



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 268

Record No. 2017/32

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

BETWEEN/

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF /

RESPONDENT

- AND -

GEORGE PAUL WATT AND MARY ANNE WATT

DEFENDANT/

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of July 2018

1. The substantive appeal with which this court is engaged is one brought by Mrs. Mary Anne Watt against an order of the High Court (Eager J.), made on the 28th November 2016. The effect of the said order was to bring to an end Summary Summons proceedings that had been instituted by Danske Bank ("the bank") against Mrs Watt and her husband.

2. The principal relief that had been sought by Mrs. Watt in her application to the High Court was an order to set aside a notice of discontinuance which had been served by the Bank on the 7th January 2016.

3. Before this Court also, is a motion dated the 18th April 2017 wherein Mrs Watt seeks, *inter alia*, extensive discovery against the bank. However, unless Mrs. Watt can establish that the High Court judge erred in law in failing to set aside the bank's notice of discontinuance, her motion for discovery must fall away. This is because orders for the discovery and inspection or for the production of documents are only made when necessary and relevant for the purpose of resolving issues in dispute in proceedings pending before the court. It follows that unless there are live proceedings involving live issues, there is no basis for a court engaging upon any such application.

Background facts

4. To decide the substantive appeal, it is necessary to consider the relevant background facts.

5. The within proceedings were commenced by summary summons dated the 5th November 2013. The bank's claim was for summary judgment in the sum of €239,722.85 which it claimed was lawfully due and owing on foot of a term loan facility granted to Mrs. Watt and her husband by National Irish Bank further to a facility letter dated the 7th September 2004. That loan was apparently secured by a deed of mortgage dated the 16th June 2005 in respect of a property situate at 12, Sandymount Drive, Wilton, Cork. The relevant loan account number was stated to be 95165370093483.

6. Prior to the issue of these proceedings, in a letter of demand dated the 17th January 2013, stated to be in respect of a/c No. 95165370093483, Mrs. Watt was advised that Danske had become the successor in title to National Irish Bank by virtue of a scheme approved by the Minister for Finance under the Central Bank Act 1971.

7. By further letter dated the 13th March 2013, sent by Peter Morrissey & Co. solicitors, Mrs. Watt was notified of the appointment of a receiver on foot of the aforementioned deed of mortgage on the 16th June 2005. The deed of appointment is dated the 26th February 2013.

8. Danske issued its motion seeking liberty to enter final judgment against Mrs. Watt in January 2014. At that time, the sum in respect of which judgment was claimed was the same as that referred to in the summary summons. However, in an affidavit sworn by Ms. Sharon Keenan, on behalf of the bank in March 2014, the sum claimed was adjusted downwards to take account of the net proceeds of sale of the property at 12, Sandymount Drive, Wilton, Cork which Danske maintained it had sold since the commencement of the proceedings. The result of the sale was to reduce the sum claimed by the bank to a sum of €24,817.

9. There followed an exchange of affidavits, with Mrs Watt swearing five affidavits in which she raised a myriad of objections to the bank's claim and demanded sight of a wide range of documents which she considered material to the bank's claim.

10. When the motion for summary judgment finally came before the Deputy Master on the 23rd July 2015 counsel for the bank applied to have the motion and action struck out with no further order. The deputy master apparently refused that application and instead adjourned the motion for judgment generally with liberty to re-enter.

11. On the 7th January 2016 the bank filed a notice of discontinuance of the proceedings. It would appear likely that this was a pragmatic response given the modest sum that remained outstanding and the extent of Mrs Watt's wide-ranging attack on the validity

bank's claim.

12. One might perhaps have expected that Mrs Watt would have been pleased that the bank had decided not to pursue her further for the sum which it considered remained outstanding, particularly in circumstances where the service of a notice of discontinuance rendered the bank liable to her in respect of her expenses of defending the proceedings up to the date upon which the notice was filed. However, rather than accept the approach adopted by the bank in its efforts to bring the proceedings to an end, she brought a motion dated the 9th June 2016 seeking to have the notice of discontinuance set aside. She also sought leave of the court to issue a notice of motion and grounding affidavit dated the 7th June 2016 and to have a date assigned to the hearing of that motion. That motion sought to compel the bank to produce various deeds and documents.

13. In her affidavit grounding her application to set aside the notice of discontinuance Mrs Watt maintained that she was neither served with nor contacted about the notice of discontinuance. She maintained there was no affidavit of service on the court file and she had not consented to the discontinuance of the proceedings. Mrs Watt also claimed that the bank needed her consent or alternatively the leave of the court to discontinue the proceedings. She further challenged the validity of the notice of discontinuance on the basis that it had not been signed by a solicitor. These were but a number of the factors relied upon by Mrs Watt when the deputy master refused her application to set aside the notice of discontinuance. The deputy master also refused to application to list her proposed motion dated 7 June 2016.

