THE HIGH COURT

[2013 No. 1833S]

BETWEEN:

BANK OF SCOTLAND PLC

PLAINTIFF

– AND –

EUGENE McDERMOTT

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 15th February, 2017.

I. Key Issue Arising

1. What are the rules applicable as regards setting aside a summary judgment obtained after a hearing at which a defendant neither attends nor is represented, despite having entered a formal appearance?

II. Background Facts

2. Following the service of the summary summons in the within proceedings, Mr McDermott entered a formal appearance on 9th July, 2013. On 22nd July, 2013, Bank of Scotland issued a notice of motion seeking an order directing that the proceedings be entered into the Commercial List of the High Court. That motion had a return date of 29th July, 2013. On the return date, Bank of Scotland turned up in court and Mr McDermott did not. As it happens, this is not an especially common occurrence. Parties can sometimes make it difficult for themselves to be served with papers (and there is no legal obligation on them to make it easy), but once papers are served, a party generally tends to turn up in court on the designated date of hearing and, whether represented or unrepresented by a legal advisor, will seek to be, and will be, heard by the court. In the within proceedings, where the amount which it was sought to recover from Mr McDermott was close on €7m, an amount so great that it would be financially ruinous to demand it of most people, it was perhaps especially unusual that a defendant did not turn up. But Mr McDermott did not turn up. What happened next is recited in the below-quoted extract from the perfected copy of the order made by the High Court (Kelly J.) on that date:

"*And on reading…the Certificate…of Mark Traynor of A&L Goodbody Solicitors* [the solicitor's certificate required under O63A, r.4(2) of the Rules of the Superior Courts required as part of an the application to enter the Commercial List], *the Affidavit of Raymond Tierney* [the grounding affidavit in the summary proceedings, in which Mr Tierney, as it happens, avers in error that he is an employee of Bank of Scotland plc], *the exhibits referred to in said Affidavit, the Summary Summons issued herein, and the Appearance entered thereto*

And on hearing said counsel [*i.e.* counsel for Bank of Scotland] – *there being no attendance in Court by or on behalf of the Defendant.*

And on reading the Affidavit of Paul Kelly [possibly a summons server, though this is not clear from the papers before this Court] *averring as to substituted service of the Motion Papers on the Defendant by prepaid ordinary post and by prepaid registered post*

And the Court noting that the Order of Mr Justice Birmingham made on the 24th day of June 2013 only permitted substituted service of the Summons [so no need for personal service] *on the Defendant*

And on reading the Affidavit of Richard Ballagh [possibly a summons server, though this is not clear from the papers before this Court] *filed on the 26th day of July 2013 as to attempts to effect personal service of the Motion Papers on the Defendant*

And on hearing said Counsel

The Court doth deem the service effected of the Motion Papers on the Defendant to be good and sufficient service in the circumstances outlined in the said Affidavits of Paul Kelly and Richard Ballagh

And the Court being satisfied that these proceedings are commercial proceedings within the meaning of Order 63A Rule 1(a)(i) of the Rules of the Superior Courts

> *IT IS ORDERED that these proceedings be entered in the Commercial List for hearing and that all further applications and Motions be heard in said list*

And said Counsel seeking summary judgment as against the Defendant in in the sum of €6,971,856.49….

IT IS ORDERED AND ADJUDGED that the Plaintiff do recover as against the Defendant the sum of €6,971,856.49 and the costs of these proceedings…".

3. The perfected version of Kelly J.'s order issued on 7th August, 2013. Notably, it was not until 18 months later, by notice of motion of 23rd February, 2015, that Mr McDermott issued a notice of motion seeking from the High Court (i) an order extending the time for Mr McDermott to apply to set aside the judgment and order of Kelly J. made on 29th July, 2013, and perfected on the following 7th August, (ii) an order pursuant to O.36, r.33 of the Rules of the Superior Courts and/or the inherent jurisdiction of the High Court setting aside the said judgment and order, (iii) an order granting Mr McDermott leave to defend the within proceedings, and (iv) certain ancillary reliefs.

