THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 269

Record Numbers: 2017/179

2017/251

2017/329

Peart J.
Irvine J.
Whelan J.

BETWEEN/

FINSBURY CIRCLE NOMINEE LIMITED

PLAINTIFF/

RESPONDENT

- AND -

MARY WATT

DEFENDANT/

APPELLANT

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

1. This judgment concerns three appeals brought by the defendant/appellant, Mrs. Mary Watt, against orders of the High Court (Gilligan J.) dated the 6th April, 23rd May and the 26th June 2017.

2. The respondent to each of the aforementioned appeals is Finsbury Circle Nominee Limited ("Finsbury") which in its plenary summons claims, *inter alia*, an order that Mrs. Watt and any other person with notice of the making of the Court's order, do vacate and deliver up possession of 12, Sandymount Drive, Sandymount Estate, Glasheen, County Cork ("the Sandymount property").

3. Finsbury maintains that by mortgage dated the 16th June 2005 made between Mrs. Watt and Mr. Paul Watt as mortgagors of the one part and National Irish Bank Limited ("the bank") of the other part, the mortgagors conveyed the Sandymount to the bank to secure certain loan facilities.

4. The circumstances in which Finsbury maintains it obtained title to the Sandymount property is set out in detail at paras 7-15 of an affidavit sworn by Mr. Miguel Fitzgerald on behalf of Finsbury on the 19th January 2017. It should be said that regardless of that affidavit and the documentation exhibited by Mr. Fitzgerald in support of Finsbury's title to the Sandymount property, Mrs. Watt contends that Finsbury has no entitlement to an order for possession. In particular she maintains that the receiver appointed by the bank was invalidly appointed with the result that he had no lawful entitlement to sell the Sandymount property to Finsbury.

5. Whilst Finsbury has it all times maintained that the Sandymount property was an investment property occupied by tenants, in the course of her oral submission on the hearing of this appeal Mrs. Watt, for the first time, maintained that it was her residence. I would observe that this submission is in stark contrast to her repeated averments, in the many affidavits she has sworn in these proceedings, to the effect that her address is 43 Southbury Rd, Summerstown, Wilton, County Cork.

Appeal: Order 6th April 2017

6. The first appeal (Record No. 2017/179) is against an order of Gilligan J. dated the 6th April 2017. By his order he granted an interlocutory injunction prohibiting Mrs. Watt and persons unknown from trespassing or entering onto the Sandymount property. He also made an order prohibiting Mrs. Watt from collecting rent or other payments in respect of that property and directed her to pay any such rent or other income as had been collected by her to Finsbury as full beneficial owner of the property.

7. It should be stated that when the order was initially drawn it referred to the premises concerned as being no. 2, Sandymount Drive. That order was later amended by order of the court dated the 23rd May 2017 to read 12 Sandymount Drive and is the order that forms the subject matter of Mrs. Watt's second appeal to which I will later return.

Mrs. Watt's submissions

8. Mrs. Watt's submissions can be summarised as follows. She claims that:-

> (i) the order of the 6th April 2017 is invalid because an earlier *ex parte* application and order dated the 3rd April 2017 are invalid. That order, she maintains, was not stamped or properly served;
>
> (ii) the plenary summons, which preceded the notice of motion for interlocutory relief, is void because it was never served. Consequently, Gilligan J. had no jurisdiction to entertain the application for interlocutory relief;
>
> (iii) the notice of motion seeking interlocutory relief was defective and void as it does not state on its face the address of the property in respect of which the relief was sought. Further, the notice of motion failed to confer jurisdiction on the

court because it did not state that the relief claimed would be based on a grounding affidavit;

(iv) the order was obtained in circumstances where the High Court judge had no jurisdiction. This was because the receiver was not validly appointed and her mortgage was not validly transferred. Mrs. Watt also claims that the novation agreement relied upon by Finsbury was invalid for many reasons and further relies upon the fact that she did not consent to the transfer of her mortgage by the original mortgagee, National Irish Bank;

(v) the High Court did not have jurisdiction to deal with the application for interlocutory relief because she had proceedings pending before the Court of Appeal which had the effect of denying the High Court jurisdiction over her property.

