THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 95

Appeal Number [2016/418]

Peart J.
Hogan J.
Whelan J.
BETWEEN

CLARE GIBB

PLAINTIFF/

APPELLANT

- AND -

PROMONTORIA (ARAN) LIMITED, BRENDAN HANRATTY

AND DECLAN TAITE

DEFENDANTS/

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 12thday of March, 2018.

1. This is the plaintiff's appeal from the judgment of O'Connor J. delivered *ex tempore* in interlocutory injunction proceedings on 12th July 2016 refusing the injunctive relief sought against Promontoria (Aran) Limited (hereafter "PAL").

Background
2. The within proceedings were instituted by plenary summons dated 25th February 2016 by the appellant. Pursuant to the general indorsement of claim, she sought damages for breach of contract, breach of duty, breach of duty of care, negligence, and breach of fiduciary duty. Further, she sought damages for the alleged illegal and unlawful appointment by PAL of the second and third named respondents as joint receivers over two properties, namely:

i. Clare's Pizzeria, 54 New Road, Clondalkin, Dublin 22 ("the Clondalkin property"); and

ii. Unit 1, 1 – 3 The Coombe, Dublin 8 ("the Coombe property").

2. By notice of motion filed in the High Court on 25th February, 2016 the appellant sought interlocutory relief as follows:-

> "An order of injunction restraining the defendants and all or any of them or their agents from interfering with the properties known as 54 New Road, Clondalkin, Dublin 22 and Unit 1, 1-3 The Coombe, Dublin 8."

3. In 2002, the appellant, who resided in Co. Kildare along with other family members, entered into a loan facility agreement with Ulster Bank secured by a legal mortgage over the Coombe property. In 2006, a further loan facility was entered into, inter alia, to refinance the 2002 facility secured against the Clondalkin property. Further restructuring and re-financing arrangements were entered into in 2007 and 2008, namely, a Demand Loan Facility dated 2nd May 2007 in the sum of €745,000 granted by Ulster Bank to Dudley Gibb, Kevin Gibb and the appellant secured over the Clondalkin property and a Term Loan Facility dated 7th February 2008 in the amount of €498,736.28 granted by Ulster Bank to Mark Gibb and Kevin Gibb secured over the Coombe property. A remarkable feature of the proceedings is that the appellant is not a party to the 2008 Term Loan Facility. She is one of three parties to the 2007 loan agreement. None of the other mortgagors in respect of either loan are a party to these proceedings.

4. The appellant's motion seeking the interlocutory relief as outlined above was grounded on five affidavits. In an affidavit dated 24th February 2016, she deposes that she is one of the co-owners of the Clondalkin property and a party to a mortgage over the Coombe property as described in the plenary summons and that she is a party to two ongoing High Court actions, numbers 2012/12523P and 2012/12524P against Ulster Bank (hereinafter "the 2012 proceedings") which relate to the two properties, and the said pleadings are exhibited.

Acquisition of 2007 and 2008 facilities by PAL
5. By a mortgage sale deed dated 16th December 2014, Ulster Bank Ireland Limited purported to sell its interest in the appellant's mortgage and facility accounts to Promontoria Holdings BV. This interest was novated to PAL by a deed of novation thereafter on 12th February 2015 whereby PAL purported to acquire, *inter alia*, the appellant's loans. The devolution of this interest is set out further at paragraph 12 below.

6. The appellant deposes that she received two letters dated 15th February 2016 "informing me of the purported appointment of receivers Declan Taite and Brendan Hanratty over the properties". She disputes the validity of the appointments. She asserts that the two 2012 actions have not progressed in the courts due to "ongoing discussions involving Ulster Bank Ireland Limited with a view to a resolution."

