THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 66

Kelly J.
Irvine J.
Mahon J.

Appeal No. 1465/2014

Between

Bank of Ireland Mortgage Bank

Plaintiff/Appellant

and

Colm Heron and Orla Heron

Defendants/Respondents

Judgment of the Court delivered on the 26th day of March 2015

Introduction
1. On the 9th March, 2015, this Court allowed an appeal against an order of the High Court (O'Hanlon J.) made on the 1st December, 2014. These are our reasons for so doing. By her order, the judge refused the plaintiff's application for summary judgment and remitted the litigation to plenary hearing.

2. The plaintiff bank appealed to this Court on two grounds. They were:

> (a) that the trial judge erred in law in finding that the defendants had established a fair and reasonable probability of having a real or *bona fide* defence to the claim and
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> (b) that the defendants had failed to establish a stateable defence to the plaintiffs claim.

The Proceedings
3. On the 12th September, 2012, the plaintiff bank commenced proceedings seeking judgment against the defendants for €162,102.15 together with interest thereon, on foot of a loan agreement concluded between the parties.

4. The usual application for leave to enter final judgment followed. By the time the notice of motion seeking such relief issued, the sum outstanding had grown to €171,699.92 taking account of interest which accrued in the meantime.

5. The motion was transferred to the judge's list where it was heard on the 1st December, 2014.

The Hearing before the High Court
6. This Court has been provided with a transcript of what took place before the High Court judge. It is clear that the affidavits exchanged between the parties were opened to the court as were the relevant legal principles to be applied on an application for summary judgment.

7. Counsel for the plaintiff maintained its entitlement to summary judgment and submitted that the affidavit filed on behalf of the defendants did not demonstrate that they had a real or *bona fide* defence to the claim notwithstanding the seven purported grounds of defence contained in it.

8. Counsel on behalf of the defendants submitted to the High Court judge that the defendants' single affidavit raised sufficient matters to justify the case being adjourned to plenary hearing. He argued that only in the context of such a hearing would the defendants have the opportunity of testing the validity of the plaintiff's claim and of pursuing their own allegations of negligence in respect of the plaintiffs alleged failure to notice alleged problems with the title to the property which the defendants purchased with the monies advanced to them by the plaintiff.

The judgment of the High Court
9. The transcript revealed that at the conclusion of the argument in the High Court, the judge simply announced as follows:

> *"All right. What I am going to say is the following, it would benefit with a plenary hearing. It should go to plenary hearing so that at the end of the day I am erring on the side of caution and giving the defendants that full opportunity."*

10. The trial judge did not give any reasons to support her decision. That is not a satisfactory situation from the point of view of either the parties or this Court. This issue will be addressed later in this judgment.

The jurisdiction of the High Court under O. 37
11. Order 37, r. 6 of the Rules of the Superior Courts requires the Master of the High Court, in contested summary cases, to transfer the proceedings for determination by a judge.

12. On a contested application for summary judgment, the High Court judge may do one of three things. He may (a) dismiss the action, (b) grant judgment for the sum to which he believes the plaintiff is entitled or (c) grant leave to the defendant to defend the proceedings in whole or in part unconditionally or subject to terms (O. 37, rr. 7 and 10 RSC).

13. Any decision made by a judge on an application for summary judgment will have significant repercussions for the parties to the litigation. For a plaintiff whose claim is remitted to plenary hearing, there will be substantial delay encountered in their efforts to

recover the sum claimed. Such a plaintiff will also incur additional costs in bringing the action to a full trial.

14. On the other hand, if judgment is granted against the defendant, the consequences of that decision may be very serious indeed. Such a defendant is denied the opportunity of a full trial because of a failure to reach the low threshold of proof of an arguable defence.

15. A failure on the part of a judge to give reasons for deciding to take whichever option is available under the provisions of O. 37 means that the parties to the litigation cannot make an informed decision as to whether the order may be successfully challenged on appeal or not.