9. Mrs. Watt also made a number of much broader submissions which, in my view, are not relevant to this appeal, such as her claim that there was unlawful conduct by the bank and its solicitors and counsel and that Finsbury Circle was guilty of what she described as "white collar crime". I do not intend to deal with these matters as they are scandalous claims made in the absence of any supporting evidence.

Submissions on behalf of the respondent
10. Counsel on behalf of Finsbury submits that:

(i) insofar as Mrs. Watt has sought to rely upon the proceedings pending before the Court of Appeal, those are proceedings between her and Danske Bank to which Finsbury is not a party. Accordingly, those proceedings could not deny the High Court jurisdiction to deal with Finsbury's application for an interlocutory injunction;

(ii) the High Court judge was wholly justified in granting the injunction sought in circumstances where damages were clearly an adequate remedy for Mrs. Watt given the fact that the Sandymount property was clearly an investment property;

(iii) Mrs. Watt's submission that Finsbury's application for interlocutory relief was not grounded on affidavit evidence was incorrect. A detailed affidavit had been sworn by Mr. Fitzgerald on the 19th January 2017. Further, it was clear from Mrs. Watt's replying affidavit which was sworn on 9th February 2017 that, contrary to her submissions, she had received that affidavit;

(iv) the fact that Mrs. Watt was in attendance before Mr. Justice Gilligan on the 6th April 2017 and disputed Finsbury's application for an interlocutory injunction, cured any defect in terms of service of the pleadings;

(v) Mrs. Watt's appeal against the *ex parte* order made by Gilligan J. on the 3rd February 2017 could have had no effect on the court's jurisdiction to grant the interlocutory relief sought on the 6th April. Neither could it be said that the High Court was denied jurisdiction because she had an appeal pending against Danske Bank in the Court of Appeal;

(vi) Finsbury had established a *prima facie* entitlement to an injunction to restrain a trespass and had satisfied the principles identified in *Campus Oil v-v the Minister for Energy* [1983] 1 I.R. 88. There was clear evidence that Finsbury was entitled to the legal and beneficial interest in the Sandymount property and that all other persons in occupation were trespassers. Finsbury had provided evidence that it had purchased the interest of the receiver and this was sufficient to warrant the High Court granting the injunction sought, and

(vii) the High Court judge was correct to conclude that damages would not be an adequate remedy for Finsbury if the injunction were to be refused. Further, the evidence suggested that Mrs. Watt was unlikely to be in a position to compensate Finsbury for the loss of rents over the period it would be deprived of possession if the injunction were to be reused.

Decision
11. Having considered the submissions of the parties I would unreservedly reject every submission made by Mrs. Watt in support of her appeal against the interlocutory injunction granted by Gilligan J. I can summarise my reasons as follows:-

(1) Any reliance upon the *ex parte* order made on the 3rd April 2017 is misplaced. Mrs. Watt appealed that order and her appeal was dismissed by this order on the 24th July 2017.

(2) Insofar as Mrs. Watt seeks to rely upon a complaint that the notice of motion seeking interlocutory relief was not properly served in accordance with the order of the 3rd April 2017, she is estopped from making that complaint in circumstances where she appeared before Gilligan J. to resist the injunction application on the 6th February 2017.

(3) Any defect in the service of the plenary summons was cured by the fact that Mrs. Watt entered an appearance to that summons on the 9th February 2017.

(4) Insofar as Mrs. Watt seeks to rely upon the fact that documents were not properly served because they were dropped through her letterbox, this is the form of service that was provided for in the order of the 3rd February 2017 and it is clear in any event from her submissions that at all stages she received the documents upon which the injunction application was based. As already stated, she attended court on foot of the notice of motion returnable for hearing on the 6th April 2017 and filed a replying affidavit in response to that which was sworn by Mr Fitzgerald.

(5) Contrary to Mrs. Watt's submission, the notice of motion seeking interlocutory relief does indeed refer to the Sandymount property. Further, it does not follow, just because the notice of motion does not refer to Mr. Fitzgerald's affidavit, that the court had no jurisdiction to engage with the relief sought. As already stated, Mrs. Watt received that affidavit and countered its content with her own affidavit of 9 February 2017.

