THE COURT OF APPEAL

APPROVED

Neutral Citation No: [2023] IECA 22

Record No: C.A. No. 215 of 2022

Costello J.

Haughton J.

Pilkington J.

BETWEEN/

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

-AND-

PETER BARRY

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Haughton delivered electronically on 3rd day of February, 2023

1. This is an appeal against the refusal of the High Court (Roberts J.) on 27 July 2022 to adjourn, on the application ("**the adjournment application**"), of counsel for the appellant/defendant ("**the defendant**") the respondent/plaintiff's ("**the plaintiff**") application to confirm the appointment of a receiver by way of equitable execution over the balance of the proceeds of a fire insurance

claim held by Zurich Insurance. The defendant was incarcerated in the Midlands Prison at the time of the adjournment application.

2. Having refused the adjournment Roberts J. went on to make the following orders, confirming an order made *ex parte* by Butler J. on 28 June 2022:

> " IT IS ORDERED that Killian O'Reilly Partner of Fieldfisher Solicitors be appointed Receiver by way of Equitable Execution over the proceeds of the Zurich Insurance PLC and/or Zurich Insurance Limited T/A Eagle Star Policy of Insurance with Policy Reference 01 HAI 1432721 held by or on behalf of Zurich Insurance PLC and/or Zurich Insurance Limited T/A Eagle Star as will satisfy the Plaintiff's said judgment
>
> AND IT IS ORDERED that Killian O'Reilly Partner of Fieldfisher Solicitors be appointed Receiver by way of Equitable Execution over the proceeds of the Zurich Insurance PLC and/or Zurich Insurance Limited T/A Eagle Star Policy of Insurance with Policy Reference 01 HAI 1432721 held by Burns Nowlan Solicitors of 31 Main Street Newbridge Co. Kildare W12 RC98 as will satisfy the Plaintiff's said judgment
>
> And the Court Doth make no Order as to Costs of the within *ex parte* Motion and Order"

3. The notice of appeal is confined to the order of Roberts J. – there is no appeal in respect of the original order of Butler J.

4. The five grounds taken together assert that in refusing an adjournment and thereby failing to allow the defendant's legal advisors to take his instructions and deciding the matter without having heard the defendant in substance, the trial judge erred in law, breached the defendant's right to fair procedures, and acted to his prejudice. The sole issue therefore is whether the trial judge was correct to refuse an adjournment.

5. In any application for an adjournment it is important to understand the context in which it is made, and that applies equally to the appellate court asked to review a refusal to adjourn. In this appeal there is a considerable history to the application that it is appropriate to set out.

Background

6. The background to the receivership application is set out in the grounding affidavit of Eva McCarthy, litigation manager of the plaintiff, sworn on 28 June 2022, and the exhibits to that affidavit.
7. Pursuant to letter of loan offer dated 4 April 2007, the plaintiff advanced to the defendant a loan of €265,500. This was secured by mortgage deed dated 7 April 2007 ("**the Mortgage**") whereby the defendant mortgaged *"ALL THAT AND THOSE a plot of ground with cottage thereon being part of the townland of Ballybrack and Barony of DECIES WITHOUT DRUM"* contained in Folio 10202 County Waterford ("**the property**"). Under clause 7.01(e) the defendant covenanted to keep the property insured "*in the joint names of the Borrower and the Lender*" in the full replacement cost.
8. On 2 November 2008 the property was destroyed by fire. The defendant engaged John P. O'Donohoe Solicitors to realise the funds due by Zurich Insurance on foot of the policy of insurance held by the defendant.
9. By clause 7.01(f) of the Mortgage the defendant covenanted to apply insurance monies in respect of the property –

> "…at the option of the Lender either in or towards making good the loss or damage in respect of which such moneys are payable or received or in or towards the discharge of the secured moneys AND the Borrower hereby declares that any such moneys payable to or received by him shall be held upon trust for the Lender subject to the proviso for redemption hereinbefore contained."