7. Central to the appellant's 2012 actions is her claim that Ulster Bank purported to unilaterally change the 2002 facility's underlying rate of interest without her consent or knowledge. She alleges that, along with her co-borrowers, she was induced to enter into a swap contract or interest rate hedging agreement which was mis-sold in respect of the 2007 facility. The hedging agreement/contract for difference with the bank and the adverse and deleterious consequences alleged by the appellant forms the

subject matter of the 2012 actions. The hedging agreement is not expressly referred to in the plenary summons in these proceedings nor has a statement of claim yet been served.

8. In a further affidavit sworn on 14th March 2016, the appellant deposes that the Clondalkin premises:-

> "[I]s now my family home since I disposed of my former principal residence at Yellow House, Blackdown, Kilteel, Naas, County Kildare, in or about December 2010 and the property in Clondalkin is not being used as a convenience to thwart the efforts of any legitimately appointed receivers and in addition they have no application nor jurisdiction over principal residences."

The appellant further deposes that in June 2010 she placed her previous home on the market and she continues as follows:-

> "In July 2010 I accepted the first offer from the first viewer of my home, the offer was for 700,000, as I was concerned that I may not get a second offer fast enough in order for me to pay off the loan facility. I believed I could achieve my goal to pay off the loan with the 700,000 euros."

She avers that on 19th August 2010 she received a letter from Ulster Bank stating that the operation of a break clause in the agreement meant an additional cost of €118,387 on the outstanding balance of €715,952, being a 16.53% "penalty", thereby resulting in a sum total of €834,339 being required to redeem the loan. She continues in her affidavit:-

> "As I had contracted to sell my home for 700,000 by this time, I felt I had no option but to proceed with the sale. The magnitude of this penalty made it impossible for me to pay off the loan."

10. The appellant asserts that she continued to meet repayments on the Clondalkin property and on the Coombe property. However, it appears that she has ceased all such repayments. The rationale advanced by the appellant for the non-payment of any principal monies or interest on the mortgages at this time is set out in her affidavit of 14th March 2016:-

> "I was very concerned that if I continued to make repayments on these facilities that it may be construed, in law, that I was participating in and accepting fraud. I explained this to the Bank. At no time has Ulster Bank Ireland Ltd called in the loan or issued a demand notice."

She asserts that she was the victim of the manipulation of interest rates, that the bank had deliberately changed her original contract to Euribor (Euro Interbank Offered Rate) and that subsequently she was locked in at very high rates of interest when Ulster Bank were "fraudulently manipulating the interest rate downwards".

11. On 3rd March 2016, P.J. O'Brien deposed in an affidavit on behalf of PAL that Ulster Bank entered into a facility letter dated 2nd May 2007 with the plaintiff together with Dudley Gibb and Kevin Gibb (the 2007 facility letter). There was a further facility letter entered into on 7th February 2008 with Mark Gibb and Kevin Gibb (the 2008 facility letter). He deposes that the following security was relied upon by Ulster Bank in support of the 2007 facility and the 2008 facility;

> (i) a mortgage dated 17th July 2002 between the bank and Clare Gibb, Mark Gibb, Dudley Gibb and Kevin Gibb over the Coombe property; and
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> (ii) a mortgage dated 12th July 2006 between the bank and Clare Gibb, Dudley Gibb and Kevin Gibb over the Clondalkin property.

12. This deponent traces the devolution of the mortgagee's rights pursuant to the 2007 and 2008 facility letters and exhibits a redacted extract from a global deed of transfer dated 12th February 2015 and other deeds of assurance together with a deed of novation whereby Ulster Bank and others purported to assure to PAL all its rights, interests and estates in the 2007 and 2008 facility letters. The Coombe property and the Clondalkin property are each referenced in the global deed of transfer at Schedule 2 and excerpts from the said instrument are exhibited with the affidavit.

13. Mr. O'Brien further avers that:-

> "There is no evidence available to PAL to suggest that there were any ongoing discussions between the Bank and the Plaintiff. I am informed by PAL that the Bank did not reveal any evidence that prosecution of the 2012 Proceedings by the Plaintiff was, in some way, subject to ongoing discussions between the parties."

