Neutral Citation No. [2011] NIQB 85 | *Ref:* **McCL8320**

Judgment: approved by the Court for handing down | *Delivered:* **29/09/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ULSTER BANK IRELAND LIMITED
and
ULSTER BANK LIMITED (As Security Trustee for the Finance Parties)

Plaintiffs:

and

MICHAEL ADRIAN TAGGART
and
JOHN DESMOND TAGGART

Defendants:

McCLOSKEY J

INTRODUCTION

[1] I have made a ruling declining to exercise the court's power under Section 22(b) of the Interpretation Act (NI) 1954 remitting these cases to the Queen's Bench Master. The Defendants apply for permission to challenge this ruling in the Court of Appeal.

The Litigation

[2] These are appeals against two orders of the Queen's Bench Master granting summary judgment to the Plaintiffs in two separate actions [2009 Nos. 59937 and 61625] in the amounts of £5 million and £4.3 million respectively.

The Section 22(b) Issue

[3] In accordance with what is now established practice this court conducted a first stage review of the appeals. At this preliminary hearing, the presentation of the Defendants' case created the distinct impression of determined attempts to significantly alter and enlarge the evidential and litigation landscapes. I shall expand on this presently. This prompted the court to raise the question of whether, in certain eventualities, the power of remittal to the Master enshrined in Section 22(b) of the Interpretation Act (NI) 1954 might become exercisable. Section 22(b) provides, in terms, that a court exercising an appellate jurisdiction is empowered to, *inter alia* –

> "*remit the appeal or any matter arising thereon to the original tribunal with such declarations or directions as the appellate court may think proper*".

Section 22(b) is engaged since, in bringing these matters before the High Court, the Plaintiffs are exercising the right of appeal conferred on them by Order 58, Rule 2 of the Rules of the Court of Judicature.

The Progress of the Appeals

[4] At the first stage review of the proceedings, the Defendants were continuing their efforts to assemble further evidence, as noted above. An early listing of the appeal for hearing was not possible due to the court calendar. Furthermore, the court was prepared to give the Defendants some further leeway, taking into account their energetic (though somewhat vague) assertions of fairness, coupled with the unavailability of an early hearing date. Accordingly, an adjournment, which spanned the summer vacation, ensued.

[5] The court conducted a second stage review hearing at which counsel for the parties made representations about the propriety of the exercise of the court's power under Section 23(2) of the 1954 Act. Whereas the Defendants contended that this power should be exercised, this was opposed by the Plaintiffs. The court delivered an *extempore* ruling in favour of the Plaintiffs on this discrete issue. The Defendants then sought permission to appeal against this ruling to the Court of Appeal. As this ruling is plainly interlocutory in nature, the permission of this court or the Court of Appeal for this course is required, by virtue of Section 35(2)(g) of the Judicature (NI) Act 1978. The court requested that written submissions (by letter) be provided. These have now been received and, by agreement of the parties, this further ruling is made without convening yet another oral hearing, in the interests of expedition and minimising costs.

[6] It is appropriate at this juncture to highlight some of the landmarks in this litigation:

(a) Both actions were commenced in June 2009.

(b) The summonses grounding the Plaintiffs' applications for summary judgment were issued in December 2009.

(c) Thereafter, during a period of almost one-and-a-half years, the hearing of the summary judgment applications was deferred while the parties exchanged affidavit evidence. Ultimately, seven affidavits, generated during a period of some nine months, were filed on behalf of the Defendants.

(d) The hearing before the Master was conducted on 7th February 2011.

(e) Following the hearing, the Master raised a discrete issue in correspondence with the parties. This elicited no response.

(f) The Master proceeded to deliver a reserved judgment on 3rd March 2011.

(g) This was challenged by the Defendants, by Notices of Appeal dated 14th March 2011.

[7] The Plaintiffs' claims against the Defendants are founded on two guarantees. Throughout the papers, these are described (in the main) as "the 5 million pounds guarantee" and "the Kinsealy guarantee". The summary judgment granted in favour of the Plaintiffs against the Defendants is based on these two guarantees. At first instance, in very brief compass, the Defendants resisted the Plaintiffs' claims on the grounds of alleged misrepresentation and material non-disclosure. The Master rejected these defences and concluded that the guarantees are binding on the Defendants. Some six months have elapsed since the Master's orders. This period has been characterised by much activity on behalf of the Defendants, which has given rise to further *inter-partes* correspondence; further affidavits; and the issue and execution of a "Khanna" subpoena against a firm of solicitors (Messrs. Tughans). At this stage, four new affidavits have been sworn on behalf of the Defendants. It was this flurry of post-hearing and pre-appeal activity which prompted the court's initial observation at the first stage review hearing about the possible exercise of the power contained in Section 22(b) of the 1954 Act.