Need to give reasons

16. For many years the Superior Courts have held that administrative bodies making judicial or quasi judicial decisions must give reasons for so doing. Such bodies must satisfy the criteria identified by Murphy J. in *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 where he said in the context of a decision given by the Planning Board that it:

> *". . . must be sufficient first to enable the courts to review it and secondly, to satisfy the person having recourse to the Tribunal that it has directed its mind adequately to the issues before it."*

17. That line has been followed in many subsequent decisions including *Grealish v. An Bord Pleanála* [2006] IEHC 310, *Mulholland v. An Bord Pleanála* [2006] ILRM 287, and *Deerland Construction Limited v. Aquaculture Licences Appeals Board* [2008] IEHC 289. Given that administrative bodies are required to give reasons for their decisions, no lesser standard can be required of courts exercising judicial functions.

18. That such is the case cannot be doubted having regard to the decision of McCarthy J. in *Foley v. Murphy* [2008] 1 I.R. 619.

19. In that case McCarthy J. considered a number of Irish and English authorities in favour of the proposition that reasons must be given for judicial decisions. In *Foley's* case, Her Honour Judge Murphy, a Circuit Court judge, had failed to give reasons for refusing an award of the applicant's costs. On judicial review McCarthy J. granted *certiorari* to quash her decision because of the failure to give reasons for it. He remitted the matter back so that the question could be determined in accordance with law.

20. In the course of his judgment he cited with approval the judgment of the Court of Appeal in England in *English v. Emery Reimbold and Strick Limited* [2002] WLR 2409. In the course of that judgment the Court of Appeal quoted with approval from the judgment of Henry L.J. in *Flannery v. Halifax Estate Agencies Limited* [2000] 1 WLR 377. There that judge said in respect of the duty to give reasons as follows:-

> *"(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know . . . whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*
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> *(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.*
>
> *(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.*
>
> *(4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."*

21. In *English's* case Lord Phillips M.R. put it succinctly when he said:-

> "The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

22. The majority of judgments in the High Court are delivered ex tempore. Such judgments cannot be expected to include anything like the same degree of detail as might be expected in a reserved judgment. They do not have to be discursive. But even an ex tempore judgment must comply with the essential requirement identified by Lord Phillips namely, that it should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.

23. The court is sympathetic to the predicament of a High Court judge faced with a lengthy motion list on every Monday of the legal term. The present case was just such a motion listed on Monday the 1st December, 2014. But a judge cannot be relieved of the obligation to set out briefly the principal reasons underlying a decision on that account. If a judge is unable to deliver a judgment *ex tempore* because of the complexity of the facts or legal issues, then judgment should be reserved. But it is never sufficient to do as was done in the present case and merely announce a decision without giving any reasons for it.

This Appeal

24. Despite seven issues identified in the replying affidavit which was placed before the High Court judge, we were fortunate that on this appeal it was accepted that there was really only one possible defence which fell to be considered. The court will turn to that presently, but before doing so, ought to identify the legal test which has to be applied on an application for summary judgment. The

parties to this litigation were not in dispute concerning it and so it is sufficient to refer to just two relevant authorities. The first is *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, where Hardiman J. stated that the court should ask itself the following question on a summary judgment application:-

> *"Is it very clear that the defendant has no defence? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

Only if those questions are answered in the affirmative should judgment follow.

25. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 McKechnie J. set out the approach to be adopted on an application for summary judgment by reference to twelve different considerations (see p. 7). This Court takes into account each of those factors.

The affidavit evidence
26. The plaintiff bank's grounding affidavit set out and exhibited the loan offer of the 24th August, 2005, whereby the plaintiff agreed to advance to the defendants a loan of €152,000 for a term of 25 years repayable by instalments. The first default on those obligations occurred in August 2007. By August 2012, there were arrears of €29,112.36. In that month the plaintiff made demand of both defendants for repayment of the outstanding sum which as of then was €162,102.15.