He further deposes that the 2012 Ulster Bank proceedings were only reactivated by the appellant some 12 months or so after the 15th February 2016 appointment of the joint receivers. He continues:-

> "I say that the plaintiff has had ample opportunity to progress the 2012 proceedings but she has failed to do so and I am advised that the existence of the said proceedings should not prohibit or prevent the defendant from realising its security under the Mortgages."

He contests the assertion by the plaintiff that the Clondalkin premises is the plaintiff's "primary residence". He disputes this claim on several grounds and exhibits documentary evidence to support PAL's contentions that the appellant has not been resident at the Clondalkin apartment in the manner she alleges.

The High Court

14. Having considered the affidavits, exhibits and submissions both written and oral, the trial judge in his *ex tempore* judgment delivered 12th July 2016 acknowledged that there may indeed be an issue to be tried regarding aspects of the interest charged upon the loan facilities granted by Ulster Bank and the extent of the assignment to PAL of the appellant's debt. However, the court was not persuaded that she was not indebted to Ulster Bank for the principal or that the mortgages granted over the two properties in 2007 and 2008 may not be relied upon by Ulster Bank or in turn, PAL. The court found that arguments based on s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 were tenuous, there being clear evidence of notification in writing of the assignment to PAL which was not disputed.

15. The trial judge noted that in a statement of claim delivered in the 2012 Ulster Bank proceedings the appellant alleged she had been induced to enter into two interest rate swaps on hedging products in 2008 which, it was claimed, were subject to the European Communities (Markets in Financial Instruments) Regulations 2007. He also noted that various alleged breaches of the Regulations on

the part of Ulster Bank were being relied upon by her in the said proceedings in support of her claim for losses.

16. With regard to the contention, which appears to have become a central issue at the interlocutory injunction hearing, that the first floor of the Clondalkin premises constituted her home, the trial court, having considered the evidence before it, noted that:-

> "over the years there had been considerable contradictory representations or indications of the plaintiff in relation to this recently developed argument."

The judge went on to state:-

> "The origin of communications and stances in her private and public life do not always converge. Nevertheless, the Court on an application like this cannot make a determination of such a fact and it remains for the plaintiff to prove whatever equity and right arising from such an argument now."

The Court appeared also to attach weight to the fact that the appellant was a co-owner of the mortgaged property with "other members of her family":-

> "Even if the Court were incorrect about the height of the plaintiff's claim being confined to the interest which she may owe and the claim in relation to the first floor of the Clondalkin premises, the Court is concerned with the very broad extent of the interlocutory injunction relief sought without having any offer of assurance from the plaintiff about her obligation in regard to maintenance and income from the properties which she co-owned with other members of her family."

17. The Court noted that if she succeeded in her claim against PAL at plenary hearing:-

> "… the ultimate figure may be adjusted in the final reconciliation of the receivership account. In other words, damages will be an adequate remedy and the Court finds no merit in the suggestion that the damages which the plaintiff made claim are not ascertainable."

18. The trial judge identified the *status quo* as being that the receivers had been appointed whilst noting that their appointment was being challenged by the appellant and that the appellant was entitled to proceed with her claim for damages against Ulster Bank. He concluded, having considered case law including *Szabo v. Kavanagh* [2013] IEHC 491, a judgment of Keane J. in the High Court, as follows:-

> "Insofar as the Court has not determined whether the plaintiff's primary residence is on the first floor of the Clondalkin premises, the Court is not in a position to grant the injunction sought by the plaintiff as details of the dispute between the receivers and the plaintiff in this regard have not been addressed adequately for the Court to make a determination even at an interlocutory stage."

19. At the conclusion of the High Court hearing, the trial judge found that the balance of convenience rested with the respondents and exercised his discretion to refuse the interlocutory relief sought by the appellant.

