THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023/95
High Court Record Number: 2013/353SP
Neutral Citation Number [2023] IECA 251

Birmingham P.

Noonan J.

Faherty J.

BETWEEN/

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

-AND-

SIMON KAVANAGH AND DEIRDRE KAVANAGH

DEFENDANTS/APPELLANTS

Ex Tempore JUDGMENT of Mr. Justice Noonan delivered on the 9th day of October, 2023

1. [Birmingham P.]: I should say that I have had an opportunity to read the judgment in draft and I agree with its contents and I agree with what he says about the manner in which the appeal should be disposed of.

2. [Noonan J.]: These proceedings commenced almost a decade ago with the issue of a special summons by the plaintiff respondent ("Start") wherein Start sought an order for possession of the Kavanaghs' property in County Wexford. That property is the subject of

an indenture of mortgage dated the 3rd August, 2005 between Start and the Kavanaghs, provided as security for two loans, one of €190,000 in 2005 and the second of €65,000 in 2006. In their original grounding affidavit to the special summons, Start alleged that the Kavanaghs defaulted on the terms of the loans since June 2011, in consequence of which formal demands for payment of the entire balance were made by Start. This was followed by a demand for possession on the 26th April, 2013. The property in question appears to comprise the Kavanaghs' family home.

3. The matter appears to have proceeded relatively slowly initially which may have been due to difficulties with the service of the proceedings and, ultimately, an order for substituted service was made. The matter initially came before the Master of the High Court in late 2015 and was eventually transferred to the judge's list where it was ultimately heard by Hedigan J. on the 18th July, 2016. It would appear that Mr. Kavanagh issued a motion seeking leave to cross-examine certain deponents of the affidavits sworn on behalf of Start. Although Mr. Kavanagh complains that he was of the impression that this was the only matter that was going to be dealt with on the 18th July, 2016, the court determined that the application for possession on foot of the special summons was properly before it and the judge proceeded to hear it and deliver an *ex tempore* judgment.

4. The terms of that judgment suggest that the main contest between the parties concerned an alleged securitisation process undertaken by Start involving securities which included the Kavanaghs' mortgage. Mr. Kavanagh argued that the effect of this process was that Start no longer had the right to pursue the Kavanaghs for an order for possession as the title in the mortgage no longer vested in it. The court considered this argument in some detail and a number of relevant authorities which made clear that this did not amount to a valid defence

to the claim for the reasons identified by Hedigan J. in his *ex tempore* judgment. Accordingly, he granted an order for possession with a stay for a period of nine months.

5. It is of importance to note that the Kavanaghs did not appeal this order. The order appears to have remained unexecuted and in February 2018, Start applied to the High Court to amend the title of the proceedings to reflect the fact that the plaintiff had now become a Designated Activity Company converting from Start Mortgages Limited to Start Mortgages DAC. That order was made on an *ex parte* basis and following service, Mr. Kavanagh brought an application to set it aside. A reserved judgment refusing the reliefs sought was delivered by Simons J. on the 11th April, 2019. Mr. Kavanagh appealed that order to this court which dismissed the appeal on the 22nd January, 2020. It is noteworthy that in the course of that particular matter, Mr. Kavanagh did not seek to impugn the terms of the original order for possession in any way.

6. Matters remained in abeyance for a further two years until on the 17th July, 2022, Start applied to the Central Office to have an order of possession issued pursuant to O. 47 of the RSC.

7. It would appear that in response to that application, Mr. Kavanagh issued a motion in November 2022 seeking to set aside the original order for possession on the basis that Start had no right to sue in its own name as it was acting as a credit servicer at all material times.

8. Mr. Kavanagh's motion came on for hearing before Simons J. on the 16th January, 2023 who reserved judgment, and subsequently delivered a written judgment on the 30th January, 2023.

9. In the introduction to his judgment, Simons J. noted that the only basis identified in the notice of motion for the application was that it was brought pursuant to O. 124 of the

RSC, which provides for the setting aside of proceedings for irregularity. The court noted however that it has an inherent jurisdiction to set aside a final judgment on the basis of the relevant principles set out by the Supreme Court in the matter of *Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514. Although this authority was not invoked by Mr. Kavanagh, the judge felt that as he was a litigant in person, it was appropriate for him to consider it in the context of Mr. Kavanagh's application.

