[2018] IEHC 339

THE HIGH COURT

2017 No. 372 CA

Between:

PERMANENT TSB PLC FORMERLY IRISH LIFE AND PERMANENT PLC

PLAINTIFF

– AND –

DAVE O'CONNOR AND MARIANNE O'CONNOR

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 11th June, 2018.

1. On 13th December, 2017, the Circuit Court made an order for possession against the defendants. On 21st December, 2017, the defendants lodged an appeal against that order and the matter duly came on for hearing last month. Before the court heard the substance of the appeal, the defendants raised what is in effect a preliminary objection to the appeal proceeding at this time. The defendants maintain that the facility letter, the alleged breach of which ultimately underpins the application for possession, was not in evidence before the Circuit Court, that Permanent TSB, despite purporting to exhibit the applicable facility letter before the Circuit Court failed properly to do so. In this regard the court notes that:

> – in a verifying affidavit sworn on 27th February, 2015, in the context of the Circuit Court proceedings, an officer of Permanent TSB avers that she has exhibited, as Exhibit 'B' a facility letter of 22nd May, 2006. However, Exhibit 'B' starts at page 1, appears to end at page 3 and is missing page 2.
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> – in an affidavit sworn on 4th December, 2017, in the context of the Circuit Court proceedings, an officer of Permanent TSB avers that she has exhibited, as Exhibit 'C', a facility letter of 4th May, 2008. Exhibit 'C' is the wrong facility letter (and averred to have been such in an affidavit sworn by an officer of Permanent TSB on 12th February, 2018).

2. It is only in an affidavit sworn on 12th February, 2018, in the context of the Circuit *Appeal*, that an officer of Permanent TSB avers that exhibited to the affidavit of 4th December 2017 had been a facility letter of 4th May, 2006 (in fact that earlier affidavit stated itself to exhibit, and exhibited, a facility letter of 4th May, 2008) but that it had always been intended to exhibit a facility letter of 22nd May, 2006, with "*the full three page Facility Letter*", it is averred, being exhibited as exhibit A. Even in this belated effort to get things right, Permanent TSB attaches seven pages of documentation (not three), though three of the pages do appear to comprise the facility letter that it was sought to exhibit before the Circuit Court but which was never properly in evidence before the Circuit Court.

3. The defendants make a relatively simple contention which is as follows. Within our court system, in proceedings commenced before the Circuit Court, parties typically get two chances to make their respective cases. They get an initial trial before the Circuit Court on such evidence as is properly before that court. A party to such proceedings who considers that s/he or it has one or more grounds of appeal, has a right of appeal to the High Court where a de novo hearing is undertaken. Following such *de novo* hearing, matters typically end. There is no further appeal as of right, though there can be onward reference of a question of law. In the within proceedings, the defendants contend that the evidence placed before this Court (the facility letter) was not properly in evidence before the Circuit Court and thus that they are only getting one chance to put their case across, with no right of appeal if this Court decides matters in a way that the defendants consider to be in error.

4. Permanent TSB does not dispute what has occurred but points to the complaint now made as being lately made and contends that it is appropriate that the appeal should now proceed.

5. The court accepts the contention made by the defendants. If one looks back over the span of time, the courts (before and since Independence) have always been particular about granting possession orders. This is not because of some lawyerly desire to be pernickety, but because of a proper appreciation (historical and continuing) by the courts as to the significance of what is being sought of them in an application for a possession order. A person who comes to court seeking a possession order is asking a court to bring the coercive power of the State to bear in removing property from the possession of one person and giving it to another. In our system, with its due respect for property rights, that is a greatly serious task and one that has always been and continues to be treated by the courts with great seriousness. The very least that a financial institution must do if it seeks a possession order is to ensure that it has its evidence in order; the very least that a trial court must do is to provide judgment solely on the basis of such evidence as is properly before it; and the very least that the High Court must do in terms of Circuit appeals is to ensure that it offers and undertakes a *de novo* hearing of a case previously heard, and that it is not acting as a court of entirely first instance adjudging for the first time on evidence of critical significance in terms of the relief initially sought in the Circuit Court.

6. The complete facility letter was never properly in evidence before the Circuit Court. It appears now to be in the evidence that is before this Court. However, if this Court now proceeds to hear what purports to be an appeal, the result will be that the defendants will only get one 'outing' in terms of having matters fully and properly heard, rather than two. That is less than they are entitled to. In all the circumstances, the court considers that the most appropriate way for it to proceed is to remit the within proceedings for hearing before the Circuit Court on the basis of such evidence as is then properly before that court and will so order.