The Grounds of Appeal

20. The appellant raises 12 separate grounds of appeal each of which is contested by PAL and is set out as follows:-

> i. The appellant asserts that "the loans secured by way of mortgages" "were for private and domestic purposes" and "not used to fund the purchase of either premises" and it was not lawful for PAL to appoint the joint receivers over the said properties. PAL asserts that the loans are commercial loans subject to the bank's standard terms and conditions governing business lending.
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> ii. She also asserts that she is "a consumer" within the provisions of the Consumer Credit Act 1995. The respondents object that this ground is new and was not agitated before the High Court.
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> iii. She further asserts that the trial judge failed to take into consideration her claim in an affidavit of 24th February 2016 that Ulster Bank had unilaterally and without her consent amended the terms of the facility letters and that these impugned facility letters were in turn transferred to PAL. The respondents assert that paragraph 14 of the judgment does not support this and further that the effect of the interest rate change is not determinative for the purposes of granting or refusing an interlocutory injunction.
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> iv. The appellant contends that the trial judge failed to take into account that she had sold her principal private residence in 2010 and moved into the upstairs part of the Clondalkin property. PAL point out that her claim to have disposed of her home is contradicted by her use of the address subsequent to the alleged date of sale. The respondents' grounds of opposition identify eight factors advanced at the hearing in the High Court in support of their contention that the Clondalkin property does not constitute the home of the appellant.
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> v. The appellant disputes the validity of the letter of demand served by PAL on 8th February 2016 prior to the appointment of the receivers. PAL asserts that same is valid and objects that this was not raised as an issue in the High Court.
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> vi. The appellant asserts that her loan account came to be transferred to RBS and disputes the bank's capacity to subsequently transfer same to PAL. The respondents assert that this ground is specious and is being raised now for the first time.
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> vii. It is claimed that the trial judge failed to take into account that PAL relied on the bank's general conditions of 01-2006 notwithstanding that, as the appellant asserts, the mortgage deeds and facility letters on foot of which the mortgage deeds were entered into were dated prior to the issue of the said conditions. PAL asserts that the 2007 and 2008 facility letters were entered into subsequent to the General Conditions 01-2006. Further, the facilities were " expressed to be all sums due".
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> viii. The appellant claims that the trial judge failed to take into account a suggestion made on behalf of her that rents received by the joint receivers be placed in an escrow account pending determination of the proceedings. The

respondents counter that the trial judge had regard to the interlocutory nature of the application before him citing paragraphs 18,19 and 20 of the judgment in particular. PAL asserts that should it be determined at the plenary hearing that PAL was incorrectly assigned some or all of this debt the relevant figures can be adjusted in the final reconciliation of the receivership account.

ix. It is claimed that the trial judge failed to have regard to the 2012 Ulster Bank proceedings. This is contested by the respondents.

x. The appellant claims that the trial judge failed to take into account that the receivers were appointed "for no apparent purpose" and the receivers have no power of sale. The respondents dispute these contentions.

xi. The appellant contends that the trial judge erred in inferring that she "was in such an impoverished state as not to be in a position to give an undertaking as to damages when there was no evidence to that effect nor any necessary inference from the evidence in court." The respondents counter that given the potential detriment which could befall PAL if the interlocutory order is made it is incumbent upon the appellant to adduce sufficient evidence of her ability to make good any such potential loss should she fail at the plenary hearing.

xii. Finally the appellant contends that the trial judge erred in his application of the appropriate test for the balance of convenience failing to take into account; that the receivers did not have a power of sale, that the Clondalkin property is the only home of the appellant and that sale by the receivers would be "an act of bad faith."

