THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 117

Record No. 597/2015

Irvine J.
Hogan J.
Hedigan J.

BETWEEN/

DANSKE BANK A.S. (TRADING AS DANSKE BANK)

PLAINTIFF / RESPONDENT

- AND -

MICHAEL MACKEN AND PATRICIA WATSON

DEFENDANTS/ APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 5th day of April 2017

1. In what circumstances should the High Court be prepared to countenance exercising its own set aside jurisdiction under Ord. 36, r. 33? This is the issue which is presented on this appeal from the decision of Cross J. on 7th December 2015 whereby he refused to entertain the defendants' application to set aside an earlier judgment of 2nd November 2015 on the ground that he was *functus officio*. At the hearing of the appeal on 23rd March 2017 the Court announced that it would allow the defendants' appeal and would remit the matter to the High Court for a determination of this issue. The Court also indicated that it would set out its reasons in written form at a later date. I now set out these reasons in this judgment.

The Background to the Application
2. Ord. 36, r.33 provides that:

> "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court, upon such terms as may seem fit, upon an application made within six days after trial."

3. In the present case the plaintiff Bank had commenced special summons proceedings against the defendants (who are husband and wife) on 3rd January 2013 seeking possession of the plaintiff's family home in Co. Roscommon. The couple represent themselves in person, but it is probably fair to say that Mr. Macken has undertaken responsibility for the defence of the proceedings on behalf of both defendants.

4. Following a lengthy exchange of affidavits and some sixteen appearances by Mr. Macken in person before the High Court on a variety of occasions, the hearing of the Bank's application for possession was scheduled to come before the High Court for hearing on 2nd November 2015. On that occasion, however, there was no appearance by or on behalf of the defendants at the first calling of the list and the matter was put back until the afternoon. When the matter was ultimately called, the hearing proceeded in the absence of the defendants. After a ten minute hearing and having heard from counsel for the Bank, Cross J. made an order for possession of the defendants' family home, together with a stay on that order for a three month period.

5. How, then, did it come to pass that the defendants were not present at that hearing? As it happens, the evidential material concerning this issue which is before the Court is rather sparse. In a subsequent affidavit sworn on 9th November 2015 Mr. Macken deposed to the fact that he was unable to attend the High Court on the 2nd November due to what he described as a "major personal difficulty" and he stated that he sent an email to the solicitor for the Bank requesting an adjournment. As it happens, the solicitor in question was on vacation on that day, 2nd November 2015, and she only received the email on the following day.

6. The only independent evidence offered by Mr. Macken in support of this claim of a "major personal difficulty" is a letter from his general practitioner dated 10th November 2015 which states, somewhat laconically, that this was "to confirm that this patient attended here at the surgery" at a particular location in Co. Offaly on 2nd November 2015. This letter does not even state in terms that Mr. Macken received treatment on the day in question, still less state the nature of his medical condition on the day in question. Before this Court Mr. Macken maintained that his medical practitioner had concluded that he was in no fit state to attend court on 2nd November 2015. The transcript of the digital audio recording of the hearing of the 7th December 2015 also shows that Mr. Macken informed Cross J. that he had been ill on November 2nd, 2015.

7. Immediately after the hearing on 2nd November 2015, Mr. Macken made contact by email on the following morning with the Bank's solicitor who had now returned to work. He was taken aback and dismayed to learn that a possession order had been made in respect of his family home and he sought the Bank's agreement – which was not forthcoming – to have the possession order set aside. Mr. Macken moved with commendable speed, however, and he applied by motion dated the 9th of November 2015 to have the order made on the previous Monday 2nd November 2015 set aside. As it happens, that motion was issued in time in view of the provisions of Ord. 122, r. 10 which provides:

> "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day."

8. As the time period envisaged in Order 36, r.33 is measured in days, this means that the first day – November 2nd – is to be excluded, so that the six days expired on November 9th, the day the motion was issued.

9. The defendant's principal complaint, however, relates to what happened when the motion came back before the High Court on 7th December 2015. It is accepted by both sides – and borne out by the transcript – that on that occasion Cross J. took the view that he was *functus officio* and that the defendant's only remedy was to appeal the re-possession order to this Court. The following

exchange may be taken as representative as what occurred at that hearing:

> "Judge: …I think that you should go to the Court of Appeal if you're unhappy with what I have done.
>
> Mr. Macken: Okay, so I can take it then you're refusing me the right to bring forward the motion?
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> Judge: Yes, correct.
>
> Mr. Macken: So you're dismissing the motion?
>
> Judge: I am."

10. This exchange, therefore, is at the heart of the defendant's appeal to this Court. He maintains that Cross J. ought to have entertained this set aside motion on the merits and at least considered whether, pursuant to Ord. 36, r.33, the judge ought to have set aside the order in view of the defendant's explanation for his absence on the previous Monday.