10. In 2009 Zurich agreed with the defendant/his solicitors to settle the insurance claim for €222,642.32. By way of first tranche of payment on 24 November 2009, Zurich paid out €85,000 (although some later correspondence suggests the pay out may have been €91,000) by cheque made out to the plaintiff and defendant jointly. It is clear that the plaintiff never saw this cheque.
11. Accompanying a letter dated 21 December 2009, John P. O'Donohoe Solicitors sent to the plaintiff a cheque for €30,000 "*being the arrears of the mortgage and bringing payments up to and including December, 2009 payments*". The letter also referred to preparation by an engineer of plans for obtaining planning permission to rebuild, and a builder's estimate. No mention was made of the cheque received from Zurich for €85,000, or how that came to be encashed, given that it was in joint names, and what had been done with the balance.
12. Queries from the plaintiff to John P. O'Donohoe Solicitors in letters of 12 January 2010, and 14 and 16 July 2010, seeking confirmation that that firm continued to hold the cheque for €85,000, went unanswered.
13. In the meantime arrears mounted on the mortgage account, and the plaintiff after making appropriate demands instituted the present proceedings by summary summons issued on 14 April 2011. No appearance was entered and a default judgment was obtained on 7 February 2012, in the sum of €225,785.53 plus costs of €339.63. On the same day an order of *fi fa* (an execution order) issued addressed to the County Registrar, County Waterford. It does not appear that any recovery was made on foot of that execution. Further the defendant did not thereafter make any further payments to the plaintiff in reduction of the balance due on the Mortgage.
14. On 29 March 2012 the defendant wrote to the plaintiff seeking a moratorium on payments and arrears under the Mortgage, and he stated:

> "My ex-solicitor Mr John O'Donohoe paid Start Mortgages €30,000 arrears without my written consent in 2009. These funds came from the house fire insurance 1st stage payment

to which Mr O'Donohoe was the administrator. Mr. O'Donohoe has also subtracted funds from the cheque for his own benefit both as a solicitor and an accountant."

This seems to have been the first time that the plaintiff was made aware that the €30,000 payment came from the fire insurance pay out, and, by inference, that the first tranche payment of €85,000 was no longer held intact by John P. O'Donohoe Solicitors.

15. By letter dated 2 May 2013 from Carter Anhold Co, solicitors newly instructed by the defendant, it was suggested that "*...it was not in the interests of our client, nor for that matter was it in the interests of your company to be in receipt of this sum of €30,000 for the purposes of payment of arrears...*" and it was suggested that the plaintiff should make €25,850 available to the defendant in order to enable him to carry out reconstruction work on the property.

16. The plaintiff, not surprisingly, by letter dated 14 June 2013, declined any refund. It is of note that the letter from Carter Anhold Co did not suggest any wrongdoing on the part of the plaintiff in crediting the €30,000 to the mortgage account in 2009. (Neither did they dispute the judgment obtained in default of appearance). Even if the plaintiff had been aware that it was part of the insurance pay out it was clearly entitled under clause 7.01(f) of the Mortgage to use them to pay off arrears – a contractual entitlement that does not appear to have been denied by the plaintiff at any point. Further it does not appear that any proceedings were taken by the defendant against John P. O'Donohoe Solicitors.

17. As the judgment debt was not discharged, the plaintiff on 20 May 2016 appointed Karl O'Neill as receiver to sell the property, which was a "*derelict shell*" at that time, no construction work having been undertaken. The defendant noticed that the property was for sale, and he instructed Burns Nowlan (now Burns Nowlan LLP) Solicitors, to make inquiries. By letter dated 6 November 2017, Mr. Matthew Byrne ("**Mr. Byrne**") solicitor of Burns Nowlan LLP acting on behalf of the defendant alleged that the appointment was invalid and threatened injunction proceedings absent an undertaking to desist from sale. The plaintiff's then solicitors O'Brien

Lynam responded by letter dated 14 November 2017 asserting the validity of the appointment, and refusing an undertaking.

18. Despite the threat in Mr. Byrne's letter, no injunction appears to have been sought, and the property was sold by the receiver in August 2018 and in due course €33,970.49 was credited to the defendant's account.

19. As Mr. Byrne later swore the only affidavit that grounded the adjournment application, I pause here to comment that it is notable that Mr. Byrne was acting for the defendant from September 2017, and advising him and writing letters with a view to stopping the sale of the property by receiver Karl O'Neill. It is not unreasonable to suggest that at this time Mr. Byrne would – or certainly should - have become aware of the loan, the Mortgage, and the history of arrears and demands, in order to give legal advice and write letters concerning the validity of the appointment of Karl O'Neill and the sale of property. It would be extraordinary if the defendant had not made Mr. Byrne aware of the summary summons proceedings and the judgment entered against him in default, or if Mr. Byrne had not made appropriate enquiry of his client or raised appropriate High Court searches.

