THE COURT OF APPEAL

Ryan P.
Finlay Geoghegan J.
Hogan J.

BETWEEN/

No. 2015/381

PAUL McCANN

PLAINTIFF/RESPONDENT

-AND-

J.M. AND Y.W.

APPELLANTS/DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 8th day of December 2015

1. This is an application by the second defendant, Ms. Y.W., for an extension of time to appeal to this Court against the decision of the High Court (Donnelly J.) delivered on 27th April 2015, *sub nom. McCann v. A, B and C* [2015] IEHC 366. The requisite appeal papers were not filed within the time permitted by the Rules of the Superior Courts and, hence, it was necessary for Ms. W. to bring this application for leave to appeal out of time.

2. It is not in dispute but that to succeed on this application for leave to appeal out of time Ms. W. - who is a litigant in person - has to demonstrate:-

(i) that she formed the intention to appeal during the period permitted for filing such an appeal;

(ii) something in the nature of a mistake and

(iii) the existence of arguable grounds: see *Éire Continental Trading Co. v. Clonmel Foods Ltd.* [1955] I.R. 170.

3. This application is grounded on an affidavit sworn by Ms. W. on 23rd July 2015. She has also produced a draft notice of appeal upon which she seeks to rely. The Court has, unfortunately, been obliged to proceed to hear this appeal without having had actual sight of a number of key documents which clearly are of some importance to the resolution of this actual appeal.

4. It is accepted that the appellant satisfies the first two of the three *Éire Continental* criteria. While the judgment under appeal was delivered on 27th April 2015, the order of the High Court was not perfected until 5th June 2015. Ms. W. clearly formed an intention to appeal within the requisite time and her efforts to lodge the appeal papers were thwarted by the unavailability of the final version of the judgment and confusion regarding the length of time available to her for the lodging of the appeal.

5. The real question confronting the Court, accordingly, is whether Ms. W. can satisfy the third condition, namely, whether she can demonstrate the existence of arguable grounds from amongst those set out in her draft notice of appeal. Before considering this question it is, however, first necessary to set the background to this litigation.

The background to the litigation

6. Mr. M. and Ms. W. were formerly partners and they have two children now aged approximately 12 years and 9 years of age respectively. That partnership broke up at some stage in 2006/2007. Mr. M. has indicated that he has no wish to take part in these proceedings, so that Ms. W. is the effective defendant to the action.

7. In 2005 Mr. M. took out loans from the EBS Building Society for the purchase of eight different properties in Dublin in the sum of some €8.3m. The loans had a variable interest rate and the term of the mortgages was expressed to be for some 25 years. Seven of the properties are residential and one is a commercial premises in Dublin city centre. Mr. M. also charged a ninth property (which is a substantial property in its own right) for this purpose.

8. Mr. M. currently lives in one of these properties and Ms. W. lives in another. It is important to stress, however, that the property in which Ms. W. lives with her children is not a family home within the Family Home Protection Act 1976 since the parties were never married.

9. Following the break-up of the parties' relationship the Circuit Court (Her Honour Judge Flanagan) made a consent order on 11th March 2008 pursuant to a settlement. The ultimate effect of that order was that the settlement provided Ms. M. at her children were entitled to reside at the ninth property. Ms. W. maintains that an affidavit of judgment to this effect was registered at the Registry of Deeds on 15th June 2009 which incorporated the earlier Circuit Court order of 11th March 2008.

10. The EBS had, however, registered mortgages against the eight properties at various dates in 2008. The first mortgage was registered in favour of EBS in the Registry of Deeds on 30th April 2008. This mortgage extended from the second to the eight properties. While it also included the ninth property, it was subsequently accepted that this property was wrongly included, a matter made clear by a later deed of rectification. The EBS had also secured the registration of a mortgage against the first property on 7th October 2008.

11. Critically, therefore, both mortgages had been registered by EBS in 2008 prior to what Ms. W. says was the subsequent registration of the affidavit of judgment incorporating the earlier Circuit Court order in the Registry of Deeds on 15th June 2009. This is of some importance in terms of the priorities affecting the first eight properties. It has been clear for the best part of 75 years that "a judgment mortgage is a process of execution and does not constitute a purchase for valuable consideration" so that a judgment mortgagee takes as a volunteer, i.e., subject to the rights and obligations of the judgment mortgagor: see In *re Strong* [1940] I.R.

382, 403, *per* O'Byrne J.