(6) It is clear from the affidavit of Mr. Fitzgerald, and in particular paragraphs 7-14 thereof, that the court was provided with sufficient evidence to justify Gilligan J concluding that Finsbury had established a serious question to be tried concerning its entitlement to possession. That is not to say that Mrs. Watt is not entitled at the hearing of the action to contest Finsbury's title to the property. However, that issue did not have to be determined on the application for

interlocutory relief. There was clearly sufficient evidence for the trial judge to take the view that Finsbury was prima facie entitled to an interlocutory injunction subject to its undertaking as to damages.

(7) I am fully satisfied that on the basis of the documentation that was before the High Court on the 6th April 2017 that the High Court judge had jurisdiction to entertain Finsbury's application. Mrs. Watt clearly engaged in a robust defence of that application with full knowledge of all of the evidence relied upon by the respondent.

(8) It is also perfectly clear that the High Court judge correctly applied the principles in *Campus Oil*. There was no evidence put before the court by Mrs. Watt to demonstrate that she would be in a position to pay damages to compensate Finsbury for its loss of rent during all of the period up to the date of trial if she failed to successfully defend the action. The High Court judge was also entitled to take the view that if Mrs. Watt was successful in her defence that Finsbury would likely be in a position to compensate her in respect of any loss sustained by her and that damages would accordingly be an adequate remedy.

12. For the aforementioned reasons I would dismiss the first of Mrs. Watt's appeals.

Appeal: Order 23 May 2017.
13. The second appeal brought by Mrs. Watt (Record No. 2017/251) is her appeal against an order of Gilligan J. dated the 23rd May 2017 whereby he permitted the amendment of the order he made on the 6th April 2017 wherein the address of the property, in respect of which the introductory injunction was granted, was incorrectly stated to be "2, Sandymount Drive" as opposed to "12, Sandymount Drive" pursuant to Ord. 28, r. 11 of the Rules of the Superior Courts.

Mrs. Watt's Submissions
14. Mrs. Watt argues:-

(i) that she was not informed of Finsbury's intention to apply to amend the order, and

(ii) the amendment was in breach of Ord. 28 as it was made without her consent. Accordingly, the order must be set aside.

The respondent's submissions
15. Counsel for Finsbury submits that by letter dated the 17th May 2017 Mrs. Watt was notified that the registrar had listed the proceedings for mention on the 19th May 2017 pursuant to the provisions of Ord. 28, r. 11(b)(ii) in order to rectify an amendment to the order which appears to have initially been made in Mrs. Watt's absence on the 11th April 2017. She was asked to confirm that she would consent to the amendment of the order and if that was the case it was confirmed that she was not required to attend on the 19th May 2017.

16. Counsel submits that Mrs. Watt did not provide consent as requested in the letter of the 17th May 2017. That being so, the matter was dealt with on notice to her, but she did not attend. Further, whilst she complains that she did not get notice of Finsbury's application, it would appear that she appealed the order of Gilligan J. dated the 23rd May 2017 before she was served with the order. This would suggest that she was well aware of Finsbury's proposed application to amend the order but chose not to attend. Neither did Mrs. Watt later seek to set aside the order on the basis that she was somehow taken by surprise by the making of that order.

Decision
17. I view this appeal brought by Mrs. Watt to be entirely without foundation. Whatever about what may have occurred prior to the 23rd May 2017, it is clear that she was put on notice that Finsbury intended to have the High Court judge rule on its application to insert the correct address on the order made by Gilligan J. made on the 6th April 2017. For whatever reason, Mrs. Watt chose not to respond to the letter of the 17th May 2017 and at no stage appeared in court on the 19th May 2017 or any date thereafter to contest Finsbury's proposed amendment.