10. The judge then set out the procedural history as I have briefly summarised it, noting that the primary defence advanced by Mr. Kavanagh to the proceedings was that the beneficial interest in the mortgage had been assigned to a different legal entity and therefore Start was not entitled to enforce it. Start in response had contended successfully that while the beneficial ownership had been transferred, it remained the legal owner of the mortgage and the party entitled to enforce same. This was the issue dealt with in the judgment of Hedigan J. already referred to.

11. The judge first turned to a consideration of O. 124 and concluded that Mr. Kavanagh's invocation of this order was entirely misconceived as it is concerned with ongoing proceedings and not with a final unappealed judgment. He noted that different rules were concerned with the concept of setting aside a judgment such as O. 27, r. 15 and O. 36, r. 33.

12. He went on to say that even if the court's discretion under O. 124 was engaged in this case, the delay of over six years, which the judge characterised as inordinate and inexcusable, would preclude the exercise of the discretion in any event. He noted that the order itself provides that no application to set aside for irregularity shall be allowed unless made within a *"reasonable time"*. The judge noted that Mr. Kavanagh also purported to rely on the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84, dealing with the essential constituents of an indorsement of claim in debt related

proceedings. He noted that although this judgment post-dated the judgment and order for possession by over three years, Mr. Kavanagh waited a further three years before applying to set aside.

13. The judge then turned his attention to the exceptional jurisdiction to set aside a judgment on the basis of the *Greendale* principles, followed in a number of subsequent authorities. He cited the following passage from the *Greendale* judgment explaining the nature of the jurisdiction:

> *"There is, therefore, a clear and consistent line of authority on this topic. A high weight has to be attached to the principle of finality. The reason behind this is clear. Where proceedings have reached an end, the parties are entitled to expect that they will not have to continue to litigate the issues which have been finally determined. However, there may be exceptional circumstances where a failure to reopen may itself amount to a clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, such that the decision sought to be reopened can properly be considered to be a nullity and not merely arguably in error. Where such a situation arises through no fault of the party concerned, it follows that the limited jurisdiction to reopen the case can be exercised."*

The judge also considered whether one judge of the High Court could set aside an order made by a different judge, in this case one who had since retired.

14. In giving his decision, the judge first noted that the argument principally advanced by Mr. Kavanagh in support of his application to set aside the judgment was precisely the same argument that had been made by way of defence in 2016. If Mr. Kavanagh wished to challenge the correctness of Hedigan J.'s conclusions, the proper course was for him to have

appealed, the judge noting that Hedigan J. had advised Mr. Kavanagh that he had a right to appeal, which in the event he did not exercise.

15. The judge also noted that despite the subsequent unsuccessful challenge to the name change and appeal of that decision to this court, Mr. Kavanagh did not seek to reopen the matter of Start's title to bring the proceedings.

16. Insofar as the complaint about the content of the pleadings was concerned pursuant to the *O'Malley* case, the judge was of the view that it was unnecessary to determine that issue because Mr. Kavanagh had not established a breach of his constitutional rights such as might justify setting aside the final judgment and order. In any event, he had been fully apprised of all the necessary particulars at the material times. The judge pointed to the fact that Mr. Kavanagh did not in fact dispute that the debt was due and owing in the original proceedings but rather advanced a legal argument based on securitisation which had failed. Therefore any alleged shortcomings in the indorsement of claim resulted in no prejudice to him. The judge also rejected the suggestion that Mr. Kavanagh had been somehow ambushed at the original hearing because of his misunderstanding that it was merely the hearing of his motion to cross-examine rather than the substantive claims, which the judge was satisfied was properly listed before Hedigan J. There was, accordingly, no *"ambush"*.

17. It is against that judgment that Mr. Kavanagh now appeals to this court. In essence, Mr. Kavanagh appears to reagitate the issues that he put before the High Court rather than engaging with the determination of the trial judge in any meaningful way. He continues to assert that Start had no title to the mortgage and thus no right to an order for possession.