12. In the present case, those obligations of Mr. M. extended to the prior mortgages which had been secured on the property, so that Ms. W., as judgment mortgagee, took subject to those earlier mortgages. In September 2008 the EBS had issued a letter of demand to Mr. M. requiring repayment in full of the secured monies. In default of repayment EBS then issued proceedings against Mr. M. seeking possession of the eight properties. An order for possession was granted on 29th October 2009 in favour of the EBS by the High Court by order of Dunne J. The EBS did not take possession of the premises, but by two separate deeds of appointment dated 26th May 2010 instead purported to appoint a receiver, Mr. McCann, over the properties. Mr. McCann is not only the plaintiff in this action, but he is also a chartered accountant and a principal in the firm of Grant Thornton.

13. It appears that the receivership proceeded in an unexceptional fashion between 2010 and early 2014. As Donnelly J. stated (at para. 22 of her judgment) the "eight premises were managed in the usual manner and any rental profit was used to reduce the indebtedness of the first defendant to the EBS."

14. By early 2014 the EBS planned to place the first and second premises on the market. At that stage, however, both defendants separately objected to the plaintiff's proposal to sell these two properties. Ms. W. objected in particular to the deleterious condition in which she said these properties had been left by the EBS. There then followed acrimonious correspondence between the parties and Donnelly J. recorded in her judgment (at para. 26) that Ms. W. had admitted in oral submissions to the High Court that "she had changed the locks and was responsible for stopping the attempts by the receiver to sell the premises." There was also evidence to suggest that Ms. W. had facilitated or encouraged others to obstruct or impede the actions of the receiver and to hold herself out to the tenants of the properties as the person entitled to payment of the rent in respect of the third to the eight properties.

15. The plaintiff then commenced the present proceedings on 29th April 2014. In these proceedings the plaintiff sought possession of the first and second premises. He also sought orders restraining the defendants from holding themselves out as the parties entitled to deal with and manage the third, fourth, fifth, sixth, seventh and eight premises and to cease demanding premises of the tenants in occupation of those premises. The first defendant took no active part in the High Court and, indeed, expressed concern that the costs of these proceedings might jeopardise the prospects of any surplus in the receivership. In a detailed and comprehensive judgment Donnelly J. rejected the challenge made by Ms. W. to the validity of the mortgages registered in favour of the EBS and the appointment of the receiver.

16. In her draft notice of appeal before this Court Ms. W. seeks leave to advance five grounds, each of which she maintains amount in their own right to arguable grounds of appeal. It is necessary first to address the third ground advanced by Ms. W., namely, the standing of Ms. W. to challenge the actions of the receiver before then considering the remaining grounds of appeal in turn.

Third ground: The standing of Ms. W. to raise the issue regarding the validity of the receiver

17. In her judgment Donnelly J. ruled against the right of Ms. W. to contest the issue of the validity of the plaintiff's appointment on the basis that this was intimately bound up with the contracts of mortgage and that as Ms. W. was simply not a party to these instruments, she could not raise any issue in relation thereto. She further ruled against Ms. W. on the ground that the matter was *res judicata*: Dunne J. had, after all, ruled on the validity of the mortgages when she made an order of possession to this effect in favour of the EBS in October 2009.

18. In her application to this Court Ms. W. has relied on many standard authorities dealing with the issue of standing (such as, for example, *The State (Lynch) v. Cooney* [1982] I.R. 337). These cases, however, all concerned the very different question of standing in the realm of public law. These authorities are not directly applicable to the entirely different circumstances of a case such as the present one, governed as it is by private law. The rights of the parties in private law are normally exclusively governed by the contractual document and, generally speaking, only the parties to that contract have the standing to invoke it: this is the doctrine of privity of contract.

19. Ms. W. maintains, however, that she secured a judgment mortgage over the properties. While Ms. W. would rank as a volunteer *qua* any such judgment mortgagee and would accordingly take subject to the prior interests of the Bank, she would – if this were established - nonetheless have a right to enforce the judgment against these properties. This, in itself, may potentially give her the right to object to the validity of the appointment of the receiver, not least where the plaintiff is contemplating the sale of those very properties.

20. All of this to say that Ms. W. has, at least, an arguable case that she has a sufficient interest in challenging the appointment of the receiver. This in itself, however, is not sufficient to enable Ms. W. to succeed on this appeal, because even if it were to be ultimately held that Ms. W. had sufficient standing to challenge that appointment, she must nonetheless further demonstrate the existence of arguable grounds by which that appointment can be challenged.

21. It is to these individual issues to which I propose now to turn.

Ground No. 1: The proper status of the EBS

22. The first ground of objection is to the past and current status of the EBS. The EBS Building Society ("the EBS") was, of course, originally a building society registered under the Building Societies Act 1989. It was the EBS which made the loan offer to Mr. M. and to which the mortgages were granted and the order for possession made by Dunne J. in October 2009 was, it appears, in favour of the EBS.

