THE COURT OF APPEAL

Irvine J.
Hogan J.
Gilligan J.

Neutral Citation Number: [2018] IECA 117

[2017/492]

[2017/493]

BETWEEN

DANSKE BANK AND STEPHEN TALLANT

RESPONDENT/

PLAINTIFFS

AND

S.C.

APPELLANT/

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on the 23rd day April of 2018

1. This matter comes before the Court by way of the defendant/appellant's appeal from the order of the High Court (O'Connor J.) whereby he refused the application of the appellant pursuant to a notice of motion as issued on the 17th October 2017 which sought an order pursuant to O. 56A, r. 2(1) of the Rules of the Superior Courts adjourning the within proceedings and inviting the parties to attend mediation. There is a second appeal against the order of the court directing the delivery of certain pleadings within specific time limits.

2. The background to the proceedings are that for some years prior to 2007 the defendant's now estranged husband was borrowing substantial sums of money from Danske Bank in respect of commercial properties situate in rural Ireland. A variety of loans were procured from the Bank, some of which allegedly involved the defendant. It should be said in this regard that she contests any involvement in the loans, alleging that her signature was forged on certain documents.

3. In 2007 the defendant commenced High Court family law proceedings against her husband. These proceedings resulted *inter alia* in an order being made pursuant to s. 8(1)(b) of the Family Law Act 1995 securing maintenance for herself and the two dependant children of the marriage against rental income from certain properties involved in the defendant's estranged husband's loans and, in particular, one property. That security was to discharge the sum of €780,000 by way of maintenance and was to be discharged by payments totalling €130,000 per annum for a period of six years as and from the 24th October 2013. Subsequently further orders were made by this Court (Abbot J.) securing payment on other properties which were the subject matter of the same mortgages between the first named plaintiff and the defendant's estranged husband.

4. The first named plaintiff has not pursued the defendant in these proceedings for judgment in respect of the various loans as taken out by the defendant's estranged husband and pursuant to a summary summons which was issued in February 2015, judgment was obtained in the High Court Central Office against the defendant's estranged husband in the total sum of €5,696,514.00. Subsequently the defendant's estranged husband allegedly did not cooperate with the first named plaintiff which resulted in the first named plaintiff seeking an order of attachment and committal against him.

5. The second named plaintiff was duly appointed to act as receiver over all the properties which are relevant to these proceedings on the 29th April 2016 and he accepted the appointment on 3rd May 2016.

6. The second named plaintiff contends that from the date of his appointment he is entitled to receive all rental payments relating to the properties involved pursuant to the terms of the mortgage and pursuant to statute, whereas the defendant contends that she has a valid order of this Court (Abbot J.) directing that the sum of €780,000 be paid over six years by way of maintenance out of the rental income from the properties involved.

7. Delays then ensued in that the plaintiffs sought to be joined to the family law proceedings and subsequently, in May 2017, it was determined that the method for the proposed parties to assert their competing rights was by way of fresh proceedings.

8. Subsequent to that judgment the plaintiffs issued these proceedings by way of plenary summons dated the 6th July 2017 and issued a notice of motion on 6th July returnable to the 27th July 2017 and the matter was adjourned to the 5th October 2017, as the defendant had not delivered any replying affidavit. The defendant was directed to deliver any replying affidavit prior to the 11th September 2017.

9. What occurred on the 5th October 2017 in the High Court was that the defendant had delivered a replying affidavit the day before and proceeded to indicate to the Court that she wished to avail of mediation. The plaintiffs indicated that this was the first they had heard of any request for mediation. The Court directed that a letter of request be furnished by the defendant to the plaintiff requesting mediation and, if the request was refused, granted liberty to issue a motion seeking such relief pursuant to O. 56A, r. 2(1) of the Rules of the Superior Courts.

10. The defendant's solicitors duly wrote by way of a letter of the 5th October 2017 formally requesting to have these proceedings referred to mediation. The plaintiffs replied by way of a letter of the 6th October declining to go to mediation, referring to an earlier settlement meeting, and made an alternative proposal that the parties would attend a further settlement meeting to be arranged in advance of the adjourned date of the proceedings and following engagement between the solicitors a meeting was fixed for 4 pm on the 18th October 2017 at the Four Courts. In the intervening period the defendant issued a motion seeking the various orders which are the subject matter of this appeal.

11. In the plaintiffs' solicitor's letter of the 17th October 2017 they take issue with the defendant's decision to issue what they term a fundamentally inconsistent application concerning mediation returnable for the day after the settlement meeting and that this fact causes the plaintiffs to question whether the defendant has a genuine intention of attempting to resolve the dispute and whether the defendant's true objective is rather to procure the delay of the proceedings.