4. In an affidavit of 23rd February, 2015 grounding this motion, Mr McDermott indicates, *inter alia*, that (a) he was "*mentally and psychologically unwell*" at the time of the July, 2013 application (the court is satisfied from the evidence before it that Mr McDermott was very unwell around this time), (b) the pace of the summary proceedings, with a notice of motion issuing on 22nd July with a return date on 29th July, with the court granting summary judgment on that later date had the result that Mr McDermott was unable to get legal representation and (Mr McDermott alleges) was denied a basic fairness of procedures, (c) that he had a good, unheard defence to the proceedings, being, in effect, that Bank of Scotland's figures were incorrect and that certain evidence purportedly provided to the court under the Banker's Book Evidence Acts was not properly before the court, and (d) the entering of judgment would cause severe and irreversible prejudice to him.

5. As regards whether or not he had received service of the notice of motion of 22nd July, Mr McDermott notes in his affidavit that he had been suffering from poor mental health from July, 2013 continuing through to February, 2015 (which may offer some explanation as to why the set-aside application was a quite long time in issuing), had been in such a poor state mentally in the period May to August, 2013 that he was "*practically a recluse…unable to leave my house for any period, withdrawn from the world, suffering from panic attacks, depression [etc]*". It is necessary to mention this aspect of matters in this little detail (the court has been supplied with more detail) as it offers a credible basis on which Mr McDermott can aver, as he does, that "*I have no recollection of having received* [substituted service of] *the documents*".

6. As to how Mr McDermott can aver that 'I do not remember having received correspondence' and 'There was no time to arrange for legal representation between 22nd and 27th July, 2013', while these may appear at first glance to be somewhat inconsistent (why would one be arranging for legal representation if one had no idea that one was due in court?), what the court understands is being asserted in this regard is that Mr McDermott's level of mental distress around July, 2013 was such that he now has no recollection of having been served, and that even if he had been served and had been well-enough to act, the 7-day interlude between issuance of the bank's motion of the 22nd and the hearing of same was just too tight a timeframe in which he could, in any event, have instructed a legal advisor to appear for him. (It seems to the court that, even in such a short timeframe, it would just have been possible to instruct a solicitor, and for that solicitor to engage with counsel, if necessary, albeit that if solicitor and/or counsel were or was being instructed for the first time, then almost inevitably an adjournment would have been sought on the 29th).

7. Bank of Scotland does not accept that Mr McDermott was as unwell as he claims to have been at relevant times. In an affidavit sworn by a senior manager in its Client Asset Management Division on 12th March, 2015, it is averred, *inter alia*, that "*I do not accept that the Defendant was not in a position to attend in Court at the date that judgment was entered in the within proceedings or at any time since that date and 23 February 2015, the date of the Affidavit sworn by the Defendant in support of his application to set aside the judgment obtained by the Bank*". In fairness, the person who swore that affidavit may not have read the 'Medico Legal Report' of 12th February, 2015, prepared by a distinguished consultant psychiatrist, Dr Abbie Lane MD LRCPSI FRCPsych, and attached as Exhibit 'EMCD 1' to an affidavit that Mr McDermott swore on 23rd February, 2015. The court, however, has read that report. While it is not going to recite the detail of same in this judgment, the report places a rather different colour on matters to that portrayed in the last-quoted averment. If there is suggestion by the bank that Mr McDermott was 'shamming' as to the extent of his ill-health around the time of July, 2013, the court does not accept such suggestion to be credible in the light of Dr Lane's professional report.