Hearing of Appeal

21. At the hearing of the appeal, counsel for the appellant distilled the key grounds of appeal down to four major points:-

i. Was the appellant "a consumer" when entering into the 2007 and 2008 Facility agreements?

ii. Were the 2007 and 2008 agreements procured on foot of actionable misrepresentations on the part of PAL's predecessor?

iii. The relevance of the claim that Ms. Gibb sold her home at an undervalue during the great economic crisis thereby losing her security of tenure in the belief that the net proceeds would be sufficient to redeem these loans only to find that a penalty of €118,000 was being demanded for early redemption which she was unable to discharge. In substance I understand this to raise, *inter alia*, whether the said sum amounts to a fetter on the equity of redemption?

iv. Whether the letters of demand dated 15th February 2016 are valid?

This Court

22. A central issue for determination is whether the trial judge was correct in the exercise of his discretion to refuse to grant the interlocutory relief sought in the following terms by the appellant:-

> "An order of injunction restraining the defendants and all or any of them or their agents from interfering with the properties known as 54 New Road, Clondalkin, Dublin 22, and Unit 1, 1 – 3, The Coombe, Dublin 8."

23. It is necessary to consider the facts and findings in the context of the criteria for the grant of interlocutory relief. The relevant principles have been authoritatively expressed in the Supreme Court decision in *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 and the line of jurisprudence flowing from it including the dicta of Quirke J. in *Clane Hospital Ltd. v. Voluntary Health Insurance Board* [1998] IEHC 78, I would adopt the following sequence of questions for consideration and determination:-

a. Whether or not the appellant raised a fair and *bona fide* question for determination?

b. Whether, if the appellant is successful at the substantive trial in establishing her right to a permanent injunction, she could be adequately compensated by an award in damages?

c. Whether, if PAL were to be successful at the substantive trial, it could be adequately compensated under the appellant's undertaking as to damages for any loss which it would have sustained by reason of the grant of interlocutory relief?

d. If either party or both have, by way of evidence, raised a real and substantial doubt as to the adequacy of the respective remedies in damages available to them, then where does the "balance of convenience" lie?

e. Whether there are any "special factors", whether technical in nature or otherwise which may influence the exercise of discretion and the granting of the relief sought?

f. Whether this court should interfere with the exercise of discretion by the trial judge?

New grounds not relied on at interlocutory hearing

24. Counsel for the appellant contended that each of the grounds identified in the notice of appeal, particularly the key and new grounds identified by him and argued for the first time at this appeal hearing as set out above, constitutes a *bona fide* issue to be tried and if substantiated and true, same would have a very significant bearing on whether any monies were due or the extent of the monies which would be due by the appellant to PAL. Further, he asserted that damages would not be an adequate remedy in circumstances where the Clondalkin premises "represents the home of the appellant and her business." This latter claim is very comprehensively contested by PAL in their affidavits.

25. With regard to the issue of whether the appellant had any liability for payment of the principal monies, her counsel stated:-

> "No, I would not be saying that there is no further liability for principal or interest because clearly there would be. But what I would be saying is that if there is a liability for interest and principal offset against that would have to be whether the amount of interest which is payable is excessive. If in fact there was a misrepresentation, there would be the issue of damages. If in any attempt to defray or discharge the mortgage she did in fact sell her property at an undervalue and was not able to discharge the mortgage, that would be another head of damage that she would be entitled to proceed on."

26. He further stated:-

> "I am not saying that she was entitled to simply say 'I am not giving you any more money'."

Respondents' position

27. The respondents object that a number of new grounds of appeal being advanced by the appellant, and in particular the new issue as to whether Ms. Gibb is a "consumer" pursuant to the Consumer Credit Act 1995, were not expressly raised or argued before the High Court at the interlocutory hearing. With regard to fresh grounds of appeal sought to be ventilated which were not expressly agitated before the trial judge at the hearing of the interlocutory application, traditionally the approach was considered to be informed by the decision of Henchy J. in *Movie News Limited v. Galway Co. Co.* (Unreported, Supreme Court, 15th July, 1977). The principle derived from that case was that, apart from in exceptional cases, a court on appeal should not enter on the trial of a matter as of first instance and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have had if the matter had been considered and decided in the High Court in the first instance.

