APPROVED **[2023] IEHC 37**

THE HIGH COURT

2013 No. 353 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

SIMON KAVANAGH
DEIRDRE KAVANAGH

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 January 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside a final, unappealed judgment and order of the High Court. The order sought to be impugned is an order for possession and had been made in the context of the present proceedings. The order is dated 18 July 2016 and had been made by a different judge than me. Put otherwise, one judge of the High Court is being asked to set aside a final, unappealed order made by another judge of the High Court.

2. The application to set aside the judgment and order has been brought by the first named defendant herein, Mr. Simon Kavanagh ("***the moving party***"), by notice of motion. The motion issued on 10 November 2022 and came on for hearing before me on 16 January 2023.

3. The only jurisdictional basis for the application which is identified in the notice of motion is that under Order 124 of the Rules of the Superior Courts. The moving party has not sought to invoke the inherent jurisdiction of the court as described by the Supreme Court in *In the matter of Greendale Developments Ltd (No. 3)* [2000] 2 I.R. 514 and subsequent case law.

4. As the moving party is a litigant in person, I propose to consider *de bene esse* whether this inherent jurisdiction might be applicable, notwithstanding that same has not been identified in the notice of motion nor in oral submission. In doing so, I am showing considerable latitude to the moving party. Ordinarily, a party who wishes to invoke the exceptional jurisdiction to set aside a final, unappealed judgment and order is required to identify expressly the basis upon which that application is made.

PROCEDURAL HISTORY

5. The within proceedings were instituted by way of special summons on 19 June 2013. The primary relief sought in the special summons had been an order for possession pursuant to a mortgage.

6. It is apparent from the affidavits filed in these proceedings on behalf of the first named defendant, over the course of the period 2014 to 2016, that the principal defence advanced to the claim for an order for possession related to the securitisation of the mortgage and underlying loan agreement. More

specifically, the first named defendant had contended that, in circumstances where the beneficial interest in the mortgage and loan agreement had been assigned to a different legal entity, Start Mortgages Ltd were not entitled to enforce the mortgage by way of legal proceedings.

7. In response, Start Mortgages Ltd had contended that whereas the beneficial ownership had been transferred, it remained the legal owner of the mortgage and, as such, was entitled to enforce same.

8. The fact that the mortgage and loan agreement had been transferred had been notified to the defendants as early as 22 January 2013, that is, more than five months prior to the institution of these proceedings.

9. The first named defendant had indicated an intention, in 2016, to seek leave to cross-examine the following deponents who had sworn affidavits on behalf of the plaintiff: Gill Cotter, Tara Smith, Stuart Parkinson and Eva McCarthy.

10. The proceedings ultimately came on for hearing before the High Court (Hedigan J.) on 18 July 2016. The trial judge refused the application for leave to cross-examine. As to the merits of the proceedings, the trial judge, in an *ex tempore* judgment, rejected the contention that Start Mortgages Ltd was precluded from enforcing the mortgage because of the securitisation issue. In this regard, the trial judge cited with approval the judgment in *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260.

11. Hedigan J. imposed a nine month stay on the execution of the order for possession. The order for possession was perfected, i.e. drawn up by the registrar, a number of days later on 21 July 2016. The defendants never lodged an appeal against the judgment and order.

12. Start Mortgages Ltd subsequently converted to a designated activity company on 21 October 2016. On 26 February 2018, an *ex parte* application was made on behalf of the company seeking, in effect, to amend the title of the proceedings to reflect the change in status to a designated activity company.

13. It should be noted that this application took the form of an "*omnibus*" application, whereby Start Mortgages Ltd relied on an affidavit and *ex parte* docket filed in one set of proceedings (*Start Mortgages Ltd v. Ryan* High Court 2008 No. 26 SP) to ground an application to amend a total of twelve sets of High Court proceedings. The present proceedings were identified in an exhibit to the grounding affidavit which had been filed in the *Ryan* proceedings.

14. The *ex parte* application was moved before the High Court (Meenan J.) on 26 February 2018 and an order made amending the title of the proceedings. The order was perfected on 31 March 2018. There had been a clerical error in the original version of the order in that it mistakenly described the second named defendant as Deirdre Murphy rather than Deirdre Kavanagh. This clerical error was subsequently corrected on 9 April 2018.

