THE COURT OF APPEAL

Peart J.
McGovern J.
McCarthy J.

BETWEEN:

Neutral Citation Number: [2018] IECA 363

Record Number 2017/177

ALLIED IRISH BANKS PLC AND AIB MORTGAGE BANK AND

DECLAN MCDONALD

PLAINTIFFS

AND

DAMIAN GIBNEY AND IRENE GIBNEY

DEFENDANTS

Record Number 2017/612

ALLIED IRISH BANKS PLC

AND AIB MORTGAGE BANK

PLAINTIFFS

AND

DAMIAN GIBNEY, AND IRENE GIBNEY AND MARIE LYONS

DEFENDANTS

JUDGMENT (*EX TEMPORE*) OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 9TH DAY OF NOVEMBER 2018

1. There are two appeals before the Court. The first appeal is an appeal against a judgment given by Ní Raifeartaigh J. on the 16th November 2017 when she granted judgment against the defendants in those proceedings, that is Mr. Gibney and Ms. Gibney. She granted judgment, first of all, in the sum of €1,011,992.39 and she went on to give judgment in favour of AIB Mortgage Bank then against Mr. Gibney & Maire Lyons in the sum of €394,829.83. The second appeal is one against an order made by O'Connor J. when he was asked to grant an interlocutory injunction against the defendants in those proceedings to restrain them from interfering with the activities of the receiver who had taken possession of property after which it was alleged in affidavits that the defendants had changed the locks and had confronted and intimidated receiver's agents and so on.

2. The particular facts behind each of those decisions do not really need to be recited since the appellants, who are present in court, are aware of them already. It is convenient to state at this stage that in each of these appeals which are against orders granted on foot of applications that were grounded upon affidavits, there are two objections common to both appeals, and only two objections, which are been relied on for the purpose of the appeals.

3. Those objections relate to the manner in which the affidavits have been drafted and sworn. The appellants rely upon the provisions of Ord. 40, r. 6 and Ord. 40, r. 9 of the Rules of the Superior Courts. They submit that those Rules have not been complied with, and in support of that submission they urge upon this Court that the High Court judge in each case was wrong to have admitted those affidavits on the basis that they were defective by not complying with the Rules which they refer to, and they urge upon this Court that therefore the judges in question ought not to have admitted them, as I have said.

4. They make a general submission, first, to say that this Court must apply the strict letter of the law in accordance with our judicial oath under the Constitution. They also make the point that the Rules of Court are the equivalent of Statute Law made pursuant to Regulations made under primary Acts, and that it is the Acts of the Oireachtas which comprise the law of the country and that case law ought not to be relied upon by this Court and that this Court should apply only a literal interpretation of the Rules. The Rules which they refer to are Ord. 40, r. 6 and Ord. 40., r. 9, as I have said, and I will read the relevant parts. Rule 6 provides:

> "Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit…"

Rule 9 provides:

> "Every affidavit shall state the description and true place of abode of the deponent."

5. In each of the affidavits upon which the applications before the respective judges were grounded, the deponent gave a business

address as opposed to a place of residence or abode as the Rule describes it. In addition, in the affidavits upon which the applications in the Court below were grounded, the time of day at which the affidavits were sworn was not stated in the jurat. It simply expressed, as is almost invariably the case, the date on which the affidavit was sworn and the place at which it was sworn, but did not give the time of day.

6. So those are the bases on which the appellants seek to succeed on this appeal and they have made it quite clear to this Court in answer to the specific question in that regard that those are the only two grounds upon which they are relying in each appeal.

7. Now, the appellants have submitted that these Rules have to be given a literal interpretation since the words used are clear, and they submit that in circumstances where various judges have permitted affidavits to be adduced in evidence and relied upon in Court those judges are facilitating what they described as perjury. They go on to urge that until these points of law have been fully addressed and determined to their satisfaction that this Court has what was described as 'no subject to jurisdiction' to proceed with the appeals.

8. Now in my view these points are without any real merit. I would just say that even though the appellants have submitted that this Court cannot rely on case law, that is simply not correct. Courts interpret Acts of the Oireachtas and they interpret the Rules of the Superior Courts from time to time where arguments are made as to a lack of clarity in those provisions. Those decisions of the Court by way of interpretation of Acts and of the Rules are sources of law that this Court can be guided by. In that regard I would just refer to a case that was referred to which is a judgment of Kelly J. (as he then was) in a case of *Kearney v. Bank of Scotland* [2015] IECA 32 which was given on the 23rd February 2015. In that judgment he addressed an issue which had been raised in that appeal which is the same issue that these appellants seek to raise in relation to the failure to give a place of abode as opposed to a business address or a work place address. For the reasons stated in that judgment he concluded that on the basis of much older case law, and the appellants make a complaint about that judge having relied upon case law pre-dating the Constitution of 1937 when concluding that the point was not a good point and even if he was wrong in that, he went on to say that Ord. 40, r. 15 would apply because it was an objection of a purely technical nature that the Court was capable of overlooking by virtue of the discretion provided for in Ord. 40, r. 15.