8. Mr McDermott's set-aside application came before the High Court (McGovern J.) on 18th May, 2015, and was refused. By notice of appeal, dated 5th August, 2015, that decision was appealed to the Court of Appeal. But when the matter came on for hearing in the Court of Appeal on 21st October, 2016, some difficulties with how matters had proceeded were identified by counsel for Bank of Scotland, who is to be commended for the transparent honesty he manifested in this regard. The difficulties are as follows:

(1) The set-aside motion of 23rd February, 2015, references, *inter alia*, O.36, r.33 of the Rules of the Superior Courts, *viz*. "*Any verdict or judgment obtained where one party does not appear* [*i.e.* physically attend] *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*". But both bank and borrower then approached the set-aside proceedings as though McGovern J., acting pursuant to O.13, r.11, which is concerned with default of appearance, *i.e.* a failure to enter a formal appearance, had refused to set aside a judgment granted by Kelly J. in default of appearance. However, that was not what had happened in the trial court: Mr McDermott had entered a formal appearance on 9th July, 2013, and then neither he nor a legal representative had attended in court on 29th July, with a summary judgment issuing against him in his absence.

(2) Although the pleadings before the Court of Appeal referenced O.36, r.33 of the Rules of the Superior Courts, in fact O.36 is concerned with plenary trials. The hearing of proceedings commenced by summary summons is governed by O.37 and O.37 does not make provision for set-aside applications, with the result that the within set-aside application falls properly to be determined by reference to the High Court's inherent jurisdiction.

9. After hearing submissions in respect of the above-mentioned points, the Court of Appeal expressed discomfort, heightened by the submissions of counsel for Mr McDermott in this regard, at the appropriateness of its hearing an appeal, in circumstances of such uncertainty as to how matters had to that point proceeded, that for the Court of Appeal to continue to adjudication might well have involved its acting as a court of first instance, with the attendant difficulties that would present. Consequently, the Court of Appeal decided to vacate the order of McGovern J. and to have the set-aside application heard anew by the High Court. And so the matter now comes before this Court.

III. The Inherent Jurisdiction of the Court

10. Both parties appear to acknowledge that the court has an inherent jurisdiction to set aside in the circumstances described above, with Bank of Scotland submitting, *inter alia*, in this regard that while "*Order 37 of the Rules of the Superior Courts…does not include an equivalent rule to Order 36, rule 33…the Plaintiff accepts that this Honourable Court must enjoy an inherent jurisdiction of similar parameters*". (Emphasis added). In terms of the principles specifically applicable to applications made under O.36, r.33, the only decision that both counsel have identified as expressly dealing with this aspect of the Rules is the relatively recent decision of Dunne J. in *Nolan v. Carrick; O'Toole v. Carrick* [2013] IEHC 523. However, while counsel for Bank of Scotland places some emphasis on this authority, counsel for Mr McDermott contends in effect that the court should approach the within set-aside application almost as though it were an application made under O.13, r.11. Are counsel right to proceed on the assumption that the scope of the court's inherent jurisdiction in a set-aside application, the substance of which is ungoverned by the Rules of the Superior Courts, is constrained by principles applicable to not entirely analogous set-aside applications, the substance of which is governed by the Rules of the Superior Courts?

11. The shorthand phrase 'inherent jurisdiction' is used to refer to residual powers that the court may draw upon, when it is just or equitable to do so, in order, for example, to achieve such ends as ensuring due process, preventing oppression and doing justice between parties. It has perhaps five key features: it is procedural, not substantive; it is exercised by way of summary process, not trial; it can be exercised against anyone; it is distinguishable from judicial discretion; and, most significantly in the context of the within application, it has traditionally been perceived as conferring powers to which those contained in the Rules of the Superior Courts are additional, not substitutive. This last dimension of the inherent jurisdiction perhaps finds at least partial expression in the oft-quoted maxim that 'the rules of court are the servants of Justice, not her master'. Sometimes conflated are the notions of inherent jurisdiction and inherent powers, but the two are not the same; the court's inherent jurisdiction involves a substantive competence to hear and determine matters; an inherent power, by contrast, is an incidental device whereby the court gives practical effect to its jurisdiction. What constraints exist as regards the exercise of inherent jurisdiction? Perhaps two key principles apply, *viz*. that it is exercised only where necessary and that it has the overriding objective of avoiding injustice. What protections exist to prevent its abuse? It seems to the court that the protections arising are essentially two-fold: the exercise of inherent jurisdiction

must conform with established constitutional and other fundamental legal norms; and the prospect of appeal curtails the possibility of undesirable jurisdictional innovation, at least on the part of courts that are subject to appeal.