15. Thereafter, an order for substituted service was made *ex parte* on 8 October 2018.

16. The first named defendant issued a notice of motion dated 13 November 2018, seeking to discharge the order amending the title of the proceedings. That motion came on for hearing before me on 25 February 2019. I delivered a reserved judgment on the matter on 11 April 2019 refusing the relief sought: *Start Mortgages DAC v. Kavanagh* [2019] IEHC 216.

17. The first named defendant, as was his right, lodged an appeal against my judgment and order. This appeal was ultimately dismissed by the Court of Appeal in an *ex tempore* judgment delivered on 22 January 2020.

18. The next event of significance in these proceedings occurred on 17 July 2022. On that date, Start Mortgages DAC took steps to execute the order for possession by applying to have an "*order of possession*" issued out of the Central Office of the High Court pursuant to Order 47 of the Rules of the Superior Courts.

19. Thereafter, the first named defendant issued a motion on 10 November 2022. The motion seeks a series of declarations, the broad gist of which is to the effect that Start Mortgages DAC was acting as a credit servicer and, as such, had no lawful right to sue in its own name. The motion is grounded on an affidavit of the first named defendant dated 9 November 2022.

20. The motion came on for hearing before me on 16 January 2023. Judgment was reserved until today's date.

CORRESPONDENCE POST-HEARING

21. Following the hearing on 16 January 2023, the moving party sought to make a further submission to the court by way of email and post. This correspondence has not been taken into account in the preparation of this judgment. It is a fundamental principle that justice be administered in public and in the presence of the other parties to the proceedings. Whereas certain types of application may, by direction of the court, be dealt with on the papers, no such direction had been made in this case. Rather, the motion to set aside the judgment and order had been listed and heard in open court on 16 January 2023. In the absence of a court direction allowing for the filing of written legal submissions post-hearing,

it was inappropriate for the moving party to attempt to contact the court to make supplementary submissions subsequent to the conclusion of the hearing.

ORDER 124, RSC

22. The only jurisdictional basis for the application to set aside the judgment and order of 18 July 2016 which is identified in the notice of motion is that under Order 124 of the Rules of the Superior Courts.

23. Order 124 provides as follows:

> "1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.
>
> 2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.
>
> 3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."

24. As appears, the court has a wide discretion as to how to treat non-compliance with the Rules of the Superior Courts. This discretion must be informed by the overriding imperative of advancing the interests of justice and ensuring that all sides' constitutional right of access to the courts is properly respected. The factors to be considered in the exercise of this discretion include (i) the nature and extent of the breach of the Rules of the Superior Courts; (ii) whether the breach has caused prejudice to the other party(s) to the proceedings; and (iii) the purpose which the particular rule, which has been breached, is intended to achieve.

25. The essence of the moving party's argument is that the special summons in these proceedings is "*irregular*", and that, accordingly, the "*proceedings*" must now be set aside pursuant to Order 124. With respect, the moving party's invocation of Order 124 is entirely misconceived. Order 124 is concerned with *ongoing* proceedings, and not with a final, unappealed judgment and order. Order 124 affords the court a *discretion* to set aside ongoing proceedings on the grounds that there has been non-compliance with the Rules of the Superior Courts. The concept of setting aside a judgment or order is different and is addressed separately under the Rules of the Superior Courts: see, for example, Order 27, rule 15 and Order 36, rule 33.

26. Moreover, even were Order 124 to be applicable in the case of a final judgment and order—and for the reasons explained above it is not—the court's discretion would have to be exercised against setting aside the judgment and order in the present case because of the moving party's inordinate and inexcusable delay. As appears from the wording of Order 124, no application to set aside any proceedings for irregularity shall be allowed unless made within a "*reasonable time*". Here, the judgment and order dates from July 2016, yet the application to set aside was not brought until November 2022, that is, more than six years later. No proper explanation has been provided for this delay.

27. If and insofar as the moving party purports to rely on the delivery of the Supreme Court judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423 as representing a supervening event which resets the clock, this could not justify the delay. The Supreme Court judgment was delivered on 29 November 2019. Yet the moving party did not bring his set aside application for another three years thereafter.

