

THE HIGH COURT

[2022] IEHC 573
[Record No. 2014/271/S]

BETWEEN:

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

–AND–

JOSEPH O’MALLEY

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 7th October, 2022.

SUMMARY

This is a successful application for leave to amend a special indorsement for claim.

1. By notice of motion of 1st October 2021, Bank of Ireland Mortgage Bank comes seeking, amongst other orders, an order pursuant to O.28, r.1 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of this Court granting leave to amend its special indorsement of claim as per the within proceedings, and certain related orders.
2. This is a matter which has been remitted to the High Court following on from the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O’Malley* [2019] IESC 84, [2020] 2 ILRM 423 a judgment of the Supreme Court which was handed down by the then Chief Justice on 29th November 2019. That was a date well in advance of the end of the Michaelmas term in late-December 2019 and long before the first Covid-related stay-at-home order issued on 27th March 2020.
3. In these proceedings it is alleged that in or about October 2008 Mr McNamara entered into a loan facility agreement with Bank of Ireland Mortgage Bank for a sum of €225k for a term of 18 years repayable on a variable interest basis and secured by means of a legal charge over

certain lands in County Mayo. It is alleged that following a change of financial circumstances there was a cessation of full payments of the loan facility agreement in or about November 2011.

4. On 23rd January 2014 a summary summons issued on behalf of Bank of Ireland Mortgage Bank seeking judgment in the amount of €225+k which, it was alleged, remained owing on the loan agreement. On 7th July 2014 an application for summary judgment succeeded in the High Court and an order for the amount of €221+k with a stay on the execution of same for a period of six months.

5. On 1st August 2014 Mr O'Malley appealed the High Court judgment to the Supreme Court. With the establishment of the Court of Appeal, it looked like the appeal would be heard by the Court of Appeal. In the end, however, it was heard by the Supreme Court. That court set aside the orders obtained against Mr O'Malley in the High Court. However, it considered that the justice of the case would be best served by remitting the matter back to the High Court where Bank of Ireland Mortgage Bank could apply to amend its special indorsement of claim in the light of the Supreme Court judgment.

6. That judgment, as I mentioned, was delivered on 29th November 2019. The within application came before me in July 2022. The reason for the delay has been sworn to in the following terms by a solicitor for Bank of Ireland Mortgage Bank:

“4. The judgment...of 29th November 2019 had significant implications for the manner in which applications for summary judgment in debt proceedings were to be thereafter prosecuted. The judgment of the Chief Justice required a fundamental reconsideration of how proceedings of this nature are to be pleaded and how the evidence granting an application for summary judgment is to be presented.”

7. The “*fundamental reconsideration*” must have been very thorough. By 27th March 2020, almost exactly four months after the Supreme Court delivered its judgment, no application had been made to the High Court. The solicitor for Bank of Ireland Mortgage Bank continues:

“4*This process [of “fundamental reconsideration”] was delayed by the outbreak of the Covid-19 pandemic in March 2020. [The first reported outbreaks of Covid in Ireland occurred in late-February 2020. So I assume that the reference to March 2020 is to the issuance of the first stay-at-home order of 27th March 2020.]*

5. *During the Covid emergency, your deponent was instructed by the plaintiff not to progress debt proceedings of this nature as to do so would put borrowers under unnecessary additional pressure, at a time when large sections of the economy were in lockdown.*

6. *A notice of intention to proceed was filed on 29th April 2021 and thereafter served on 5th May 2021. The within motion issued on 4th October 2021 returnable initially for 24th January 2022.”*

8. It would have helped if the affidavit for Bank of Ireland Mortgage Bank had treated the Bank’s actions in greater detail. The solicitor for the Bank was instructed to do something and of course did as she was instructed. To some extent unexplained is why the Bank acted as it did. There is an intimation in the just-quoted text that it did so out of good-natured solicitude for its customers. That may have been part of its motivation. However, I suspect that it was also done pursuant to the payment holidays that commenced following on the EBA Guidelines of 2nd April 2020 on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis.

9. The reason the EBA Guidelines are relevant is because most people who availed of those payment holidays started coming out of them at the end of September 2020. There followed a roughly two-month period in October-November 2020 when banking life seemed to be getting back to normal. Then a second wave of Covid-19 caused the EBA to re-activate its guidelines at start-December 2020 which, if memory serves me right, remained in place until end-March 2021.