18. Mr. Kavanagh also purports to make wild and unsubstantiated allegations of fraud and perjury against Start's legal team which are entirely without any basis and totally improper. He appears to raise a new issue about he and his wife being *"consumers"* within the meaning

of the relevant consumer code which appears not to have been raised either before Hedigan J. or subsequently, Simons J., and is in any event entirely irrelevant. He appears to make a new complaint about the fact that Hedigan J. was the presiding judge on the day of the hearing rather than another judge who had dealt with an earlier aspect. The basis for this complaint is entirely unclear.

19. He purports to make further scandalous allegations about the trial judge having predetermined the matter on a prearranged basis which, as with his previous allegations against the lawyers concerned, is scurrilous and groundless. He again attempts to agitate the ambush issue.

20. He raises the same point about *O'Malley*. In his oral submissions to the court today, Mr. Kavanagh concentrated on *O'Malley*, submitting that the indorsement of claim in the special summons is defective because no sufficient particulars of the debt and other matters are given. He says the proceedings should therefore now be dismissed "with prejudice" and not remitted for further hearing by the High Court. He relied on a number of passages from *O'Malley* which of course post-dated the judgment of Hedigan J. here by some 3 years. Perhaps in anticipation of that difficulty, he stressed that earlier editions of Delaney & McGrath on Civil Procedure state that such particulars should be given, so that this was a requirement in any event when his case was heard in 2016.

21. Of course, the difficulty with that contention is that if it was a requirement in 2016 and before, then he failed to raise it at the relevant time. As such he fails that part of the *Greendale* test which requires that the injustice complained of arises through no fault of the party bringing the challenge to the earlier judgment. As for relying on *O'Malley* simpliciter, a party cannot be permitted years after the giving of a final judgment to re-open a case simply because a later judgment casts doubt on a particular practice or procedure previously

adopted. Were parties free to come back to court to re-open their cases in such circumstances, the principle of finality of litigation would be fatally undermined, as no case could ever be said to be finally determined. Mr. Kavanagh's final complaint is that the judge rebuked him for attempting to put in further written submissions after the conclusion of the hearing, which as the trial judge correctly observed offends the principle of justice being administered in public.

22. This appeal and indeed this entire application by Mr. Kavanagh is a manifest abuse of process. It is impossible to avoid the conclusion that this is no more than a further attempt by Mr. Kavanagh to postpone the inevitable, triggered by Start's application to the Central Office to renew the possession order. The application is, as the trial judge identified, based on a total misconception, deliberate or otherwise, of the terms of O. 124 and amounts to little more than a cynical attempt to reagitate all the issues that were comprehensively decided against Mr. Kavanagh now over seven years ago. Mr. Kavanagh, who in his original replying *"affidavit of truth"* describes himself in familiar terms as a non-individual living man and refers extensively to wet ink documents, is part of a small but significant minority of litigants in person who appear to think nothing of making the most serious imaginable allegations against members of the judiciary and legal profession, apparently untroubled by the need for any scintilla of evidence. As has been said many times in the past, such conduct is to be deprecated in the strongest possible terms.

23. As the trial judge pointed out, even if O. 124 had any conceivable application to the facts of this case, which I am satisfied it does not, the extraordinary delay in making this application automatically disqualifies Mr. Kavanagh from relying on it.

24. The trial judge in this case went to considerable lengths to have regard to any possible basis upon which a final judgment of the court might be set aside in ease of the plaintiff as a

litigant in person, despite Mr. Kavanagh not even mentioning *Greendale* or purporting to rely on it. In his oral submissions today, he seeks to rely on *Greendale*, despite having not done so in the High Court, but he falls hopelessly short of identifying any exceptional circumstances or breach of his fundamental constitutional rights such that the original decision ought to be considered a nullity.

25. Nonetheless, he received the fullest and fairest possible hearing in the High Court which he now, again, baselessly, seeks to characterise as a denial of his constitutional and convention rights. Needless to say, these claims are without any basis or merit. However, these contentions, baseless though they may be, have to be addressed by the opposing party at considerable cost and expense, which no doubt Mr. Kavanagh and others like him believe they will never have to bear. Perhaps that, together with delay and obfuscation, is the object of the exercise.

26. I have no hesitation in dismissing this appeal.

27. [Faherty J.]: I have listened to the judgment just delivered by my colleague Judge Noonan and I too would dismiss the appeal for the reasons set out by Judge Noonan.