12. The letter further references the fact that the defendant sought short service of the application concerning mediation from the High Court (Twomey J.) on an *ex parte* basis and failed to advise Twomey J. of the fact that the parties had agreed to attend a settlement meeting in lieu of mediation arranged for the 18th October 2017.

13. It also is the situation that there had been a previous settlement meeting held in March 2017 at which both parties with solicitor and counsel had attended.

14. The nature of the interlocutory relief as sought by the plaintiffs against the defendant was to protect the flow of the rental income that was being paid to the defendant until the issue that arose between the parties could be determined by the Court particularly against a background where the order of the High Court (Abbot J.) would expire in October 2019.

15. In relation to the defendant's application pursuant to O. 56A, r. 2(1) of the Rules of the Superior Courts this Court (O'Connor J.) delivered an *ex tempore* judgment on the 19th October 2017. It was brought to the attention of the Court on behalf of the plaintiffs that the first mention by the defendant of the question of possible mediation was as mentioned by counsel in the High Court on the 5th October 2017.

16. The Court referred in its judgment to the correspondence that had passed between the parties and in particular the plaintiffs' solicitor's letter of the 17th October 2017 as referred to above and the Court noted that without prejudice settlement meetings had taken place in March 2017 and also the previous day, being the 18th October 2017.

17. The Court referred to the decision of this Court (Irvine J.) in *Atlantic Shellfish Ltd. v. Cork County Council* [2015] 2 IR 575 and the relevant principles to be applied and, in particular, "the manner in which the parties have conducted the litigation up to the date of the application for mediation". It was noted that a specific mediator with dates in the relatively near future was proposed, that the costs of the mediator had been agreed and that it was suggested by the defendant that the parties should split the costs of the mediation hearing on a 50/50 basis. The circuitous route of getting to that point in time before the Court was noted and the Court also observed that the two previous without prejudice settlement negotiations involving experienced senior counsel, had not led to a settlement.

18. O'Connor J. took the view that it was more appropriate that the pleadings be delivered and indicated to the plaintiffs that they should narrow the various reliefs as sought and while accepting that the issues in dispute between the parties may be amenable to mediation, he considered that it was too early and not appropriate for the Court to intervene in the way sought at that stage having regard to the apparent futility of same, to the absence of an exchange of pleadings and to the imminent finalisation of the affidavits for the interlocutory injunction application. In these circumstances O'Connor J. declined to make an order pursuant to O. 56 adjourning the proceedings to allow mediation take place and instead made certain case management directions regarding the delivery of proceedings.

19. It is of significance that the family law proceedings which the plaintiffs had been joined to came before the High Court (Abbot J.) on 6th July 2017 and he was informed that these proceedings were ready to issue and the application for an injunction was made returnable for the 27th July 2017 with a direction that the defendant should deliver any replying affidavit she wished to in advance of that date.

20. On the 27th July 2017 the defendant had not delivered a replying affidavit and the time for delivery of an affidavit was extended to the 11th September 2017 and the application by the plaintiffs for injunctive relief was listed in the Chancery List on the 5th October 2017 for the purpose of fixing a hearing date. The replying affidavit of the plaintiff in this regard was not delivered until the 4th October 2017 and it was the next day that the issue of potential mediation was raised.

21. Counsel on behalf of the defendant, Dervla Browne, S.C., submitted, *inter alia*, that the defendant was in a difficult position as the proceedings would involve her in considerable legal costs and there were issues regarding as to whether or not the second named plaintiff had been validly appointed and there were allegations of forgery of the mortgage documentation and discovery would arise. It was emphasised that a very experienced mediator had been available at a reasonable cost, that there was no delay on the defendant's part in respect of the proceedings, that insofar as the plaintiff says that the issue of mediation was raised at a very late stage, this has to be seen in the context of the two settlement negotiation meetings which proved to be unsuccessful and that the defendant went as far as she could in these negotiations and she took the view that she required the assistance of a skilled mediator.

22. It was submitted on the defendant's behalf that she had acted appropriately in announcing the intention to seek an order pursuant to O. 56 in relation to mediation in open court and that the defendant then followed the Court's directions as regards the writing of a letter seeking mediation and then bringing the motion.

23. Rossa Fanning, S.C., on the plaintiffs' behalf submitted, *inter alia*, to the Court that he accepted that mediation does offer many benefits in the litigation context but that in this particular instance it was the context in which the application for mediation arose and in his submission the trial judge was entirely correct to refuse the application in the particular circumstances.

24. Mr Fanning contends that the trial judge has a clear discretion to adjourn or not the proceedings and that the judge exercised that discretion correctly on the facts before him.

