

Neutral Citation No: [2019] NICH 9

Ref: McB11001

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 12/06/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

ULSTER BANK LIMITED

Plaintiff/Respondent;

-and-

ANTHONY BRENNAN

Defendant/Appellant.

McBRIDE J

Application

[1] This is an appeal by Mr Anthony Brennan against the order of Master Kelly dated 14 December 2018 when she granted the plaintiff/respondent, the Ulster Bank ("the Bank") an order of bankruptcy against the defendant/appellant Mr Brennan ("Mr Brennan").

[2] Mr Brennan appeared as a litigant in person. The Bank was represented by Mr David Dunlop of counsel.

[3] The case was heard on 12 June 2019. I gave an ex tempore judgment and dismissed the appeal. I indicated that I reserved the right to provide a written judgment setting out in full my reasons for dismissing the application. Mr Brennan indicated he wished to appeal and accordingly I agreed to provide this written judgment.

Background

[4] In 2014 the Bank issued proceedings against Mr Brennan and his wife. The action was settled on 9 May 2016 by way of a written agreement which was signed by all the parties including Mr Brennan. When he entered into the agreement Mr Brennan had the benefit of legal advice.

[5] The terms of the agreement were not complied with. In accordance with its terms and with the consent of Mr Brennan and his wife (both of whom had legal representation) the Bank obtained a court order, on consent, dated 13 December 2016 (“the consent judgment”) under which the Bank obtained a money judgment against Mr Brennan and his wife and further obtained an order for possession of certain property.

[6] On 30 October 2017 the Bank served a statutory demand upon Mr Brennan seeking payment of the sum due on foot of the consent judgment.

[7] On 1 December 2017 Mr Brennan applied to have the statutory demand set aside. On 27 April 2018 the Master dismissed his application.

[8] Mr Brennan and his wife then applied to have the consent judgment set aside. This application was dismissed by Horner J on 13 February 2018.

[9] On 14 February 2018 Mr Brennan and his wife issued a writ of summons against the Bank seeking, inter alia:-

“(1) An order for rescission/set aside of the contract/Tomlin Order entered into by the plaintiffs and the defendant on 9 May 2016 by reason of a breach of contract and misrepresentation of the defendant.

(2) An order for the setting aside of the court order/judgment dated 13 December 2016 by reason of the breach of contract and misrepresentation of the defendant.”

[10] On 15 June 2018 Mr Brennan issued a Notice of Appeal against Master Kelly’s decision dismissing his application to set aside the statutory demand.

[11] This appeal was heard by Judge Devlin. Mr Brennan was represented by solicitor and counsel. Judge Devlin dismissed his appeal.

[12] Thereafter the Bank issued a bankruptcy petition and the Master adjudicated Mr Brennan bankrupt in December 2018. It was against this order that Mr Brennan now appeals.

Submissions

[13] Mr Brennan submitted that even though he was not successful in having the statutory demand set aside the court should nonetheless permit him to challenge the debt on the basis that there had been a change in circumstances since the application to set aside the statutory demand was dismissed. He submitted that the change in

circumstances related to the fact that he had now filed a Statement of Claim and in addition had filed an affidavit by a Mr Chambers who commented upon a valuation report dated 6 March 2008. He submitted that these two documents demonstrated that there was a dispute in respect of the debt on which the statutory demand was based and accordingly the court should grant the appeal.

[14] Mr Dunlop for the Bank submitted that the doctrine of re judicata applied and therefore it was not open to Mr Brennan to re-litigate his liability in respect of the debt at this stage. He further submitted that there was no change in circumstances which would enable the court to re-open any alleged dispute about the debt. In particular he submitted that all the matters Mr Brennan now sought to rely upon were matters he should and could have brought to the attention of Judge Devlin. In particular Mr Brennan accepted that he had received the valuation report upon which Mr Chambers commented in his affidavit, in February 2017, some 18 months before the bankruptcy order. Consequently he submitted that Mr Brennan could and should have raised any arguments he wished about the valuation report before Judge Devlin. In addition he submitted that the Statement of Claim did not set out any new information. It was simply Mr Brennan setting out the claim he had made in the Writ, in more detail. Finally, Mr Dunlop submitted that the appeal was out of time.