28. For completeness, and for reasons analogous to those discussed in my judgment in *Bank of Ireland Mortgage Bank v. Keating* [2021] IEHC 132, a development in the case law cannot normally be relied upon retrospectively to justify a delay in seeking to set aside a judgment and order.

EXCEPTIONAL JURISDICTION TO SET ASIDE JUDGMENT

29. The Supreme Court held in *In the matter of Greendale Developments Ltd (No. 3)* [2000] 2 I.R. 514 that there is an exceptional jurisdiction to reopen a final judgment. The principles governing this exceptional jurisdiction have been most recently considered by the Supreme Court in *Student Transport Scheme Ltd v. Minister for Education and Skills* [2021] IESC 35. The nature of the jurisdiction is summarised as follows (at paragraph 2.13 of the judgment):

> "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, then it follows that the limited jurisdiction to reopen the case can be exercised."

30. The Supreme Court in *Student Transport Scheme Ltd v. Minister for Education and Skills* endorsed the following two principles which are of immediate relevance to the present proceedings. First, the party seeking to have a final order set aside must clearly establish a fundamental denial of justice against which no other remedy, such as an appeal, is available (*L.P. v. M.P.*

[2001] IESC 76, [2002] 1 I.R. 219 (at page 229 of the reported judgment)). Secondly, the exceptional jurisprudence does not exist to allow a party to re-argue an issue already determined (*Murphy v. Gilligan* [2017] IESC 3 (at paragraph 138)).

31. One of the unusual features of the present case is that the set aside application is being made to a different judge than the trial judge who made the original order. In the intervening years, the trial judge who made the original order had been appointed to the Court of Appeal and, having served with distinction on that court, has since retired. Most of the case law appears to involve circumstances where the application to reopen a judgment was brought before the same judge who had delivered the judgment, or, in the case of an appellate court, to the same panel of that court.

32. The question of whether one judge of the High Court could ever have jurisdiction to set aside a final, unappealed order which had been made, following an *inter partes* hearing, by another (former) High Court judge was not fully argued before me. (Different considerations apply in the context of an *ex parte* order). It is not necessary, for the purpose of this particular case, to decide the point definitively. This is because I have concluded, for the reasons explained under the next heading, that the high threshold for setting aside a final, unappealed judgment and order has not been met. Thus, the set aside application would have to be refused even if I had been the judge who had made the original order. It is superfluous, therefore, for the purpose of resolving the application in this case to address the complicating factor of the order having been made by a different judge who is since retired.

DISCUSSION AND DECISION

33. The principal argument advanced by the moving party in support of the application to set aside the judgment and order of 18 July 2016 relates to the securitisation issue. More specifically, it is argued that in circumstances where the beneficial interest in the mortgage and loan agreement had been assigned to a different legal entity, Start Mortgages Ltd was not entitled to enforce the mortgage by way of legal proceedings.

34. This is precisely the same argument which had been relied upon in defence of the proceedings. See, in particular, the content of the affidavits filed by the moving party on 12 March 2014 and 20 June 2016, respectively. This argument was rejected by the trial judge in his *ex tempore* judgment of 18 July 2016. In this regard, the trial judge had cited with approval the judgment in *Kearney v. KBC Bank Ireland plc* [2014] IEHC 260.

35. It is not open to the moving party to seek to reagitate this argument now under the guise of an application to set aside a final, unappealed judgment and order. It is well established on the *Greendale Developments* jurisprudence that the exceptional jurisdiction to set aside a final judgment and order does not exist to allow a party to re-argue an issue already determined.

36. Had the moving party wished to challenge the correctness of the judgment and order of 18 July 2016, he was entitled to do so by lodging an appeal to the Court of Appeal. Indeed, the trial judge had confirmed, in response to a question from the moving party, that he had a right of appeal. In the event, the moving party did not exercise his right of appeal in respect of that judgment and order.