25. Mr Fanning outlined to the Court that in fact there was no difficulty whatsoever with the orders that were made in the High Court Family Law Division but that subsequent events had intervened and that the first named plaintiff had obtained judgment against the defendant's estranged husband in the sum of €5.7 million and that there was now a sum of well in excess of €6 million due. It was indicated to the Court that the defendant's estranged husband is the sole legal owner of the various folios involved and that although

the defendant executed various mortgages she is not in fact on title and that no judgment has been obtained against her. Mr Fanning contends, however, that the defendant wishes to continue to live in a wholly artificial world where her entitlement from the family law proceedings are effectively sealed in and incapable of being changed or set aside in any way, whereas the reality is that her estranged husband has no longer the means to pay her the €130,000 per annum by way of maintenance. A knock-on effect of what has occurred is that various other tenants in the properties are not paying over the rent as due and it has been held in various escrow accounts but one tenant does continue to pay a portion of the rent as due to the defendant by way of an agreement. In this regard it is contended that the status quo suits the defendant but does not suit either of the plaintiffs.

26. Mr Fanning contends that there was a delay by the defendant in delivering a replying affidavit with the result that the application could not proceed at the end of July and had to be transferred to the 5th October in order to obtain a date for hearing and the affidavit was finally delivered on the 4th October, three months after the injunction proceedings had issued and that the main reason for seeking the order pursuant to O. 56 is to pre-empt the interlocutory application against a background where the defendant had been receiving a portion of the rental income for over a year and a half from the date of the appointment of the second named plaintiff and there is a prejudicial aspect for the first named defendant as there appears to be little prospect of getting a refund from the defendant.

27. Mr Fanning referred to the fact that the defendants had attended two without prejudice settlement meetings with no success and that on the basis of the *Campus Oil test (Campus Oil Ltd. v. Minister for Industry and Commerce (No.2)* [1983] IR 83) it would appear that the injunction application should favour the plaintiffs.

28. It is further contended on the plaintiff's behalf that the trial judge was conscious, having regard to the decision of this Court in *Atlantic Shellfish* as to why there would be a basis for a referral to mediation during the course of an interlocutory injunction application where the pleadings had not closed and there was no statement of claim or defence delivered.

29. Mr Fanning clarified that had the matter proceeded to an interlocutory injunction application and the plaintiffs were successful with the rents being ring-fenced pending the trial of the action then realistically the plaintiffs would have gone to mediation and there would be no appeal before the Court.

Conclusion
30. A number of factors have to be taken into account in respect of this appeal. They can be summarised as follows:

It is quite clear that there is a legal issue to be determined as regards the second named plaintiff's right to recover all rents due to the plaintiffs arising from the various mortgages as entered into by the defendant's estranged husband.

- The order of the High Court in the family law proceedings with regard to the payment to the defendant of the sum of €130,000 per annum from the rent roll is for a period of six years from the 24th October 2013 and will expire in October 2019.

- The first named plaintiff's rights pursuant to the various mortgage documents are wasting if the receiver cannot collect the various rental payments that are due from the various properties involved and, in this regard, the defendant continues to be paid sums of money from one property and other tenants have placed the rent in escrow accounts.

- In these circumstances it is clear that time is of the essence and it is reasonable for the plaintiffs to make an application for injunctive relief to protect their rights and entitlements so that the rent roll is preserved pending the determination of the legal issue that arises between the parties.

- The defendant delayed until the very last moment to deliver her affidavit in reply to the plaintiffs' application for injunctive relief.

- It is clear that the defendant has delayed in raising the issue of mediation, particularly against the background whereby in March, 2017 she had attended with the benefit of solicitor and senior counsel a settlement consultation meeting where it is accepted that some progress was made between the parties and subsequently on the day before the hearing before this Court (O'Connor J.) had attended a second settlement consultation meeting, again with the benefit of solicitor and senior counsel, which did not resolve the situation. Perhaps the most crucial aspect is that there was no agreement whereby from that point in time onwards the rent roll would be protected in some form of an agreed manner and the injunction proceedings would not be necessary. Against this background, on the following day, the defendant proceeded with the application for the order pursuant to O. 56 and if successful this would have resulted in the proceedings being further adjourned against the background of a wasting asset.

- Mr Fanning has clearly indicated to the Court that if the rent roll was protected in some way or alternatively if injunctive relief was in place then the plaintiffs would have acceded to a request to mediation and it does not appear to this Court that if the rent roll is protected there is no reason why the parties cannot with the benefit of a mediator attempt to resolve the issue as between them.