23. Two arguments were, however, advanced by Ms. W. in relation to this ground. She first stated that in November 2008 the EBS's mortgage book was transferred to EBS Mortgage Finance Ltd. pursuant to s. 58 of the Asset Covered Securities Act 2001. She then stated that in July 2011 the mortgage book of the EBS was transferred to EBS Ltd. pursuant to an acquisition conversion and demutualisation scheme contained in Part XI of the Building Societies Act 1989. She then states that it is not presently possible for EBS Ltd. to demonstrate that it had acquired the rights to the mortgage book so far as these loans are concerned.

24. The two copies of the instruments of appointment furnished by Ms. W. to this Court show that the plaintiff was appointed as receiver by the EBS Building Society, although Donnelly J. commenced her judgment (at para.1) by stating that the plaintiff "is the receiver purportedly appointed by EBS Ltd."

25. Part of the difficulty currently confronting this Court is that we have been furnished only with a limited set of papers for the purposes of this motion which, of course, is simply an application to extend the time for lodging an appeal to this Court. It may well be that at a full hearing any possible issue regarding the status and entitlement of the EBS and EBS Ltd. in respect of these mortgages can be fully documented and explained.

26. At the moment, however, based solely on the documents presented to this Court I consider that Ms. W. has an arguable ground of appeal that the appointment of the receiver was invalid because either EBS Building Society did not hold the debt owed by the first named defendant or that it did not continue to have the benefit of the mortgages granted at the date of the appointment of the receiver.

27. For the avoidance of any doubt, I would stress, however, that Ms. W. does not have any entitlement to argue that the original mortgages granted by the EBS Building Society were invalid. I believe that Donnelly J. was quite correct when she held that this matter had already been determined by Dunne J. in the orders which she made on 29th October 2009. These orders were not appealed at the time and the finality of these orders may not be collaterally or indirectly challenged by Ms. W. in these proceedings.

Ground No. 2: The appointment of the receiver was invalid
28. On 26th May 2010 two deeds of appointment of the receiver were purportedly executed by the EBS Building Society. The first appointment was in respect of the second to seven properties and the second appointment was in respect of the first property. Both deeds recite that the receiver executed the deed by his hand and seal. While it seems that the receiver signed the deed and had it witnessed, there is nothing in the exhibits before us to suggest that the receiver affixed his seal. Both deeds further recite that the EBS executed the deeds by the affixing of the common seal of the Society. While a witness was ostensibly present when the common seal of the Society was so affixed, there is nothing in the documents before us to suggest that the deed was so sealed.

29. I would pause here to observe once again that given that this is simply an application for leave to appeal, the members of the Court simply have the motion papers presented by the applicant, Ms. W. If leave were to be granted, it might well transpire at a subsequent hearing that the receiver would be able to demonstrate that both his appointments were duly sealed by both the Society and himself. If, however, the Court assumes for the moment in Ms. W.'s favour that no such seal was affixed, either by receiver or the EBS, what is the position?

30. Section 64(2) of Land Law and Conveyancing Law Reform Act 2009 ("the 2009 Act") provides that any instrument executed after 1st December 2009 is a deed if

> (a) it is so described and
>
> (b) it is executed in the following manner:
>
> > (i) if made by an individual
> >
> > > (I) it is signed by the individual in the presence of a witness who attests the signature, or
> > >
> > > (II) it is signed by a person at the individual's direction given in the presence of a witness who attests the signature, or
> > >
> > > (III) the individual's signature is acknowledged by him or her in the presence of a witness who attests the signature;
> >
> > (ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association;
> >
> > (iii) if made by a body corporate registered in the State other than a company, it is executed in accordance with the legal requirements governing execution of deeds by such a body corporate…..
>
> and
>
> (c) delivered as a deed by the person executing it or by a person authorised to do so on that person's behalf."

31. So far as the plaintiff is concerned, it is clear that he signed the deed and had that signature appropriately witnessed. It is thus clear that the requirements of s. 64(2)(b)(i)(I) of the 2009 Act were satisfied. It follows that the instrument of appointment was a "deed" within the meaning of s. 64(2) of the 2009 Act as it was both so described and it was executed in the manner specified in the sub-section.

32. Section 64(3) of the 2009 Act further provides that:

> "Any deed executed under this section has effect as if it were a document executed under seal."

