.

30. The trial judge then stated:

"It appears to this court that the defendant thinks that he can treat this court with contempt on the one hand and at the same time ask the same court to dismiss proceedings against him. His claim for dismissal alleges that the validity of the High Court order of 20th November 2006 is in some way affected by the application for an execution order to Mr Justice Brian McGovern on 12th July 2014 which was vacated by the Court of Appeal. This claim is without foundation in

this court's view. The only way in which the validity of the High Court order of 20th November 2006 could be called into question is by that order being reversed on appeal which did not happen. The Court of Appeal decision of 19th December 2016 relates solely to an execution order and does not affect the High Court order of 20th November 2006, nor indeed does it affect the High Court order of 11th October 2010, which orders were made against the defendant and against which he is in continuing breach.

In all those circumstances therefore this court will grant the orders 1 to 3 in the plaintiff's notice of motion. In relation to item 3 there will be a temporal requirement of seven days, so that order must be complied with within seven days and this court will make the matter returnable before this court at 11am next Wednesday. This court will also dismiss the defendant's motion to have the matter dismissed."

31. The trial judge was correct to point to the distinction between the order for possession and the execution order of possession, for the reasons I have already explained. I would however differ from the trial judge in relation to his conclusion that the order for possession has still not been complied with by the defendant. While he did not comply with that order in the sense of voluntarily surrendering possession of the lands, it is a fact that on the 17th July 2014 he undertook to the High Court when purging his contempt before McGovern J. that "possession of the lands is being surrendered to the plaintiff", and indeed on that same date the agent of the receiver attended at the lands and by 2.50pm had taken possession of the lands and secured them. In my view, at that point the order for possession had been executed. Possession had been taken of the lands on foot of the order for possession. Thereafter no further action needed to, or could, be taken on foot of that particular order. Its purpose had been achieved. Thereafter, any adverse action taken by the appellant after that date constituted an act of trespass. None amounts to a re-taking of possession as such. It follows that the respondent did not need to re-execute the order for possession by making any application to renew the execution order of possession after the 17th July 2014 because he was already in possession as mortgagee in possession. He was entitled to seek to restrain any subsequent trespass of the lands by the appellant, and this is what was sought to be achieved by his motion to the High Court for injunctive reliefs as sought in his notice of motion issued on the 15th January 2016, and which resulted in the order of the High Court (Twomey J.) dated 5th July 2017 which is the subject of appeal herein (Appeal 388/2017). In view of the evidence of trespass before the High Court, the trial judge was entitled to, and was correct to, make the orders which he made.

32. The appellant's submission that the respondent had to have renewed the execution order of possession before he was entitled to obtain the further injunctive reliefs which he sought in his notice of motion is simply wrong, for the reasons I have explained. The receiver was already in possession and the appellant was a trespasser. If the appellant, as he has submitted, had any issue with the lawfulness of the underlying loan, either because of the rate of interest charged under same, or because of any breach of his rights under Consumer law, and he wished to have an opportunity to raise these issues, the time for doing so was when the respondent sought an order for possession on foot of the special summons issued for that purpose, and when that application was before the High Court (Dunne J.) on the 20th November 2006. As that order shows, the defendant did not appear on that application, and therefore no such issues were raised by him. Neither did he appeal the order for possession.

33. For the reasons explained above, I would uphold the order of the trial judge made on the 5th July 2017 granting the reliefs sought at paras (i) to (iii) of the notice of motion dated the 15th January 2016, and dismiss the appeal against it.

34. For the same reasons appearing above, I am satisfied that the trial judge was correct to dismiss the appellant's motion issued on the 14th March 2017 seeking to dismiss the respondent's special summons proceedings (Record No. 2006/245 SP) and for a declaration that the respondent has no valid order of possession/execution order.

35. For these reasons I would dismiss both appeals.