12. In terms of established legal principle, it seems to the court that the exercise of inherent jurisdiction which is now sought of it, while it is more akin to an exercise of the power arising under O.36, r.33 than that arising under O.13, r.11 (because O.36, r.33 is concerned with the situation where, at plenary trial, a party does not attend, as opposed to not entering an appearance, whereas O.13, r.11 is concerned with default of appearance, *i.e.* a failure to enter an appearance (which is simply not what happened here)), it is not in fact an application under O.36. In truth, given the absence of any set-aside provision in O.37, the within application involves nothing more than a straightforward application that the court exercise the inherent jurisdiction to set aside a final order which appears originally to have been recognised by the Supreme Court in *Re Greendale Developments Limited (No. 3)* [2000] 2 IR 514. In this regard, Mr McDermott faces a most heavy burden, as is clear, *inter alia*, from the judgment of Dunne J. in *Nolan.* This last-mentioned case involved a set-aside application arising in the context of proceedings in which Mr Carrick deliberately decided not to attend plenary proceedings at which substantial awards of damages were made against him. Because his non-attendance was deliberate, his application under O.36, r.33 was unsuccessful; and a related application to set aside the judgments and direct a new trial on grounds of want of mental capacity to defend was likewise unsuccessful. At paras. 43–44 of her judgment, Dunne J. observed as follows:

> "*43. There is no doubt whatsoever that the circumstances in which a final order of a court can be set aside is limited. Provision is made in the Rules of the Superior Courts for the correction of mistakes. Further, the court itself can amend a final order where it finds that the judgment as drawn up does not correctly state what the court actually decided and intended. In addition, as was mentioned previously, the Rules provide a jurisdiction to set aside a judgment pursuant to the provisions of O. 36, r. 33 of the Rules of the Superior Courts. Further, it has been established that there is an inherent jurisdiction to set aside a final order in exceptional circumstances such as on the basis of bias or fraud or where there has been a breach of constitutional rights. That jurisdiction, as described above, has been set out in a number of cases, such as in* Re Greendale Developments Limited (No. 3) *and* Bula Limited v. Tara Mines Limited (No. 6). *It is also necessary to bear in mind the decision in the case of* L.P. v. M.P. [[2002 1 I.R. 219]
>
> 44. *It is clear that the onus on an applicant seeking to set aside a final order is, to quote from Denham J. in* Re. Greendale Developments Limited (No. 3), *'a very heavy onus'. Further, it is clear that a case will not be re-opened save in the most exceptional circumstances and that a case will only be re-opened where through no fault of the party, he or she has been subject to a breach of constitutional rights. Finally, it is apparent from the decision of the Supreme Court in* L.P. v. M.P. *that this exceptional jurisdiction is not to be exercised in circumstances where there is another remedy available such as an appeal…".*

13. In passing, the court notes that (i) Dunne J. recognised in *Nolan* that the principles applicable to the bringing of applications under O.36, r.33 are distinct from the principles applicable to an application to set aside a final order brought pursuant to the court's inherent jurisdiction, (ii) the principles that she identified as applicable to an O.36, r.33 application seem somewhat less stringent to those applicable under *Greendale* when the inherent jurisdiction of the court to set aside a final order is invoked, and (iii) the consequence of the foregoing and of the application by Dunne J. of the Supreme Court decision in *Greendale*, appears to be that, counter-instinctively, a more stringent burden applies to a person seeking to set aside a summary judgment in circumstances such as those now presenting than had the case gone to plenary hearing and an O.36, r.33 application then been made. If the court is correct in this regard, that seems a proposition that, while legally correct, appears logically flawed.