28. More recently, the Supreme Court appears to have endorsed a more flexible approach as exemplified by the judgment of O'Donnell J. in *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 I.R. 227 where at para. 28 he stated:-

> "There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in *K.D. (otherwise C.) v. M.C.* [1985] I.R. 697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court (…) or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point on appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."

29. In *Arnold v. Judge McCarthy* [2017] IECA 303 Hogan J. carried out an important analysis of the current jurisprudence regarding admissibility of new grounds particularly where the appeal is brought against a decision other than the substantive determination at the trial of the action stating;

> "36. This Court is endowed only with appellate jurisdiction by Article 34.4.1 of the Constitution and it enjoys no first instance jurisdiction whatever. Of course, this does not necessarily mean that there is some *ex ante* rule which by definition automatically excludes the admission of new grounds of appeal of this kind: see generally the comments of O'Donnell J. in *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] 1 I.R. 227, 245-246 . *In Lough Swilly O'Donnell* J. noted that prior to 1922 'it was possible to seek leave to appeal to argue a fresh ground of appeal before the [pre-1922] Court of Appeal, but only on strict conditions' and that:
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> > 'Nothing in the 1922 Constitution or 1937 Constitution suggests any different understanding of the concept of an appeal from the High Court in performance of the administration of justice.'
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> 37. O'Donnell J. accepted that in this matter there existed a spectrum of possibilities, ranging from a new argument which would have necessitated the admission of new evidence on the one hand, to those cases where a simple refinement of an argument already made in the High Court was sought to be made. In that case the Court would not permit the appellants to advance a new argument to the effect that a particular statutory provision had not been commenced.
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> 38. A similar approach was subsequently taken by the Supreme Court in *Westlink Toll Bridge Ltd. v. Commissioner of Valuation* [2013] IESC 42 where the Court would not permit the respondent to advance an entirely new argument to the effect that the costs associated with motorway maintenance were deductible for rating valuation purposes. As MacMenamin J. pointed out, this conclusion was the 'polar opposite' of the evidence which had actually been led in the High Court.
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> 39. In view of these authorities, the general practice of appellate courts in this jurisdiction – be it the Court of Appeal or the Supreme Court – is to lean heavily against the admission of new grounds of appeal. This is especially so in the case of a ground as potentially weighty or far-reaching as a challenge to the constitutionality of the 2000 Act.
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> 40. There are, however, three countervailing factors in this case which must be considered. First, the applicants are litigants in person. Second, the applicants stand convicted of a criminal offence and they face the prospect of (an admittedly very short) prison sentence if they persist in not paying the fine unless the constitutionality of the law is successfully challenged. Third, while the hearing in the High Court was inter partes, it was nonetheless only an application for leave."

30. The learned judge continued:-

> "43. The third ground is, however, by far the most pressing one, namely, that the proceedings are still at the preliminary stage involved in application for leave. Critically, therefore, there has been no final determination of the merits of the application by the High Court. The considerations which weighed so heavily in cases such as *Lough Swilly* and *Westlink Toll* have lesser application in the present circumstances: to date there has been no full hearing on the merits before the High Court and if leave were to be granted in respect of this issue, the Attorney General and the other State respondents would all have an opportunity to meet the case on its merits at a full hearing [in] the High Court.

44. It may be noted that this very point was acknowledged by Clarke J. in *Moylist Construction Ltd. v. Moylan* [2016] IESC 9 , [2016] 2 I.R. 283 . In *Moylan* the defendants sought to dismiss the proceedings as being bound to fail. On appeal the plaintiffs sought to advance a new argument before the Supreme Court which had not been advanced before the trial judge. On this point Clarke J. commented ([2016] 2 I.R. 283, 293):

> 'It is clear that some additional leeway may properly be given on appeal to a party who is faced with being deprived of what might otherwise be their entitlement to a full trial…the fact that a plaintiff may be deprived of a full hearing should any appeal result in a decision that the proceedings should be dismissed means that the court may in some circumstances be prepared to give greater latitude to such a plaintiff to argue further grounds on appeal.'