[8] In the course of his submissions on behalf of the Defendants urging this court to exercise its statutory power of remittal to the Master, Mr. Ronan Lavery (of counsel) agreed with the court that, from his clients' perspective, the menu of unfinished interlocutory and evidence gathering steps potentially includes the following:

- Continued execution of the "Khanna" subpoena.

- Further *inter-partes* discovery.
- Uncompleted litigation in Florida, USA.
- The possible issue of a witness subpoena.
- Possible further affidavits.
- The spectre of cross-examination of deponents.
- The possibility of third party proceedings.
- The progress of the litigation in another action (Taggart –v- Ulster Bank), where no Defence has been served.

This extensive list weighed heavily with the court against the background and progress of these proceedings generally. It appeared to this court incongruous that the framework of this litigation should be so apparently uncertain and incomplete in circumstances where the rundown period culminating in the first instance hearing had been, on any showing, a lengthy one – see paragraph [6] above - and taking into account that such hearing culminated in a final order, determinative of the litigation, subject only to appeal to this court.

[9] Giving particular weight to the values of legal certainty, finality in litigation and the overriding objective enshrined in Order 1, Rule 1A I rejected the Defendants' arguments. In doing so, I also took into account that the Plaintiffs do not oppose the adduction in evidence before this appellate court of the further affidavits generated since delivery of the Master's judgment. Furthermore, I had regard to the principle that an appeal of this kind involves the *de novo* exercise of this court's discretion and that this court's powers include the ability to receive still further new evidence if this is considered to be in the interests of justice and there is good reason for its late introduction (see ***Bailie –v- Cruickshank*** [1995] 6 BNIL 79). I also formed the view that the Defendants have been dilatory in their conduct of these proceedings generally, in circumstances where delayed progress was plainly in their interests and antithetical to the interests of the Plaintiffs. In addition, I considered that the intrinsic vagueness and uncertainty of the Defendants' current position was underlined emphatically by the Plaintiffs' submission relating to the person identified as Richard Ennis and the abject paucity of detail relating to him. I also took into account that any remittal of the matter to the Master would give rise to increased delay and cost. Furthermore, I was satisfied that the Defendants will suffer no prejudice by the continuation of the appeal before this court in preference to a remittal to the Master. Finally, it seemed to me plainly undesirable to remit to the Master the uncertain, demonstrably incomplete, evolving and unpredictable litigation scenario portrayed to this court on behalf of the Defendants. The Master has fully discharged his function and it now falls to this court to discharge its appellate function.

Conclusion

[10] Against the protracted and unsatisfactory background rehearsed in outline above, the Defendants have applied for permission to appeal to the Court of Appeal against my ruling declining to remit these proceedings to the Master. Having

considered the Defendants' submissions in full, I construe them to resolve to two main contentions. The first broad proposition is that the Defendants were prejudiced at the first instance hearing. The second is that significant further evidence has materialised subsequently. I conclude that the first contention has no merit, as it is abundantly clear that the issue upon which it is founded was ventilated both during the hearing before the Master *and* in subsequent correspondence generated by the Master, approximately one month before he delivered his reserved judgment. This demonstrates that the Defendants had a fair and reasonable opportunity to respond *and* to invite the Master to grant them appropriate facilities such as a further hearing or the receipt of additional evidence or the deferral of his judgment. The Defendants did not pursue any of these courses. I conclude that the second of the Defendants' main contentions is equally without merit, given the Plaintiffs' willingness to have further evidence from the Defendants considered by this court. I have not ruled finally on this discrete issue for the simple reason (as highlighted above) that the picture is an incomplete and evolving one. I consider this discrete consideration to constitute yet another factor contra indicating the grant of leave to appeal to the Court of Appeal.

[11] Finally, there is nothing in the Defendants' submissions which suggests that the exercise of discretion inherent in my rejection of their remittal request was in breach of any relevant principle, in disregard of any material evidence or consideration or in any way aberrant. In determining this application for permission to appeal, I also take into account that the impugned ruling of this court was made in an intensely fact sensitive context. It gives rise to no discernible point of law or legal principle. Moreover, it does not, for example, entail the resolution of conflicting authorities. Nor does it involve any issue of construction of the statutory provision in question. Furthermore, I must have regard to the further delay and cost which an appeal to the Court of Appeal would generate and, in this respect, I take notice of the extant Court of Appeal calendar. Any fair and objective review of the conduct of these proceedings to date suggests that the Defendants have been dilatory throughout. This court is instinctively reluctant to take any course which would, without good reason, add to the delays to date, increase costs and postpone the final day of reckoning. No good reason, in my opinion, exists.

Disposal

[12] Permission to appeal to the Court of appeal is refused accordingly.