The finality of litigation and the doctrine of functus officio

11. There is a clear public interest in the finality of a judicial determination, subject only to an appeal. It is, moreover, generally understood and accepted that where a High Court judge has pronounced judgment in a given matter, that judgment is final and the only remedy open to the disappointed litigant is to appeal. This point is so firmly embedded in our system of civil procedure that it is actually difficult to find direct authority on the point.

12. This issue did, however, arise in *U. v. Minister for Justice, Equality and Law Reform* [2011] IERHGC 95, [2011] 1 I.R. 749, even if the context of that decision is quite different from that presented in this appeal. In that case I had delivered judgment as a judge of the High Court upholding the validity of a particular deportation order. After that judgment had been delivered, but before the question of costs or the grant of a certificate of leave to appeal to the Supreme Court pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 could be considered, the applicant applied to me to amend the pleadings so to permit the constitutionality of s. 3(1) of the Immigration Act 1999 (*i.e.*, the sub-section providing for the deportation power in the first place) to be challenged.

13. I rejected that argument, saying that I was functus officio in the matter so far as the validity of the deportation order was concerned:

> "In my view, however, these proceedings are no longer current before me. I accept that the order still remains to be perfected and, as we have noted, the issues of costs and a certificate remain outstanding. But the proceedings so far as they concern the validity of the deportation order have been disposed of by this Court and they cannot be said to be current in any real or meaningful sense. It follows, therefore, that I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am *functus officio* on that very issue. It is true that, in the event that the appropriate certificate for leave to appeal was given and there was an appeal to the Supreme Court, that Court would have a jurisdiction to amend the pleadings, but this power would derive from Ord. 58, r.2 and not from Ord. 28, r.1."

14. Such is clearly the general rule. But Ord. 36, r.33 may, however, be regarded as a minor derogation from that rule, designed as it is to deal with the special contingency of where a litigant, whether by reason of oversight or what amounts to *force majeure*, is prevented from actually attending court on the day in question. Every legal practitioner has had experience of where – whether through oversight, listing difficulties, transport failures, sudden indisposition or a medical or family emergency – a litigant went unrepresented and judgment was entered against them in their absence. Order 36, r. 33 is designed to deal with these types of difficulties and to ensure that justice is fairly done as between the parties where events of this kind occur. In particular, it allows the trial judge to set aside the judgment (on terms, if needs be) and proceed to determine the matter where both sides are represented without the necessity for an actual appeal.

15. It is, of course, important to stress that a party who deliberately elects not to participate at a particular hearing may not invoke r. 33, at least in the absence of quite particular extenuating circumstances. If it were otherwise, then as Leggatt L.J. observed in *Shocked v. Goldschmidt [1*998] 1 All E.R. 372, 382:

> "….a party who chose not to be present at trial could afterwards change his mind and provided that he was prepared to pay the costs thrown away could always procure a rehearing of the matter, however much time of the court had been wasted by his decision, whatever the inconvenience to his opponent and however little his own conduct merited indulgence. That is not the law."

16. In *Shocked* Leggatt L.J. also observed ([1998] 1 All E.R. 372, 381):

"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."

17. In that case a former agent had sued a musician for breach of contract. Although the defendant was aware of the proposed hearing date, she did not take steps to apply for an adjournment. She had admittedly encountered difficulties with her solicitors and in the lead-up to the trial she was on tour in Australia. The case then proceeded for four days in her absence and judgment was given against her. Ms. Shocked then applied almost one year later under the equivalent provisions of Ord. 36, r. 33 which were contained in the English Rules of the Supreme Court. She was successful in this application at first instance, but the English Court of Appeal took a different view of the matter and allowed Mr., Goldschmidt's appeal against the successful set aside order.

18. Leggatt L.J. stressed that Ms. Shocked had deliberately elected not to attend the trial; that she had no real prospects in any re-trial; that she had delayed in setting the judgment aside; that her conduct both before and after the judgment had been undeserving; that the other party would be incommoded by a re-trial and that it had been estimated that any further re-trial would take another ten days. Leggatt L.J. stressed that in these circumstances it would not be right to set aside the judgment.