45. Much the same can be said, at least by analogy, so far as the present case is concerned. If the applicants are denied leave, they may well be denied an opportunity of having their case determined on its full merits. The denial of leave in judicial review is, in many respects, akin to striking out plenary proceedings as being bound to fail. In both instances the litigant seeking leave or resisting a strike out motion (as the case may be) is obliged to show that their case is arguable. This, therefore, suggests that while the courts should not indulge the negligent or the casual or the indifferent litigant by blithely permitting them to introduce new arguments on appeal, nevertheless, as Moylist *Construction* illustrates, the fact that the applicants might otherwise be faced with the prospect of being denied an entitlement to a full trial on the merits at first instance is a factor to be taken into account in deciding whether to admit a new ground on appeal to this Court.

46. In these somewhat unusual circumstances, I would be prepared to admit this ground as a new ground of appeal if it could be shown (i) that the applicants would obtain a practical benefit thereby if they were ultimately to succeed on this ground and (ii) this new ground was at least arguable."

Has the appellant demonstrated countervailing factors in the instant case?

31. Firstly, by contrast with the *Arnold* case the appellant has been fully legally represented by solicitors and able counsel since 11th May 2016. Nowhere do the facts disclose the exceptionalism arising in the *Arnold* case which concerned an appeal against a refusal to grant leave to seek judicial review and where the personal liberty of the applicants was in jeopardy. The decision in *Arnold*, however, concerned an appeal against a High Court decision to refuse to permit the applicants to commence the proceedings whereas by contrast the present application for an interlocutory injunction will often in practice determine the outcome of the proceedings. In many respects, therefore, this type of case is closer to the case of an appeal from a substantive decision on the merits as distinct from the purely preliminary decision at issue in *Arnold*. Hence that decision is distinguishable and cannot avail this appellant.

32. No explanation of any kind has been offered for the failure and omission to raise issues under the consumer credit legislation before the High Court at the interlocutory hearing. Whereas the issue whether the appellant was "a consumer" was introduced, without leave, in the notice of appeal, no justification was offered for the failure to raise or agitate the point at the interlocutory hearing. A fundamental reason why O'Donnell J. in *Lough Swilly* identified a spectrum of cases is that there are two competing interests with which a court on appeal confronted with such an application must engage and give consideration; firstly it is generally in the interests of justice that where a point is outcome determinative a litigant should not be faced with the prospect of losing their case because such a decisive point was not raised at the initial hearing. On the other hand, as was identified by Clarke J. in *Ambrose v Shevlin* [2015] IESC 10

