THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 119

Record No. 2014/642

Peart J
Edwards J
McGovern J

BETWEEN/

IRISH BANK RESOLUTION CORPORATION LIMITED (FORMERLY IRISH NATIONWIDE BUILDING SOCIETY)

PLAINTIFF/RESPONDENT

- AND–

PATRICK RAFTERY AND PATRICIA RAFTERY

DEFENDANTS/APPELLANTS

- AND –

MARS CAPITAL IRELAND DAC PLC

NOTICE PARTY

JUDGMENT of Mr. Justice McGovern delivered on the 12th day of April 2019

1. The second named appellant ("the applicant") has brought a motion pursuant to O. 86A, r. 4(c) of the RSC seeking the special leave of the Court for the admission of new evidence in the above entitled appeal.

2. The application is grounded upon the affidavit of Mr. Donal Keigher, the solicitor for the applicant who says at para. 3 of his affidavit:-

> "I say that during the period since trial from the 31st day of July, 2012 to the 20th of December, 2018 I was handed some documents and letters received by my client and addressed jointly to her and her spouse, P.J. Raftery, including among others, three letters from John J. Quinn & Co. Solicitors dated the 3rd day of January, 1995 referring to and enclosing a copy letter from the Irish Nationwide Building Society dated the 23rd December, 1994 together with copy letter dated the 28th August, 1995, and subsequent reminders dated the 12th September, 1995 and the 5th October, 1995 respectively…"

3. He states that in the High Court the transfer of the family home into the joint names of the appellants was represented by the respondent to have occurred on the 12th November, 1992 although no evidence was led by the plaintiff/respondent to prove the date of transfer.

4. Mr. Keigher avers that from reading the correspondence from John J. Quinn & Co. Solicitors referred to, that it appears the deed of transfer was not signed until some date in 1995 and back-dated to the 12th November, 1992. Subsequently, the deed of transfer was lodged on the 27th November, 1995 in the Land Registry in Roscommon under dealing reference number 95CRO6834 and registered in December of that year. He states that these documents supported the respondent's application for possession of the appellants' family home in Roscommon.

5. In para. 6 of his affidavit he states:-

> "I say and believe from a reading of the document at exhibit "C" herein being copy Folio 1769 County Roscommon, it appears now the registration of the deed of transfer into the joint names did not pre-date the registration of the mortgage. I say that I did not take over the original file of John J. Quinn & Co. Solicitors, Longford when consulted by my client in July 1996 with a view to protecting her own interest in the family home and due to the imminent threat of dispossession. I say that J.J. Quinn and Co. continue to act for Patrick Raftery, the first named appellant and continued therefore to hold the original file. Therefore, I was not aware and could not be aware of the contents of the original file including the said letters above referred to at exhibit "A". I, this Deponent believed the plaintiff/respondent's representation that the deed of transfer and mortgage were executed on the 12th November, 1992."

6. In para. 7 of his affidavit he goes on to state that the correspondence and documents referred to demonstrate that the deed of transfer was executed subsequent to the mortgage and he requests this Court to admit these documents as new evidence.

Admittance of additional evidence on appeal

7. Since appeals are conducted on the basis of the hearing in the Court below and the evidence adduced there, appellate courts will be slow to admit additional evidence at the hearing of an appeal. It will only do so in special circumstances. In the first place the appellate court has to determine whether the evidence is, in fact, "new" or whether it existed at the time of the trial and could have been discovered by the exercise of reasonable diligence.

8. In *Murphy v. Gilligan* [2014] IESC 43 at para. 4.1, Clarke J. stated:-

> "…A party to any litigation is required to make its case at the court of trial. While it is acknowledged in the jurisprudence

that there may be circumstances where the justice of the case requires that new evidence be permitted to be considered by an appellate court, it would be a recipe for procedural chaos and great injustice across a whole range of cases, if parties could easily run their case and, having lost it, seek to introduce new evidence on appeal."