Consideration

[15] The bankruptcy order was made on 14 December 2018. The appeal notice although dated 10 January 2018 [sic] was not issued until 26 April 2019 and is therefore considerably out of time. Mr Brennan did not seek an extension of time and failed to file any affidavit evidence addressing the delay and the reasons for it. He did however verbally inform the court that the delay in issuing proceedings arose because he had requested remittal of court fees. Ultimately he was unsuccessful in this application and he then paid the fees and issued the Notice of Appeal.

[16] The court has power to extend time in accordance with the principles set out in *Northern Ireland Carriers v Davis*. Before determining the question whether the court should extend time, I intend to deal with the substantive appeal.

[17] When the bank issued the statutory demand seeking payment of the sum due on foot of the consent order dated 13 December 2017 Mr Brennan and his wife sought to have the statutory demand set aside on the basis that they contested the debt was due and owing. Mr Brennan applied to the Master to set aside the statutory demand on this ground. When his application was refused he appealed and the appeal was heard by Judge Devlin.

[18] In support of his appeal Mr Brennan filed an affidavit which stated as follows at paragraphs [6] and [7]:-

“After issue of the application to set aside the statutory demands, I prepared and issued a writ which makes the claim that the settlement and the judgment should be set aside ... In that matter, my wife and I are representing ourselves, which is still at an early stage. ... I respectfully say that the dispute to the statutory demand is based on the proceedings seeking to set aside the settlement in the judgment. I invite this honourable court to find that there is an issue to be tried through the medium of the proceedings which my wife and I have issued, and that until that action is determined, it would be premature to rule that there is no dispute to the statutory demand.”

In addition his counsel made the following argument which was recorded at paragraph [13] of Judge Devlin’s judgment as follows:

“In the present case counsel of the appellant sought to draw attention to the issue of the writ of summons by the appellant on 14 February 2018, and to its contents. He argued that it was clear that the appellant by now issuing these proceedings was seeking to challenge both the judgment and the settlement upon which that judgment was based. He argued that by reason of this issue, and having regard to its contents, until such time as these proceedings had been determined, it could not be said there was no dispute to the statutory demand relied upon by the bank.”

[19] It is therefore clear that when the matter was heard before Judge Devlin, Mr Brennan sought to dispute the debt by relying upon allegations contained within the writ issued by him and his wife dated 14 February 2018.

[20] As appears from the writ endorsement Mr Brennan and his wife sought to set aside the agreement dated 9 May 2016 and the consent Court judgment dated 13 December 2016 on the basis that the agreement and the Court order had both been entered into by reason of breach of contract and misrepresentation by the Bank.

[21] In *Fulton v AIB Group (UK) Plc* [2018] NICH 10 the court considered the bankruptcy scheme and the application of the principle of *res judicata*. It held at paragraph [30] as follows:

“... Failure to apply to set aside a statutory demand or an unsuccessful attempt to do so, conclusively determines the liability of the debtor to pay the debt

demanded by the creditor. Any attempt to either litigate or re-litigate liability for the debt at the petition stage, I find, is res judicata or otherwise an abuse of the process of court unless there has been a change of circumstances between the dismissal of the application to set aside the statutory demand and the hearing of the Bankruptcy petition.”

[22] Accordingly I am satisfied that it is not open to Mr Brennan to re-litigate liability for the debt at this stage of the bankruptcy process unless there has been a change in circumstances between the dismissal of his application before Judge Devlin and the hearing of the bankruptcy petition or at the latest, today’s date.