20. On 24 February 2020 Fieldfisher, the solicitors now acting for the plaintiff, sought from Mason Hayes & Curran ("**MHC**"), Zurich's solicitors, an update on the payment out of the balance of the insurance settlement monies. In reply on 29 May 2020 MHC indicated Zurich's willingness to pay out the balance to one or other of the parties' solicitors – if there was agreement – or to pay out a cheque in joint names.

21. On 15 June 2022 MHC notified Fieldfisher that the defendant had issued specific performance proceedings against Zurich seeking to compel Zurich to pay the balance to him, and intimated that "*our client is now making payment to Mr. Barry's legal representatives, Burns Nowlan LLP*". Thus their position on behalf of Zurich had changed between May 2020 and June 2022. In response by letter sent by email on 15 June 2022 Fieldfisher requested of MHC that Zurich hold

off making payment while they took instructions, and by letter and email of 20 June 2022 Fieldfisher indicated that an injunction would be sought unless the monies were paid to Fieldfisher to be held in an escrow account, or Zurich agreed to withhold payment to Burns Nowlan LLP until the dispute between "*Mr. Barry and our client is determined*." Fieldfisher, presumably out of concern that the monies had been or were about to be paid over, also wrote/emailed to Burns Nowlan LLP on 20 June 2022 seeking an undertaking that they would hold onto the monies and copies of the proceedings brought against Zurich.

22. By letter of 20 June 2022 Burns Nowlan LLP declined to give an undertaking on the grounds that they had no instructions to do so, and further refused to provide copies of the specific performance proceedings. Further no undertaking was forthcoming from MHC/Zurich. By further letters sent by email on 24 June 2022 Fieldfisher again sought undertakings from both MHC/Zurich and Burns Nowlan LLP on behalf of the defendant, by 4pm, intimating that in default the plaintiff would seek an injunction or an order appointing a receiver by way of equitable execution over the settlement monies.

23. In a reply dated 27 June 2022 Mr. Byrne indicated that the email was only received in his office at 2.38pm, and that he was then in Portlaoise Circuit Court. He stated:

> "Please note for the avoidance of doubt that we have no instructions to provide any undertakings that you are seeking and *there is no basis for any application by your client…"* [emphasis added]

24. The plaintiff's application for the appointment of Killian O'Reilly of Fieldfisher as receiver was made *ex parte* before Butler J. in the High Court on 28 June 2022. The making of such applications *ex parte* is appropriate and governed by Order 45 of the R.S.C. The application was grounded on the detailed affidavit of Eva McCarthy which exhibits relevant documentation to support the appointment sought. It appears that a Mr. Daly solicitor from MHC was in attendance on behalf of Zurich.

25. Butler J. made the orders sought, but also ordered that the matter be adjourned to 14 July 2022, and directed service on the defendant by electronic service on Burns Nowlan LLP to give the defendant/his solicitors the opportunity to appear and raise objection or, more properly, to seek to set aside the orders. The balance due to be paid out on the policy was €154,000.25.

26. It appears from the affidavit sworn by Mr. Byrne on 26 July 2022 to ground the adjournment application before Roberts J., which I will address more fully shortly, that Burns Nowlan LLP were notified of the application and order of Butler J. on 28 June 2022, and Mr. Byrne avers that he received the booklet of documents (274 pages) on 30 June 2022 – and that he requested further documents (not specified) which he received.

27. On 14 July 2022 when the matter came before O'Moore J. Counsel for Zurich indicated that they were taking a neutral position. Counsel for the defendant (Mr. Sweeney B.L.) sought an adjournment, indicating that Burns Nowlan LLP had been unable to contact the defendant who was incarcerated in the Midlands Prison. Counsel for the plaintiff opposed an adjournment. O'Moore J. adjourned the matter to 27 July 2022 in order to allow Burns Nowlan LLP to take instructions. There is some minor difference as to precisely what O'Moore J. said at this time – in the written submissions (para.1.2) of Mr. Rafter B.L., counsel for the defendant, it is said that he indicated that if instructions could not be taken in the interim the reasons for this would need to be set down on affidavit; whereas the plaintiff's written submission (Mr. Hayes B.L.) (para.6(f)) records that O'Moore J. adjourned for Burns Nowlan LLP to "*take instructions and to provide an explanation as to why the instructions could not be taken from [the defendant]*", and earlier (at para.2) records that the adjournment was to allow the taking of instructions "*as to the basis upon which he wished to contest the application*". Mr. Rafter B.L., who did not appear in the High Court, very fairly accepted Mr. Hayes' recollection on what occurred before O'Moore J.