27. The only ground sought to be raised on this appeal by way of defence was an assertion that the plaintiff's solicitors having examined the title to the property which the defendants purchased with the loan monies, had failed to notice a problem with it. The defendants asserted that they had relied on the inspection by the bank's solicitors when they purchased the property and had they known that the title was defective, they would never have entered into the loan.

28. This is how the matter was dealt with in the defendants' affidavit:-

> *"I say that the plaintiff bank's solicitors conducted an examination of the title of 27 Doran Close, Bundoran, Co. Donegal, as part of the mortgage approval process. I say that the plaintiff bank's solicitors failed to notice the problems with the title to the said property. I say that we relied upon the plaintiff bank to carry out a proper investigation of the title of 27 Doran Close, Bundoran, Co. Donegal, and that we would not have proceeded with the loan had we known that the title was defective. I say that my wife and I want to have these proceedings remitted to plenary hearing so we can enter a defence to all, or part of the plaintiff bank's claim against us based on the plaintiff bank's solicitors failure to notice the problems with the title to the said property. I say that we are unable to provide further details of the nature of that defence at present due to the nature of the proceedings instituted against us by the plaintiff bank and failure to seek discovery from the plaintiff bank."*

29. The response to that averment was contained in a supplemental affidavit sworn on behalf of the bank. This is what the deponent said:-

> *"Insofar as the first named defendant states that the defendants relied upon the plaintiff to carry out a proper investigation of the title of 27 Doran Close, Bundoran, in the County of Donegal, I say and believe and I am informed that the plaintiff did not engage solicitors to act either on its own behalf or on the defendants behalf with respect to the conveyance of the charged property at issue in these proceedings, namely 27 Doran Close, Bundoran in the County of Donegal. Mr. Aidan Kelly of John McGale Kelly & Co. solicitors, provided a solicitors undertaking on behalf of his then clients, the defendants, on the 12th December, 2005, wherein he undertook inter alia to ensure that the defendants were acquiring good marketable title to the property. Mr. Kelly subsequently provided a certificate of title to the plaintiff on the 28th May, 2010, confirming that the defendants had good marketable title to the property. The said solicitors undertaking and the certificate of title were expressly given by Mr. Kelly as the solicitor for the borrowers namely the defendants herein. Mr. Kelly was at all times the agent of the defendants. Accordingly, the plaintiff relied upon the said solicitors undertaking and certificate of title furnished by Mr. Kelly when it advanced the loan monies the subject matter of these proceedings to the defendants and the plaintiff continues to rely on same."*

30. The affidavit then exhibited the undertaking and the certificate of title furnished by the solicitor. Although that affidavit was sworn on the 13th March, 2014, and the motion for summary judgment was not dealt with until the 1st December, 2014, no affidavit was sworn by the defendants controverting in any way that averment. Neither was any notice to cross examine the deponent of the bank's affidavit served.

31. The exhibits contained in the replying affidavit of the bank consist of the undertaking given by Mr. Kelly whereby he promised to acquire good marketable title to the property on the defendants' behalf. The undertaking is signed by both defendants. It acknowledges that the solicitor was retained and authorised by them to deal with the bank on their behalf. The certificate of title furnished by Mr. Kelly in May 2010, confirms that the defendants had acquired good marketable title to the property.

32. It is clear in the light to this material that the relevant part of the defendants' affidavit which is relied upon as demonstrating an arguable defence is mere assertion. Furthermore it is not credible. The supplemental affidavit sworn on behalf of the bank together with its exhibits demonstrates that the bank did not engage solicitors to act on its behalf in relation to the title to the property. Rather it relied upon the undertaking furnished by the defendants own solicitor, that he would obtain good title to the property on behalf of the defendants. No arguable defence has been shown.

33. It is of some concern to this Court that when swearing his affidavit, the first defendant must have known the true state of affairs particularly since he himself is a solicitor in Northern Ireland.

Disposal
34. This Court is satisfied that the defendants did not meet even the low threshold required to justify the case being adjourned to plenary hearing. The trial judge erred in making the order which she did. It is for these reasons that this Court allowed the appeal and entered judgment in favour of the plaintiffs.