14. Turning in any event to an application of *Greendale* to the facts at hand, has Mr McDermott identified so basic a flaw in the original summary application in the within proceedings as would justify this Court setting aside the judgment and order that ensued? Three key contentions are made by Mr McDermott in this regard, these being that:

> *(1) Mr McDermott was not duly served with the motion.*
>
> Court Note: Kelly J., as he then was, was fully entitled to conclude on the evidence before him that Mr McDermott had been duly served, and did so conclude. However, the court is now apprised of facts which were unknown to Kelly J., specifically that Mr McDermott was in a state of such poor mental ill-health around July 2013 (to which Dr Lane's medical report, at p.2, lends perfect credence) that he has no recollection now of ever having received service of Bank of Scotland's motion at that time. The general principle in relation to claims *in personam* under Irish law is that service of process is the foundation stone on which the court's jurisdiction rests. While the court does not doubt that the mechanics of service were observed in this instance, with the motion being posted to Mr McDermott's home address, it must admit to the very greatest doubt, given that Mr McDermott does not now recall service of the motion, an upsetting event likely to stick in anyone's memory, that he had notice of the motion in such a manner as to comprehend what was before him, if indeed he ever read it at all. The facts lend support to this conclusion. Is it likely that a man being sued for close on €7m would not speak with a solicitor following service of Bank of Scotland's motion? Is it likely that a man who stands to lose a farm that has been in his family for generations would simply not turn up in court on the day when the debt proceedings that could lead to that eventual loss stand to be heard? Both of these eventualities are, in truth, so *unlikely* that the court accepts that, notwithstanding compliance with the mechanics of service, there was no true notice of the pending motion to Mr McDermott in the unfortunate circumstances presenting, with the result that neither he nor a legal representative appeared in court on 29th July, 2013. Had Mr McDermott and/or a legal representative attended it is quite possible that judgment would still have issued against Mr McDermott. However, in all the circumstances presenting, the court as a court of conscience (and it will be recalled that the equitable jurisdiction of the court has for a very long time embraced the protection of those suffering from mental ill-health) cannot persist in the view that, notwithstanding that service was effected in the manner directed by the court, Mr McDermott in fact had notice of the motion that was heard by Kelly J. on 29th July, 2013.
>
> *(2) Mr McDermott was so "mentally and psychologically unwell" at the time of summary application as to be unable to attend at the summary hearing.*
>
> Court Note: It seems to the court that this is but a variation of (1) and that it need not consider this aspect of matters further.
>
> *(3) the grounding affidavit before Kelly J. was sworn by someone whom it has since been recognised was not competent to swear an affidavit under the Banker's Books Evidence Acts.*
>
> Court Note: It is not strictly necessary for the court to deal with this point, given its conclusions as to jurisdiction at (1).

However, it cannot but note in this regard that it has been clear since at least the time of the decision of Ryan J. in *Bank of Ireland v. Keehan* [2013] IEHC 631 that a bank is not obliged to comply with the Bankers' Book Evidence Acts to prove that a debt is due to itself. Those Acts merely make facilitative provision where a bank is required to produce customer records in court. In the within proceedings, Mr Tierney, though not an employee of Bank of Scotland, was a person within the Bank of Scotland Group who was giving direct evidence as to Mr McDermott's indebtedness following on an analysis of Bank of Scotland's books and records. There is nothing legally wrong with that, nor in a judge relying on such affidavit evidence.

IV. Conclusion

15. In all the circumstances presenting, and for the reasons stated above, the court will accede to the application to set aside the judgment and order of Kelly J. on 29th July, 2013. However, as (i) the mechanics of service previously directed by the court were observed, (ii) Mr McDermott is now entirely aware of the substance of the bank's motion and has had ample time to prepare such arguments as he wishes to make as to why this matter should go to plenary hearing, and (iii) the requirements of justice demand that this matter should proceed swiftly to hearing after having already been a remarkable three times before the High Court and once before the Court of Appeal, the court would propose to set a date for next term when it will itself hear Bank of Scotland's motion for summary judgment, obviously subject to neither party electing, in the meantime, to appeal the within judgment.