10. If I am right as to the relevance of the EBA (and consequent domestic) arrangements – and I should have been advised of these or whatever relevant details by the Bank, then it is unclear to me why (i) there was no action taken by the Bank throughout the entirety of October and

November 2021, (ii) following the second lifting of the EBA Guidelines, there was no meaningful action taken until 29th April 2021, (iii) the within motion then only issued six months later on 1st October 2021. (In this last regard I note that the Notice of Intention to Proceed indicates an intention to proceed on the expiration of one month from 29th April 2021. That would have left all of June and July 2021 for the Bank to take action, subject to a grace period for the Whit Break).

11. Banks need to remember that there are real and often ‘stressed out’ human beings at the end of debt recovery proceedings and ought, therefore, to proceed at a timely pace so as not to unduly protract human suffering. That said, apart from the issue of the turn in Mr O’Malley’s health (which I treat with later below), even if I were to blame the Bank completely for the delay referenced at points (i), (ii) and (iii) in the preceding paragraph (and I do not know if it is to blame for all that delay because I have been left in the dark by the Bank in this regard) I do not see that, even then, any prejudice would arise for Mr O’Malley were I to acquiesce to the within application.

12. The solicitor for the Bank continues:

“7. When the matter came before the court on 24th January 2022, counsel for the defendant successfully applied for an adjournment in order to allow the defendant to file a replying affidavit”.

13. The reason for the adjournment was certain health issues that had arisen for Mr O’Malley. A further adjournment was granted when Mr O’Malley (for reasons unexplained) failed to furnish his affidavit within the period initially allowed. I should perhaps note at this point that I have read the details from Mr O’Malley’s GP concerning the health issues that have latterly presented for Mr O’Malley. Out of respect for Mr O’Malley’s privacy I do not detail them here. I do not doubt that the said health issues are genuine, and Mr O’Malley has my sympathy that they should have occurred. Respectfully, however, I do not see that they have any relevance to the within application. I do not see how they could have impeded him in instructing his solicitor and even if he *was* impeded for a time, the Bank has proceeded at such a pace that I do not see how he has been adversely impacted in this regard.

14. Mr O'Malley's desire as regards the within application is well-captured in the following paragraphs of his solicitor's affidavit where that solicitor avers as follows:

“20. *I say and believe and am advised that at a minimum the Plaintiff was obliged and ought to have acted on foot of the judgment of the Supreme Court in early course and within reasonable time. It is respectfully submitted that the Supreme Court could not have intended that the Plaintiff would seek to amend the pleadings almost two years after the judgment of the Supreme Court. The delay and acquiescence by the Plaintiff ought not to be permitted. In the interim the Plaintiff's health has deteriorated....*

21. *....I say and believe that the plaintiff ought to have acted with reasonable expedition and reasonable promptness on foot of the Supreme Court judgment but the plaintiff did not do so. I say and believe and am advised that this is contrary to fundamental principles of fairness and the interests of justice. I say and believe and am advised to now seek the relief to amend the indorsement of claim at this remove is contrary to fundamental principles of fairness. I say and respectfully submit that in all the circumstances the relief sought by the plaintiff herein ought to be refused.”*

15. The law on amendment of pleadings pursuant to O.28 is clear. It proceeds, to borrow from O.28, r.1, on the basis that “*all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties*”. In addition, the courts have long manifested a reluctance to abridge the constitutional right of a party to litigate and to make the case that she wishes to make (see, e.g., *Bird v. Devine* [2004] IEHC 324). It follows that a party will, to the extent consistent with the foregoing, generally be entitled to amend her pleadings, save where to permit an amendment would cause irreparable prejudice to the opposing party. I cannot see that any prejudice, still less irreparable prejudice will be occasioned to Mr O'Malley by my allowing the amendments sought. And I do not see that the delay presenting (even allocating unexplained delay to the Bank and so placing Mr O'Malley's case at its height) should change my view in this regard; nor does it change my view. (I note in passing that prejudice in this regard does not include the effect of the amendments sought on Mr O'Malley's chances of success in these proceedings).

16. I will grant the orders sought at points 1 and 2 of the notice of motion. Counsel might attend in court at their convenience so that the time required for delivery of the amended summary summons can be decided.