18. Even if the order of Gilligan J. of the 23rd May 2017 did not comply with Ord. 28, r. 11 of the Rules of the Superior Courts, which it did, there is no merit whatsoever in Mrs. Watt's contention that the said order should be set aside. To do so would not be consistent with the proper administration of justice. It would make a nonsense of the Court's own process and would also visit a gross injustice upon Finsbury. As Mrs. Watt well knows, given that she contested the application for the introductory injunction, the relief sought by Finsbury was in relation to its alleged rights as the legal and beneficial owner of the property at 12, Sandymount Drive and not No. 2, Sandymount Drive. Hence, the order drawn needed to be amended to reflect the true intention of the court when it ruled on the injunction application. Relevant also is the fact that Mrs. Watt did not apply to Mr. Justice Gilligan as she might have done, to set aside his order of the 23rd May 2017, on the basis that she had not been notified of Finsbury's intended application, as she might have done had she not been so notified and considered herself prejudiced by what was proposed. Instead, she opted to appeal the court order and has done so in circumstances where she has failed to demonstrate any prejudice by reason of the Court's amendment of the order initially drawn on the 6th April 2017.

19. For the aforementioned reasons I would reject this appeal.

Appeal: Order 26th June 2017.
20. The final appeal of Mrs. Watt (Record No. 2017/329) concerns the order of Mr. Gilligan J. made on the 26th June 2017. By his order he refused Mrs. Watt's application to dismiss Finsbury's proceedings as bound to fail pursuant to the court's inherent jurisdiction and her alternative application that the claim be dismissed under Ord. 19, r. 28 on the basis that the claim as pleaded did not disclose a cause of action.

Mrs. Watt's submissions
21. Mrs. Watt submits that the High Court judge did not in fact hear or determine her application. She claims that this is evident from the fact that she obtained no written judgment from the High Court judge.

The respondent's submissions
22. The respondent submits that the High Court judge did indeed, as per his order, address the relief sought by Mrs. Watt in her motion. However, the High Court judge did so in relatively short order in circumstances where, having granted Finsbury an interlocutory injunction on the 6th April 2017, it would have been wholly inconsistent to conclude that the proceedings were an abuse of process are bound to fail.

Decision

23. I am quite satisfied from the face of the court order that the High Court judge did indeed determine the application brought by Mrs. Watt on foot of her notice of motion dated the 9th February 2017. It cannot be said that because the High Court judge failed to deliver a written judgment on the issue, that he did not consider her application.

24. It has to be remembered that Mrs. Watt's motion dated the 9th February 2017 has to be seen in the context of Finsbury's application for an interlocutory injunction for possession which was dealt with by the trial judge on the 6th April 2017. In my view, it is inconceivable, in circumstances where the High Court judge was satisfied at the time he made that order that Finsbury had established a serious question to be tried at a plenary hearing, that he could have dismissed the proceedings on the grounds that the pleadings did not disclose a cause of action or that the proceedings were bound to fail.

25. Whilst it is probably unnecessary to add anything further to justify dismissing this, the third of Mrs. Watt's appeals, because the High Court judge did not give a detailed ruling on her application, I will make a number of short observations from which I hope it will be clear that her application was without any merit.

26. The first matter to state is that the court's inherent jurisdiction to dismiss a claim as bound to fail is different from the jurisdiction of the court under Ord. 19, r. 28.

27. The foundation stone for an application under Ord. 19, r. 28 is that the claim as pleaded does not disclose a cause of action. Here, it is perfectly clear that the claim as pleaded by Finsbury does disclose a cause of action. There is clearly an arguable basis in law for the claim as pleaded in the plenary summons. Accordingly, Mrs. Watt's reliance upon Ord. 19, r. 28 was entirely misplaced.

28. Regarding the court's inherent jurisdiction, it has long been established that even if a High Court judge takes the view that a plaintiff's case is innovative or weak, such a claim could not be dismissed under the court inherent jurisdiction (see, for example, Charleton J. in *Millsteam Cycling Limited v. Tierney* [2010] IEHC 55). In the present case the High Court judge, in making the order which he did for an interlocutory injunction on the 6th April 2017, formed the view that Finsbury's case was not a weak case but was one which established a serious question to be tried. Accordingly, Mrs. Watt's application to dismiss Finsbury's proceedings was unstateable.

29. For all of the aforementioned reasons I would dismiss this appeal also.