14. Mrs Watt, by notice of motion dated 11 July 2016, sought to set aside the order made by the Deputy Master and also her refusal to list her notice of motion dated the 7th June 2016 for hearing. That application was heard by Mr Justice Eager on the 28th November 2016.

15. By his order of the 28th November 2016 the High Court judge refused the relief sought in the notice of motion of the 11th July 2016 and he struck out the proceedings. It is from this order that Mrs Watt now appeals.

The Appeal

16. The onus is on Mrs Watt to establish that the High Court judge erred in law in refusing to set aside the notice of discontinuance. Unless she is successful in that regard her motion, to which I have earlier referred must fail.

Mrs Watt's Submissions

17. In the course of her written and oral submissions Mrs Watt has advanced a multitude of reasons why she contends this court should set aside the bank's notice of discontinuance and oblige it to continue with its proceedings.

18. The following is by no means an exhaustive list of the grounds advanced by Mrs Watt in support of her appeal. Mrs Watt contends:

- (i) that the summary summons was not properly served. It was dropped through her letter box;
- (ii) there was no valid legal process before the High Court;
- (iii) she never had any contractual relationship with Danske;
- (iv) the receiver/receivers were appointed illegally without a court order and without her consent;
- (v) the bank's affidavits concerning the sale of her property were not credible;
- (vi) the property the subject matter of the mortgage has not been sold, as contended for by Danske;
- (vii) National Irish Bank did not lawfully transfer her mortgage or her loan to Danske;
- (viii) the bank suppressed evidence;
- (ix) she never had a loan account bearing number 95165370093486 (my emphasis), accordingly the bank could not establish its claim;
- (x) one of the affidavits sworn on behalf of the bank had not been stamped;
- (xi) her rights under the data protection legislation had been breached;
- (xii) the letter of demand sent by Danske was invalid as she never had any agreement or contractual dealings with Danske;
- (xiii) Danske was seeking to dismiss its own claim because it was not in a position to prove its case. This should not be permitted. There had to be accountability on the part of Danske for maintaining the claim which it had advanced and couldn't prove;
- (xiv) the notice of motion seeking liberty to enter final judgment did not include her address and was invalid;
- (xv) she had not been served with the notice of discontinuance. She had obtained a copy of it from the central office;
- (xvi) the notice of discontinuance was invalid because it was not signed, and
- (xvii) the notice of discontinuance was invalid because it was served without her consent and without a court order.

The Respondent's submissions

19. Counsel for the bank submits that in circumstances where Mrs Watt had not delivered a defence to the proceedings, there was no need under Ord. 26 of the Rules of the Superior Courts for it to obtain her consent or the consent of the court to discontinue the proceedings.

20. Counsel accepts that if the proceedings had been referred to a plenary hearing and a defence had been delivered, the bank would have required Mrs Watt's consent or alternatively the approval of the court in order to discontinue the proceedings. He also accepts that had a counterclaim been filed that the service of a notice of discontinuance would have had no effect on that counterclaim. However, neither was the case. The application for summary judgment had never been determined.

21. Even if Mrs Watt was not served with the notice of discontinuance, counsel submits that nothing would be achieved if the court were to set aside the notice of discontinuance. The bank could simply serve a fresh notice of discontinuance. If that were to happen Mrs Watt would still not be in a position to advance the proceedings. Alternatively, the bank might do nothing in which case the proceedings would be left in abeyance and the only remedy available to Mrs Watt would be to seek to dismiss the proceedings for want of prosecution. Either option would close down Mrs Watt's potential to litigate the issues referred to in her submissions. There is no procedure whereby Mrs Watt can force the bank to participate in the type of hearing or inquiry which she would like the court to conduct. Accordingly, if Mrs Watt did not receive the notice of discontinuance, she cannot establish any prejudice due to the non-service of the notice. That being so, this court should not set aside the notice of discontinuance or interfere with the High Court order

22. Finally, counsel submits that if it if Mrs Watt wishes to raise issues concerning the validity of the appointment of the receivers or other like issues, she would have to do so in the context of separate proceedings.

Discussion and decision

The relevant rule

Order 26

23. The relevant part of Ord. 26 of the rules of the Superior Courts provides as follows:-

"The plaintiff may, at any time before receipt of the defendants defence, or after the receipt thereof before taking any other proceeding in the action, by notice in writing in the form number 20 in appendix C, wholly discontinue his action against order any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendants costs of the action, or, if the action you not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed."

24. On the facts of this case, at the time the bank filed its notice of discontinuance, Mrs Watt had not filed a defence to the proceedings. Not only had a defence not been filed, but the proceedings which had been brought by way of summary summons had not even been remitted to a plenary hearing.

25. It is true to say that Mrs Watt had filed five affidavits setting out the matters she had hoped to rely upon by way of defence to the banks claim if the proceedings had been remitted to a plenary hearing, but the proceedings never got that far. For the purposes of Ord. 26, the replying affidavits which she filed in response to the bank's application for summary judgment cannot be treated as a defence. That being so neither her consent nor the consent of the court was required to permit the bank discontinue these proceedings subject of course to its obligation to discharge the defendant's expenses incurred in meeting the claim up to the date upon which the notice was filed.