9. In *Fitzgerald v. Kenny* [1994] 2 I.R. 383 the Supreme Court held that fresh evidence would be admitted when to refuse it would affront common sense or a sense of justice. (*per* Blayney J. at 398). In that case the new evidence only came into existence after the trial.

10. The applicant has not sworn an affidavit in support of this application but relies on the evidence of her solicitor. The affidavit of Mr. Keigher is remarkably vague as to when the evidence sought to be introduced first became available. The judgment which is the subject of the appeal was delivered on the 9th August, 2012. He states that "…during the period since trial from 31st day of July 2012 to the 20th December 2018…" he was handed the documents which he now seeks to adduce as "new" evidence. Those dates amount to a span of almost six and a half years. When one examines the correspondence from Mr. John J. Quinn much of it is addressed to both appellants who were his clients at the relevant time.

11. No satisfactory explanation has been offered as to why the applicant could not have obtained this evidence for use at the trial. Mr. Keigher filed a notice of change of solicitor on the 9th February, 2005 having been appointed the applicant's solicitor for the purpose of the proceedings. On the 25th August, 2008 an amended defence and counterclaim on behalf of the applicant was filed in which the effect of the mortgage was called into question. The Court would have expected that Mr. Keigher in his affidavit would exhibit correspondence between him and Mr. Quinn seeking copies of all relevant correspondence and documents in the period leading up to the trial. As no such correspondence has been exhibited the Court can only conclude that it does not exist.

12. It is clear that any of the documents now sought to be admitted were available at the time of the hearing before Hedigan J. and could have been obtained by reasonable diligence. On the 10th September, 2004 the respondent served a notice to admit documents on the appellants in which it was sought to admit the original of the indenture of mortgage made between the appellants and the respondent. The same notice sought admission of copies of documents set out in a schedule which showed that a transfer dated the 12th November, 1992 was filed in the Land Registry on or about the 29th November, 1995. When Mr. Keigher took over carriage of the applicant's defence he and his client would have had access to these documents.

13. The "new" evidence now sought to be admitted would involve the applicant making a significantly different case to that which was made in the High Court. Its admission would involve an enquiry as to the date of execution of the mortgage and the implications of the alleged execution of the deed of transfer after the execution of the mortgage. Such matters could not be dealt with by this Court but would necessarily involve sending the matter back to the High Court (where witnesses would be cross-examined) in circumstances where judgment was delivered as long ago as the 9th August, 2012 and the motion to admit new evidence was filed on the 20th March, 2019. That would give rise to a wholly unacceptable situation.

14. The power of the Court to permit new evidence is discretionary. The following facts are relevant to the exercise of the Court's discretion:-

(1) The evidence is not "new" and was discoverable by the exercise of reasonable diligence prior to the trial.

(2) No satisfactory explanation has been given for the delay in bringing the application to adduce new evidence and the failure to seek it from the former solicitor of the appellants.

(3) The loan which underlies the High Court proceedings is dated the 18th December, 1991 and the special summons commencing these proceedings was issued on the 28th March, 1996 which is twenty-three years ago.

(4) The judgment of the High Court was delivered on the 9th August, 2012, six and a half years before this application was brought to adduce new evidence.

15. Counsel for the applicant on this motion has informed the Court that she is not relying on a defence of *non est factum*. The appellants accept they signed the mortgage relied on by the respondent. Indeed, the correspondence between Mr. John Quinn solicitor and the appellants exhibited in the affidavit of Mr. Keigher establishes clearly that it was the intention of the appellants to have the family home put in joint names, and that there would be a deed of transfer and a mortgage deed executed. Furthermore, the loan offer dated the 28th November, 1991 was in the form of confirmation of "mortgage facilities" which was signed and accepted by the appellants and provided for the creation of a mortgage of the appellants' bar and family home as security.

16. Weighing up all these factors, the absence of special circumstances shown in the affidavit of Mr. Keigher and the absence of any affidavit from the applicant herself, I would refuse the application of the second named appellant to admit new evidence and direct that the appeal must proceed on the basis of the evidence before the High Court judge.