37. As appears from the summary of the procedural history set out earlier, the moving party subsequently brought an appeal to the Court of Appeal against a

different judgment and order in these proceedings. More specifically, the moving party lodged an appeal against the judgment and order of 11 April 2019 in respect of the amendment of the title of the proceedings to reflect the change in status of the plaintiff company from a limited liability company to a designated activity company. See *Start Mortgages DAC v. Kavanagh* [2019] IEHC 216. Importantly, the notice of appeal filed in that appeal did not make any complaint in respect of the judgment and order of 18 July 2016. The appeal was ultimately dismissed by the Court of Appeal in an *ex tempore* judgment delivered on 22 January 2020.

38. Having failed to appeal the judgment and order of 18 July 2016 to the Court of Appeal, the moving party cannot seek to challenge the merits of same through the back door by inviting the High Court to overturn the judgment and order itself.

39. The second argument advanced by the moving party is to the effect that the special summons issued in these proceedings is "*irregular*". The moving party seeks to rely in this regard on the Supreme Court judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423.

40. The moving party argues that the special endorsement of claim is "*but a mere heading*". It is alleged, variously, that there is no claim; that there are no details of a claim; that there is no cause of action; that there is no description or identification of the parties; and that there is no description or identification of the liquidated sum.

41. The primary relief sought in the special summons had been as follows:

> "An Order for Possession of the property set out in the Schedule hereto, which said property was mortgaged by demise by the Defendants to the Plaintiff under an Indenture of Mortgage dated the 3rd day of August 2005 and made

> between the Plaintiff and the Defendants to secure to the Plaintiff all moneys due under the said Indenture of Mortgage subject to the proviso for redemption therein contained."

42. It is not necessary, for the purpose of resolving the set aside application, for me to determine the extent, if any, to which the principles governing the particulars to be pleaded in the context of a claim for summary judgment in a liquidated sum translate to a claim for an order for possession. (cf. *Start Mortgages DAC v. Gawley* [2020] IECA 335 (at paragraph 38)). This is because even if one were to assume, for the purpose of argument, that there had been shortcomings in the manner in which the particulars had been pleaded in the endorsement of claim, the moving party had not been prejudiced by same. Certainly, the moving party has not established a breach of his constitutional rights such as might justify setting aside a final judgment and order.

43. The fact of the matter is that, prior to the hearing on 18 July 2016, the moving party had been fully apprised of all relevant particulars. The special summons correctly identifies the cause of action, the date of the mortgage, and the mortgaged land. Thereafter, there had been an extensive exchange of affidavits, and the loan agreement, the mortgage deed and statements of account had all been exhibited. The moving party was thus on notice of the precise basis upon which an order for possession was being sought. Indeed, the moving party did not seriously dispute that the debt was due and owing. The principal defence asserted related to the securitisation issue rather than the existence of the debt. In the circumstances, the shortcomings, if any, in the endorsement of claim did not result in any prejudice to the moving party, still less did this result in a clear and significant breach going to the very root of the fair and constitutional

administration of justice, such that the judgment and order sought to be reopened can properly be considered to be a nullity.

44. The third and final argument advanced by the moving party is that he was subject to an "*ambush*" in relation to the hearing on 18 July 2016. The gist of the argument appears to be that the moving party had a legitimate expectation that the only matter which was to have been dealt with by the court on that date was an application for leave to cross-examine. This is incorrect. The substantive proceedings were listed for hearing before Hedigan J. on 18 July 2016. This was not a case where a motion seeking leave to cross-examine had been issued and had been listed *separately* for hearing, with the substantive proceedings listed for mention only on that date. The application for an order for possession was properly before the court for hearing. There was no "*ambush*".

CONCLUSION AND FORM OF ORDER

45. For the reasons explained herein, the application to set aside the final, unappealed judgment and order of 18 July 2016 is dismissed. Accordingly, the reliefs sought in the notice of motion of 10 November 2022 are refused.

46. As to costs, my provisional view is that the plaintiff, having been entirely successful in resisting the application to set aside the judgment and order, is entitled to the costs of the motion as against the moving party, i.e. the first named defendant. If the moving party wishes to contend for a different form of costs order, he should file written legal submissions in the Central Office of the High Court within two weeks of today's date. A copy of any such submissions should be sent to the registrar and to the plaintiff's solicitors. The plaintiff will have two weeks thereafter to reply.

Appearances

Rudi Neuman Shanahan for the plaintiff instructed by Lavelle Partners LLP
The first named defendant appeared in person