33. In these circumstances, the fact the receiver did not (apparently) execute the appointment by seal is irrelevant, since the effect of s. 64(3) is to deem such a deed to have the same effect in law as if it were executed under seal: see *McGuinness v. Ulster Bank of Ireland Ltd.* [2014] IEHC 281.

34. In the case of a body corporate other than a company (such as the EBS Building Society) the requirement is that the deed must be "executed in accordance with the legal requirements governing execution of deeds by such a body corporate". If it is so executed, then the instrument will be a deed for the purposes of s. 64(2) and, in view of the provisions of s. 64(3), the necessity for a seal will have been dispensed with.

35. As matters stand, however, the Court has no knowledge of the legal requirements governing the execution of deeds by the EBS. Again, as with Ground No. 1, it may be that following the lodging of the books of appeal, it will quickly transpire that the deed was properly executed. For the moment, however, I think say that Ms. W. has raised an arguable ground in respect of this issue so far as the execution of the deed of appointment by EBS is concerned. She has, however, not established the existence of an arguable ground so far as the execution of the deed by the plaintiff himself is concerned.

Ground No. 4: Breach of privacy and data privacy
36. At para. 46 of the judgment of Donnelly J. makes clear, an issue relating to the scope and effect of the earlier family law proceedings arose in the High Court. For this purpose Donnelly J. quite properly directed that this aspect of the case should be heard in camera. Ms. W. contends, however, that following the delivery of the judgment it was published in un-redacted form on the Courts Service website. She maintains that the un-redacted judgment which was so published contains details of the various addresses of

the properties which were the subject of the judgment and, specifically, details of the family law proceedings and the parties to those proceedings.

37. Ms. W. submits that such publication was a violation of her constitutional rights to privacy in relation to her marriage, dwelling and family as protected by, *inter alia*, Article 40.3.1, Article 40.5 and Article 41 of the Constitution. She further argues that the publication of these un-redacted details on the website amounts to a violation of her rights to data protection and privacy under the Data Protection Acts 1988-2003.

38. I will assume for the purposes of this judgment that Ms. W. might be able to demonstrate at the full hearing of this appeal that such a publication took place and that such amounted to a breach of her constitutional rights to privacy and data privacy. It is clear that, in principle, a breach of personal data privacy could amount to a breach of a constitutional right to privacy: see*, e.g., Schrems v. Data Protection Commissioner* [2014] IEHC 310, [2014] 2 I.L.R.M. 401. Depending on the particular circumstances of the case this might possibly give rise to a cause of action for damages for breach of constitutional rights to privacy: see, *e.g., Kennedy v. Ireland* [1987] I.R. 587. It is also possible that a breach of data privacy may sound in damages in tort by reason of s. 7 of the Data Protection Act 1988: see here the judgment of Feeney J. in *Collins v. FBD Insurance plc* [2013] IEHC 137.

39. It is, however, unnecessary to express any view on these questions for the purposes of this appeal*. If* Ms. W.'s version of events is correct she may possibly have a cause of action against third parties by reason of the manner in which the judgment was published. Yet even taking her case in this regard at its absolute height, it is clear that it does not in any way affect the validity or merits of the judgment under appeal and nor does it give her any rights vis-à-vis the plaintiff so far as this particular appeal is concerned. If there has indeed been any breach of her constitutional rights to privacy or data privacy in the manner contended for by Ms. W. – and I again refrain from expressing any view on this question – there is no basis at all (and, in fairness, none has been suggested) that the plaintiff has been responsible in any way for such breach.

40. It follows that Ms. W. has not established any arguable ground of appeal in respect of this ground.

Ground 5: Alleged breach of constitutional rights by the plaintiff
41. Ms. W. has further contended that the plaintiff has violated her constitutional rights and, specifically, violated her rights to the inviolability of her dwelling as protected by Article 40.5 of the Constitution by unauthorised trespass and entry upon her family home. I again refrain from expressing any views on these claims, as it is sufficient to say that even if these contentions were properly made out, this would not affect the plaintiff's rights *in these proceedings* or affect the merits of the judgment of the High Court presently under appeal. If the plaintiff wrongfully acted in the manner claimed, Ms. W.'s remedy lies in a separate action for damages for trespass and breaches of constitutional rights. No claim of this kind is presently properly before the court.

42. It follows also that Ms. W. has not established any arguable ground of appeal in respect of this ground.

Conclusions
43. Summing up, therefore, I would grant an extension of time to Ms. W. to issue a notice of appeal on or before December 17th 2015. In accordance with the terms of this judgment the notice of appeal must be confined to Grounds 1, 2 (but only so far as the execution of the deed of appointment of the receiver by the EBS is concerned) and 3, but not in respect of Grounds 4 and 5.