28. In any event in my view nothing material turns on this. Burns Nowlan LLP knew the plaintiff was intent on proceeding on 27 July 2022; they had on their own account failed to take instructions from the defendant for a two week period (at least – it will be recalled that they had received correspondence warning of such an application from 20 June 2022), and they should have appreciated on 14 July the urgency of the matter and the need to take instructions from the defendant and thereafter to set out the basis (if any) for opposing the appointment of the receiver in time for the adjourned hearing on 27 July 2022.
29. On 27 July 2022 when the matter came before Roberts J. counsel for Zurich again indicated its neutral position, and that it would not pay out any monies pending the court's further order, with which it would comply.
30. Counsel for the plaintiff sought a confirmation order, and resisted the application for a further adjournment.
31. The adjournment application was made by Mr. O'Mahoney B.L., on behalf the defendant, and was grounded on the affidavit sworn by Mr. Byrne the previous day. In essence what Mr. Byrne avers to in his affidavit is –
    - That he only got notice of "*any previous legal proceedings instituted by Start Mortgages against my client*" on 28 June 2022.
    - That in order to take full instructions he requires an in-person consultation with the defendant and Junior Counsel and then to prepare and have signed a replying affidavit which would require a second in-person consultation at the Midlands Prison, where a Commissioner for Oaths would also have to attend.
    - That due to court commitments including "*a number of matters proceeding before the Courts including Jury Trials in respect of criminal matters and matters for hearing in respect of Civil litigation*", and the sudden passing of his aunt on 19 July, he was unable to attend at the prison.

- That these circumstances were "*beyond his control*".
- That the plaintiff will not suffer any prejudice by an adjournment to the next legal term.

Counsel submitted that the defendant would suffer prejudice if he did not have an opportunity to put in a full and proper affidavit.

32. The Transcript of the hearing before Roberts J. records the detailed submissions made by counsel for the plaintiff in opposing an adjournment, and in relation to Mr. Byrne's affidavit. Counsel cast doubt over the need for an in-person consultation to get instructions, and the absence of any averment that the papers served had been furnished to Junior Counsel. Mr. Byrne had had four weeks to take instructions, and had only come up with personal matters as excuses, and failed to explain at all why instructions were not taken in the period 28 June to 14 July, or why he was unable to contact the defendant by phone or remotely (as routinely done over the previous 2 ½ years due to the Covid pandemic). Despite the specific performance proceedings taken on the defendant's behalf Mr. Byrne claimed to have no knowledge of the present proceedings. He also pointed out that the affidavit gave no indication of why the plaintiff would not be entitled to the orders appointing the receiver.
33. Counsel for the plaintiff asserted prejudice on the part of the plaintiff in having to bring the application for the appointment of a receiver, now listed before the court on a third occasion, with the prospect of a replying affidavit being put in and further delay in achieving a hearing (potentially to 2023) while the defendant tried to enmesh the receivership application with the ongoing specific performance proceedings brought by the defendant (thus involving three legal teams) against Zurich, and the "*great expense*" being occasioned where no defence to the application has been disclosed.
34. In her *ex tempore* judgment Roberts J. indicated that having read the affidavit of Mr. Byrne she agreed with the submissions made by counsel for the plaintiff. She stated:

"I am in agreement with the submissions made to me on that affidavit that it is extremely light on detail, given that Mr Byrne is already on record, as I understand it through his firm of Burns Nowlan in specific performance proceedings on behalf of the defendant he must be in possession of some level of knowledge that would put him in a different position to a solicitor who was not so involved, and in those circumstances, my expectation would have been of some basis, albeit hypothetical and qualified, that might have been put forward by Mr Byrne in his affidavit as to the basis on which a replying affidavit would be put in on what it would seek to address. I am mindful of the fact that I've been assured the monies are secured, and while that would normally be a matter which would convince this Court to grant an adjournment, in the circumstances of an order already having been made over one month ago and no specifics on why Mr Barry is unable now to have any solid information before this Court as to why he wishes to challenge it and bearing in mind that Mr Barry will have the usual remedies available to him in the event that he wishes to do so, I am going to refuse the application this morning for an adjournment, and in those circumstances, confirm the order made by Ms Justice Butler on the 28th of June should now be effective."

The trial judge made no order as to costs.