26. Order 26 makes clear that the notice of discontinuance should be in writing and in accordance with Form No. 20 in appendix C of the Rules of the superior Courts. It is clear from a perusal of that Form that the notice is to be addressed to the defendant against whom the action is to be discontinued and should be signed. It follows that a plaintiff who wishes to discontinue their proceedings must serve the notice of discontinuance so that the defendant may know of their action.

27. In my view, there is no reason for this court to treat as otherwise than truthful Mrs Watt's statement that she did not receive the notice of discontinuance, particularly in light of the fact that the notice does not contain her full address, omitting as it does "43 Southbury Road". The notice refers to her address as Summerstown, Wilton, Co. Cork rather than 43 Southbury Road, Summerstown, Wilton, Co Cork, the address on all of the other legal documents in the proceedings. I would also observe in passing that, contrary to the submission made by Mrs Watt on this appeal, the notice of discontinuance is in fact signed by the solicitors on record for the bank. I will shortly return to consider the consequences, if any, that flow from the bank's failure to serve the notice of discontinuance on Mrs Watt.

28. Before I do so however, I consider it necessary to address very briefly, albeit in general terms, some of the legal issues which Mrs Watt would want the High Court to determine should this court accede to her demand and set aside the notice of discontinuance.

29. Many of Mrs Watt's submissions, whilst undoubtedly reflecting some genuine concerns, afforded her no prospect of successfully defending the bank's claim had it been pursued. For example, any irregularity in the service of the summary summons was cured by the fact that she entered in appearance. Likewise, the minor error on the face of the notice of motion was cured by the fact that Mrs Watt filed a number of affidavits in response to the substance of the banks claim. Whilst an incorrect account number appeared in one of the letters exhibited by the bank, the correct account number appears to have been set out in the summons, the grounding affidavit and in the letter of demand. Accordingly, the error in the correspondence is of simply no import.

30. Clearly, Mrs Watt harbours concerns regarding the circumstances in which the receivers, namely Mr Fergus Lowe and Mr Stephen Tennant, were appointed. Further, she has doubts about the lawfulness of the sale of her mortgage by Danske to Finsbury Circle Nominees, as appears to have occurred. These concerns, and many of the others that I have earlier referred to may or may not be valid, but, even if they are they are immaterial in the context of the bank's application for summary judgment. They could not afford her a defence to that claim and are at best matters that she might litigate in separate proceedings brought by her against the bank and/or the receivers.

31. It is unnecessary to discuss, *seriatim*, the other issues which Mrs Watt believes she would be entitled to pursue in the context of these proceedings if this court were to set aside the notice of discontinuance, because that is to ignore the legal reality of her situation. If this court were to set aside the notice of discontinuance by reason only of the fact that the bank could not prove service of the notice, the issues which Mrs Watt has sought to rely upon in her submissions will never be determined by the court in the context of these proceedings.

32. There are two possibilities as to what might occur should this court set aside the notice of discontinuance. The first is that the bank would serve a fresh notice of discontinuance addressed to Mrs Watt at her correct address. In those circumstances there would be no legal or factual basis upon which she could seek to set aside that notice. She would then find herself in precisely the same

position she is at present, namely, that the bank's proceedings are at an end and she is entitled to her outlay and expenses of defending the proceedings up to the date of the filing of the notice of discontinuance.

33. The second possibility is that the bank might decide to do nothing and simply leave the proceedings as they are. If that were to occur there is no procedure available to Mrs Watt to force the bank to take any further action in the proceedings. Her only remedy would be to seek to strike out the proceedings on the grounds of inordinate and inexcusable delay. If successful on that application she would be entitled to her expenses of defending the proceedings up to that date. In that scenario she would find herself in the same position as she is at this point in time.

34. It follows that Mrs Watt would have nothing to gain by this court setting aside the notice of discontinuance. Further, to adopt such an approach would in my view be not only irresponsible but would be contrary to the interests of the proper administration of justice. It would likely cause the parties further expense and inconvenience and would likely adversely impact on the court's own scarce resources.

35. Finally, whilst somewhat loath to do so having regard to the evidence that has been made available on the appeal, it is obviously open to Mrs Watt to pursue any legal issues which she considers are viable in the context of other proceedings in which she would be the plaintiff.

Conclusion

36. For the reasons earlier stated I am satisfied that the High Court judge acted within jurisdiction and in accordance with his discretion when he refused to set aside the notice of discontinuance. Whilst it was perhaps unnecessary for him to strike out the proceedings, the fact that he did so was neither irregular nor prejudicial.

37. Given that I am satisfied that the high court judge did not err in law in refusing to set aside the notice of discontinuance or in striking out the proceedings, it follows that there can be no basis for Mrs Watt's application for discovery/disclosure. For these reasons I would dismiss her appeal and would also strike out her motion for discovery/disclosure.