- Against the background to these proceedings it was at least an unusual occurrence that out of the blue in open court without any indication to the other parties involved, counsel would ask that the matter be referred to mediation . Furthermore, it was at least unusual that having agreed to a second settlement consultation meeting on the 18th October 2017, the defendant would apply to a judge of the High Court for leave for short service of the motion seeking the order pursuant to O. 56 without advising the judge that a second settlement consultation meeting had been arranged for the 18th October.

- Finally, the apprehension as raised in these circumstances by the solicitors for the plaintiffs in their letter of the 17th October 2017 does not appear unreasonable.

31. In *Atlantic Shellfish Ltd.* Irvine J. has succinctly set out the various principles applicable in respect of an application for an order pursuant to the provisions of O. 56A, r. 2(1) and, in particular, that the Court should only exercise its discretion if it considers it appropriate to do so having regard to all of the circumstances of the case.

32. As Irvine J. stated:

> "To my mind the court could not be satisfied that it would be "appropriate" to make an order unless it was first satisfied

> that the issues in dispute between the parties were amenable to the type of ADR process proposed. That being so I consider that this is the first issue that ought to be addressed by any judge when faced with an application of this type. It is only if satisfied on this particular issue that the judge need move on to consider any other "circumstances of the case" that might weigh in favour or against the granting of the relief sought. It is obvious that it would be a waste of the court's time to consider any such ancillary circumstances unless first satisfied that the process to which its invitation is to be addressed would enjoy a realistic prospect of resolving or substantially narrowing the issues in dispute."

33. Irvine J. went on to state that the invitation to the parties to use an ADR process to settle or determine proceedings infers that the Court when exercising its discretion ought to be satisfied that the process proposed is one which is capable of determining the proceedings or the issues between the parties.

34. It also follows as set out by Irvine J. that the Court has to consider whether the application is made *bona fide* in the belief that the issues in dispute can be disposed of and that the applicant is genuinely willing to engage with the proposed ADR rather than one made for the sole purpose of improving the applicant's negotiating position given that the effect of the order will be to trigger the costs provisions of r. 1(b) of O. 99 and the apprehension that necessarily follows for the party who for good reason may reject the Court's invitation.

35. The further relevant aspect which arises in this instance is as set out by Irvine J. that the Court should not make the order sought if satisfied that the application is brought by a party who knows that an invitation from the Court will for good reason be refused and/or where satisfied that the applicant has no real interest in the ADR proposed but is motivated to make the application knowing that the refusal will allow them proceed to trial while so to speak holding a sword of Damocles over their opponent until the very end of the litigation.

36. These various factors in my view clearly combine to bring about the result that in this instance the trial judge correctly exercised his discretion to refuse the application. This application was against a background where the plaintiffs were seeking interlocutory relief to protect the rent roll and where, having regard to the *Campus Oil* principles, they had a stateable case to obtain the order as sought on an interlocutory basis which would have eased their concerns. In the particular circumstances that arose before the trial judge there had been two settlement negotiations attended by the client's solicitors and counsel and settlement had not been achieved. The interlocutory application was still pending and it is apparent that no or no sufficient comfort was given by the defendant to the plaintiff as regards protection of the rent roll at that stage. The defendant delayed in delivering a replying affidavit by the duly appointed day immediately prior to the commencement of the long vacation and, having then been facilitated that the affidavit was to be delivered prior to the 11th September 2017 when the matter was to be listed, delivered the affidavit on the 4th October and yet only raised the issue of mediation for the first time on the morning of 5th October..

37. Accordingly, the trial judge had a decision to make as to whether or not in the exercise of his discretion he considered it appropriate having regard to all the circumstances of the case that the matter would again be adjourned to facilitate the defendant. He also had to consider as to whether or not having regard to the fact that there had been two settlement meetings attended by solicitor and senior counsel as to whether or not an ADR process would lead to a settlement or determination of the proceedings and he also had to consider as to whether or not in the particular circumstances that arose, the application or in this instance the reference to mediation on the 5th October 2017 was made *bona fide* in the belief that the issues in dispute could be disposed of against a background where there was no agreement between the parties as regards the protection of the rent roll.

38. In my view, it was open to the trial judge in considering all these aspects and in the exercise of his discretion to come to the conclusion that the application for the order pursuant to O. 56 of the Rules of the Superior Courts should be refused and pleadings should be delivered and that the interlocutory application should proceed and in my view he cannot be faulted in the particular circumstances that arise in this matter.

39. Accordingly, I would dismiss the defendant's appeal.

40. There is a second appeal in respect of the case management directions as made by O'Connor J. but these directions have now been complied with and both parties agree that the matter is now moot and in these circumstances I would also dismiss this appeal.