[23] The only change in circumstance relied upon by Mr Brennan since the matter was dealt with by Judge Devlin related to the issuing of a Statement of Claim and the filing of an affidavit by Mr Chambers.

[24] I am satisfied that neither the filing of the Statement of Claim nor the filing of the affidavit by Mr Chambers, constitute such a change in circumstances that the court can reconsider his liability to pay the debt.

[25] The Statement of Claim merely sets out in detail the claims already made in the Writ which was issued on 14 February 2018. The Statement of Claim does not refer to any matter or thing which was not known to Mr Brennan when he sought to have the statutory demand set aside before Judge Devlin.

[26] The second new circumstance relied upon by Mr Brennan was the filing of the affidavit by Mr Chambers, RICS Survey and Valuer. In this affidavit Mr Chambers refers to a valuation report obtained by the bank in March 2008 for mortgage purposes and makes a number of comments about its adequacy for lending purposes.

[27] As appears from the Writ and Statement of Claim, Mr Brennan seeks to have the consent order set aside on the basis that a valuation report was negligently prepared. Mr Brennan accepted that he has been in receipt of the valuation report since 2017. Given that he has been in receipt of this report for such a long period of time I am satisfied that Mr Brennan could and should have made any arguments he wished in respect of the valuation report before Judge Devlin. As noted by Judge Devlin the applicant had the opportunity to set out in detail all the essential features of his dispute with the Bank together with an outline of facts and circumstances upon which that dispute was alleged to be based. In particular he could, if he had so wished obtained an expert’s report on the valuation report. The applicant failed to do so and accordingly I am satisfied that the principle of res judicata applies.

[28] I note that Mr Brennan alleges that his lawyers failed to bring a number of matters to the attention of the judge. Even if this was so, and I am not making such a

finding, this does not prevent the doctrine of res judicata applying. Mr Brennan's remedy would lie against his lawyers.

[29] Accordingly, I am satisfied that neither the filing of the Statement of Claim nor the filing of the affidavit by Mr Chambers, constitutes such a change in circumstances that this court ought to look behind the dismissal of the application to set aside the statutory demand.

[30] Mr Brennan's unsuccessful attempt to set aside the statutory demand conclusively determined his liability to pay the debt demanded by the Bank. Accordingly I am satisfied that Mr Brennan's attempt now to re-litigate his liability to pay the debt is res judicata.

[31] Given my conclusion that the doctrine of res judicata applies it is not necessary for this court to consider the merits of the dispute regarding the debt. If however I am wrong in finding that res judicata applied I further find that there is no merit in the appellant's case that he has a bona fide defence to the debt.

[32] I have read the Statement of Claim. It is written in an unconventional manner but appears to make the case that a valuation report, obtained by the Bank at the time it was advancing funds to Mr Brennan, was negligently prepared. Mr Brennan's case is that, in such circumstances the Bank ought not to have approved the facility to him and this therefore provides a complete defence to its claim for repayment of the advance. Further, he alleges that if he had been advised of the fact the valuation was negligently prepared he would then not have entered into a mortgage arrangement with the Bank.

[33] I have also read Mr Chamber's affidavit. It is merely a commentary upon a valuation report obtained by the Bank in or around the time it advanced funds to Mr Brennan. It appears that the report was not obtained by Mr Brennan and the report specifically provided that it was provided for the party to whom it was addressed and accepted no responsibility to any other party.

[34] I am satisfied that Mr Brennan's application to set aside the consent judgment has no serious prospect of success.

[35] Mr Brennan does not seek to rely on any other ground to defend the bankruptcy petition.

[36] I am satisfied that all the requirements for making a Bankruptcy order are satisfied. I am further satisfied that there is no ground upon which the Court should not make a bankruptcy order. Accordingly, I find the Master did not err in making the bankruptcy order. I therefore dismiss Mr Brennan's appeal and refuse to extend time for appeal. I award costs in favour of the Bank.