9. But, as I say, the point is without merit as is the point about the failure to insert the time of day into the jurat. I say that because while the Rules identified by the appellant say what they say the Rules are not but sometimes referred to as a Penal Statute which require the type of inflexible, strict and literal interpretation that the appellants urge upon this Court. The Rules have to be applied with a degree of common sense and practicality. I have said in the past and I will say it again now, that in my view the Rules of Court lay down procedures which are designed primarily to enable things to be done and not to prevent things from being done. Litigants, of course, must adhere to the procedures provided. But there are within the Rules themselves certain provisions which for example make clear that where a time for doing any Act or taking some step in the proceedings is exceeded that time can be extended by the Court or indeed abridged. So there is flexibility built into the scheme of the Rules to enable things to get done.

10. For example, where in Ord. 12, r.2 a period of eight days is provided for the entry of an appearance following service of a summons on a defendant, and the defendant does not comply with that Rule and exceeds that time limit, there is a provision in Ord. 12, r. 13 which says that a defendant may enter his appearance at any time before judgment is given. That is just one example of the sort of flexibility that is within the Rules themselves. I say that to demonstrate that the Rules do not have the sort of inflexibility that the appellants urge.

11. So in relation to their submission both in relation to the address of the deponent and the failure to provide the time of day that the affidavits were not admissible on those bases, they fail to have regard to Ord. 40, r. 15 which contains the specific provision which Kelly J. (as he then was) referred to in the *Kearney* case which indicates that Ord. 40, rr. 6 & 9 are not to be applied with the kind of strict interpretation contended for, and which, if their submissions were to be accepted, would allow form to triumph over substance and Ord. 40, r. 15 provides that the Court may receive any affidavits sworn for the purpose of being used in any cause or matter notwithstanding any defect by mis-description of parties or otherwise in the title or jurat or any other irregularity in the form thereof and may direct a memorandum to be made on the document that it has been so received.

12. Insofar as the present objections are of a very technical nature, and in respect of which absolutely no prejudice has been asserted either in the Court below or her arising from the alleged defects, it is quite clear to me that even if there was some merit in the assertion that there should be a place of residence and the time of day inserted in the appropriate parts of the affidavit, this Ord. 40, r. 15 entitles the Court to overlook that for the reasons that I have said.

13. Now, I acknowledge that the appellants have urged that that Rule cannot be used to overcome significant defects in the affidavits and they consider those to be significant defects. But I disagree. I regard them as technical defects which come within the ambit of Ord. 40, r. 15.

14. I would further add that the construction of Ord. 40, r. 6 which is urged upon by the appellant, that is in relation to the time of day in the jurat, would lead to a manifest absurdity. A statement that a particular affidavit was taken by the Commissioner of Oaths at, say, 10 a.m. without adding the date in question would be meaningless and pointless. In that regard I would refer again to the provisions of Ord. 40, r. 6 which say that every Commissioner shall express the time when and the place where he shall take any affidavit.

15. Now if that is to be given a literal interpretation the jurat would simply say e.g. "sworn at 4.15 at Ormond Quay, Dublin 7 …" and it would have to omit the date. If the date was inserted a litigant such as the appellants, might well come in and submit that the jurat does not comply with the Rules because the date is inserted. In my view, any objection so raised would amount to an absurdity. In these circumstances I think it is appropriate to refer to the provisions of s. 5 (2) (b) of the Interpretation Act 2005. That says that in construing a provision of a Statutory Instrument that on a literal interpretation would be absurd or fail to reflect the plain intention of the Act as a whole, the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole.

16. Now if the reference to time is simply to time in the sense of time of day, then the provisions of Ord. 40, r. 6 simply do not reflect that plain intention of the drafters, in my view. I think it is plain that in using the word 'time' they intended to have an appropriate record for court purposes of when the affidavit was taken before the Commissioner for Oaths.

17. In these circumstances it is permissible, particularly having regard to s. 5 (2)(b) of the Interpretation Act to treat the word 'time' as it appears in Ord. 40, r.6 as referring not simply to the time of day but also embracing the date on which the affidavit was also taken.

18. So in the present case I am completely satisfied that the issues raised under Ord. 40, rr. 6 & 9 fall into the category of purely technical defects if they are defects at all. In fact, having regard to the fact that it is permissible to have regard to the Interpretation Act I do not consider them to be a breach of Ord. 40 in any event.

19. As to the address of the deponents being stated as their work place address and not their place of abode in the sense of their home, the phrase "place of abode" must be also given a sensible meaning in line with its clear purpose.

20. I appreciate that if one seeks a dictionary meaning for the word "abode", it will state "dwelling" or some such, to indicate a place where a person lives. But giving the perfectly obvious purpose of the requirement to state an address for a deponent the context of litigation must enable that word to include the address at which the deponent works and hence where he may be found should that be necessary for any purpose. I do not consider the insertion of a work place address to breach Ord. 40, r. 6, but even if it did it is of a purely technical nature well capable of being disregarded by any court for the purpose of allowing the affidavit to be used. I would refer also to a judgment given by Irvine J. in this Court in Danske Bank v. Kirwan [2016] IECA 99 where she found to similar effect.

21. So, for these reasons I would dismiss these appeals, and insofar as the appellants have asked this Court to state a case, as they have put it, to the Supreme Court so that the Kearney decision can be re-visited and considered by the Supreme Court, that is something that this Court simply has not power to do. But insofar as they have applied for that I would refuse it.