> "4.12 However, on the other side of the equation, there are very real dangers in adopting a practise which is generous in permitting new grounds to be raised. First, there is the overall desirability that parties be required to make their full case at trial. An overly generous approach to permitting new grounds to be raised for the first time on appeal can only encourage either sloppiness or imprecision in the way in which cases are run, or, indeed, attempts to take tactical advantage by only bringing forward a part of a claimant's true case in the knowledge that there will be a good chance that, if it does not work at trial, a different tack can be adopted on appeal. A culture of tolerance of parties who fail to bring forward their full case can only encourage such practises, leading to a significant risk of injustice across a whole range of cases and, indeed, causing difficulties for the administration of justice generally by a proliferation of unnecessary appeals and, in many case, retrials. It must be emphasised that the possibility of an injustice to an individual party in a specific case may be more easily identifiable than the real and equally important risk of injustice to a whole range of parties to many cases, to which a policy of excessive tolerance might give rise.
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> 4.13 In addition, there can be a very real risk of injustice to the opposing party if new grounds are permitted to be raised for the first time on appeal. Precisely how a case was run at trial may well have been influenced, in ways that may not be completely obvious, by the issues which seemed to be before the court. All litigation (or at least almost all litigation) involves some degree of tactical decision by the advisers of both parties. Such tactical decisions often involve weighing up the pros and cons of a particular course of action. Those decisions are taken on the basis of the case as it reasonably appears to stand at the time the decision is taken. The more easily a party can reinvent their case on appeal, the greater the risk that real prejudice will be caused. Sometimes a party will be readily able to point to such prejudice. For example, witnesses may not have been called precisely because an issue was not before the court. Areas of evidence or lines of cross examination may not have been pursued. Legal issues may not have been raised. Many other examples could be given. But it is, in my view, important for a court to keep in mind that the sort of prejudice of which I speak can be subtle and difficult to demonstrate but nonetheless real. To all of that needs to be added the real risk that, in many cases, the only way of avoiding a risk of prejudice will be to direct a retrial. Such a course of action inevitably delays the completion of the relevant litigation and exposes the parties to much greater cost.

33. In evaluating the appellant's claim to base this appeal on a key ground not raised or agitated at the interlocutory hearing I am satisfied that there are significant countervailing factors which lean heavily against allowing such point to be raised for the first time in this appeal;

a. the appellant was legally represented at the interlocutory hearing but did not raise the issue.

b. No reason or explanation for this omission is forthcoming.

c. The omission is all the more surprising since the issue was adverted to in one of the affidavits grounding the application for interlocutory relief.

d. The appellant is not a party to the 2008 Term Loan Facility dated 7th February, 2008.

e. The parties to the 2008 facility are not involved in or parties to this litigation and there is no evidence before this court as to their position on this issue.

f. Documentation exhibited by the respondent appears to be inconsistent with the contention that consumer legislation has any application to the 2007 and 2008 Facility agreements.

g. Whilst the appellant is one of three named borrowers in relation to the 2007 facility the position of the other borrowers is not known and it is unclear whether they are even aware of the litigation and what their stance is in relation to same.

34. At the hearing of this appeal it was conceded that the real ground of substance being relied upon was whether the appellant was "a consumer" pursuant to the Consumer Credit Act 1995. This appellant has failed to meet the threshold of "significant justification" as adumbrated by Clarke J in *Ambrose v Shevlin* or the exceptionalism as was identified by Charleton J. in *ACC Bank plc v Lynn* [2015] IESC 100 so as might warrant allowing the late introduction of a new ground of appeal. Accordingly, having regard to the principles laid down by O'Donnell J. in the Supreme Court in *Lough Swilly*, I am satisfied that no ground not relied upon by her at the interlocutory hearing should be entertained in this appeal. No countervailing factors have been established which could take the appellant into the spectrum of exceptional cases warranting deviating from the general rule which generally precludes the introduction of new grounds for the first time at appeal stage.

35. When evaluating this application and attempting to place it along the spectrum of cases identified in *Lough Swilly* it is clear that this proposed new ground falls at neither extremity of the continuum identified by O'Donnell J. but rather is unexceptional as a point alluded to in a grounding affidavit but not articulated developed or argued at the interlocutory hearing.

The Court's findings; fair or *bona fide* question to be tried
36. In the circumstances I am satisfied that there exists no fair and bona fide question to be tried which would warrant the granting of the very broad interlocutory relief sought. The plenary summons issued on the 25th February 2016 and no meaningful steps have been taken by the appellant to date to progress this litigation to a conclusion. No statement of claim has yet been served. Should her claims or any of them prevail at plenary hearing she will be amply compensated in damages.

Conclusion
37. Accordingly, for the reasons set out hereinbefore, I would refuse to allow the new grounds of appeal to be introduced. Otherwise, I would not interfere with the discretion exercised by the trial judge and would dismiss this appeal.