19. These principles were applied by Dunne J. in *Nolan v. Carrick* [2013] IEHC 523, another case where the defendant had deliberately absented himself from his trial. As Dunne J. explained:

> "It seems to me that the purpose of Ord. 36, r. 33 of the Rules of the Superior Courts is not to deal with circumstances such as those which arose in this case. This is not a case of inadvertence, mistake or surprise. It is not the case that the

> defendant was unaware of the fact that the proceedings were in a list for hearing. As I have said, it appears that a deliberate decision was made by the defendant not to attend court. The defendant did not instruct a new solicitor to attend court, even for the purpose of renewing the application for an adjournment, nor did anyone else, such as a family member, attend court on behalf of the defendant. Therefore it seems to me Ord. 36, r. 33 of the Rules of the Superior Courts, is not applicable to the facts of this case. Order 36, r. 33 is there to avail those parties who by accident or mistake or for some similar reason were not aware of the trial date and consequently suffered a judgment being given in their absence. In the circumstances of these cases, I refuse the application pursuant to Ord. 36, r. 33 of the Rules of the Superior Courts.
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> For the sake of completeness, I would add that I do not think there is any doubt but that the court could enlarge the time for making an application pursuant to Ord. 36, r. 33 of the Rules of the Superior Courts in appropriate circumstances. Given that I am not satisfied that this is an appropriate case in which to grant an application pursuant to Ord. 36, r. 33, it is not necessary to consider whether or not it would have been appropriate to extend the time within which to bring the applications herein."

20. If one applies these principles to the present case, it can be seen that Mr. Macken's application for a set aside order should at least have been entertained on its merits by the High Court. He had, after all, moved immediately to have the order set aside and it cannot be said, for example, that the inconvenience to the Bank from the re-hearing of a matter which was a ten minute hearing heard on affidavit puts Mr. Macken's case into the same category of the four day action which was at issue in Shocked. Most importantly of all, if, moreover, his explanation for his absence were to be accepted – namely, that he was prevented by illness from attending and that he had endeavoured to communicate this to the Bank's solicitor by e-mail that morning – the case would have come within the rubric of Ord. 36, r. 33, although this is not to say that the Court would necessarily have set aside the first judgment.

Whether there was an estoppel by election on the part of the defendants?

21. It is true that, as counsel for the Bank, Mr. Neuman, observed, Mr. Macken had immediately appealed the first decision of Cross J. to this Court. This was, of course, in addition to the application which he sought to make pursuant to Ord. 36, r. 33. The plaintiff Bank accordingly contended that the lodging of a right of appeal amounted to an election for this particular remedy and that in view of that election he could not now be heard to object to Cross J.'s treatment of the Ord. 36, r. 33 issue at the second hearing on December 7th, 2015.In effect, the argument was that Mr. Macken was estopped by his conduct in now seeking to have the judgment set aside pursuant to Ord. 36, r. 33.

22. It is true that a litigant is normally bound by a knowing election in the course of a trial and cannot thereafter pursue a remedy inconsistent with that election: see, *e.g., Corrigan v. Irish Land Commission* [1977] I.R. 317 and The State (Byrne) v. Frawley [1978] I.R. 326. Both of those cases concerned the deliberate election on the part of the litigant in question to object to the regularity of one aspect of the hearing or even – as in the case of *Byrne* – the constitutionality of the manner in which a particular jury had been empanelled during a criminal trial. In both cases the litigants elected with full knowledge to continue with the hearing and they were later held to be estopped by their conduct from thereafter raising their objections. I do not think, however, that the present case comes with that particular category of election.

23. The defendants' family home was at stake in the proceedings and Mr. Macken was doubtless frantic with worry lest an order for possession of that property might have been made by the High Court in his absence. It was only natural that he would wish to have the judgment set aside in accordance with Ord. 36, r.33. But he equally cannot be faulted for seeking to appeal to this Court the first judgment granting possession to the Bank. Of course, from Mr. Macken's perspective an appeal against the making of a judgment in undefended proceedings was less attractive than having that judgment set aside. Yet if the Ord. 36, r. 33 remedy was not to be available to him, the right of appeal to this Court against the making of the first order was nonetheless better than nothing.

24. Having regard, therefore, to the special facts of this case, the two remedies should be regarded are really complementary rather than – as was the case in both *Corrigan* and *Byrne* - exclusive. In effect, Mr. Macken was saying that in the event that the judgment could not be set aside, it should nonetheless be appealed. In the particular circumstances of this case, this was a course of action which, in justice, he was fully entitled to take. I would accordingly reject the argument that this conduct amounted in the circumstances to an election as between otherwise inconsistent remedies.

Conclusions

25. In all these circumstances, I have come to the conclusion that Cross J. fell into error in failing to consider whether he should have exercised the discretion conferred by Ord. 36, r. 33 and in holding that he was entirely debarred by the *functus officio* doctrine from even considering Mr. Macken's application to have the November 2nd, 2015 order set aside. It is important to stress, however, that since the High Court never came to adjudicate on the merits of that application, it would be inappropriate for this Court to do so by way of appeal or, indeed, to express any view as to how the High Court should now approach this matter. It is sufficient for present purposes to state that it will be now a matter for the High Court to consider afresh this application pursuant to Ord. 36, r. 33 to have the judgment of 2nd November 2015 set aside, aided perhaps by reference to some of the principles and authorities which I have set out in this judgment.

26. I would accordingly allow the appeal and remit the matter to the High Court to consider and determine Mr. Macken's application under Ord. 36, r.33 on its own merits.