The Appeal submissions

35. Mr. Rafter B.L. – the third counsel to represent the defendant in relation to the adjournment application – appeared in this court. Somewhat surprisingly – but this is no reflection on him - he was attended by a Town Agent rather than by Mr. Byrne or any other solicitor from Burns Nowlan LLP.

36. In his helpful written and oral submissions Mr. Rafter argued that while the adjournment of proceedings is a matter for the discretion of the trial judge, and the jurisprudence indicates that, while the appellate court should be cautious about intervening in the exercise of that discretion, nevertheless the appellate court will intervene and is not restricted to doing so where an error of

principle is disclosed. His written submission cites the following passage from the judgment of Irvine J. in *Collins v Minister for Justice* [2015] IECA 27, at para. 79

> "For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in *Lismore Homes*, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

Referring to *Byrne v Judge McDonnell* [1997] 1 I.r. 392, *Lawlor v. Geraghty* [2010] IEHC 168, *Flynn v District Justice Ruane* [1989] I.L.R.M. 690 and *G. v. The Appeal Commissioner* [2005] IEHC 121, Counsel submitted that the common thread in these decisions was that the decision resulted in a prejudice resulting in unfairness to the party seeking the adjournment – and that in each of them a refusal to facilitate an adjournment to present further evidence relevant to an application was struck down. Counsel argued that fair procedures warranted granting the adjournment application on 27 July 2022 as there was *"a real, manifest or potential prejudice to the applicant"* (*per* Kearns P. *Lawlor v Geraghty*, allowing a challenge to a coroner who refused to adjourn an inquest).

37. Counsel relied in particular on two recent decisions of this court setting out the matters that should be considered by a court on an adjournment application.

38. The first in time is the judgment of Collins J. in *Promontoria (Oyster) DAC v Greene* [2021] where the trial judge had refused the plaintiff an opportunity to put in a corrective affidavit addressing a gap in the plaintiff's proofs:

> "[61.] In *O'Callaghan v District Judge Clifford* [1993] 3 IR 603, the refusal of a District Judge to allow an adjournment in a criminal prosecution was challenged by way of judicial review. Giving the only judgment in the Supreme Court, Denham J. stated that:

"*The adjournment of a case is a matter for the discretion of the District Court Judge. It must be exercised as a judicial discretion within constitutional parameters. It is a matter on which appellate courts should intervene cautiously*." (at 611).

The facts in O'Callaghan were quite different to the facts here and it was, of course, a judicial review of a decision of the District Court rather than – as here – an appeal from the High Court. However, it appears to follow from O'Callaghan that, in making decisions regarding adjournment (and decisions as to whether to permit a party to adduce further affidavit evidence) the High Court is bound to exercise its discretion judicially and within constitutional parameters.

[62.] *O'Callaghan v Clifford* was cited by the High Court (Kearns P) in *Lawlor v Geraghty* [2011] 4 IR 486, a challenge to the refusal by a coroner to adjourn an inquest. After noting that a court on review should be cautious about interfering with a decision to grant or refuse an adjournment, Kearns P nonetheless indicated that intervention would be warranted where the decision-maker had not acted judicially, had failed to employ fair procedures or "*where there is a real, manifest or potential prejudice to the applicant.*" While this statement was made in the different context of a coroner's inquest, it appears to me to be of more general application and to be relevant to this Court's review of the Judge's decision here.

[63.] In England and Wales, it has been said that "*the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair*": per Sedley LJ in *Terluk v Berezovsky* [2010] EWCA 1345, at para 18. That appears to me to be an apt formulation of the test and one that is consistent with the Irish authorities to which I have referred, subject to the caveat that, for appellate intervention to be warranted, any unfairness must be significant and that any assessment of unfairness must not focus narrowly on the interests of the party

seeking the adjournment but must also be sensitive to the interests of the other party or parties and wider considerations of the proper administration of justice."

39. The second decision is *Minogue v Clare Co Co* [2021] IECA 98. This was an appeal from a decision of the High Court judge who refused to adjourn a part-heard matter. During the hearing the trial judge had enquired about rent in the context of whether the applicant might have been entitled to acquire the freehold of certain property. After lunch Counsel for the applicant sought an adjournment to see if evidence of rent receipts could be found, but this was refused, with the trial judge simply commenting "*Having embarked on it to this extent….*". Humphreys J. (with whom Whelan and Pilkington JJ. agreed) addressed the factors to be addressed by a trial judge on an adjournment application:

"[138.] Modest and all as the adjournment application procedure is, the interests of justice do come in to the analysis very strongly. Among the major factors to be considered are:

(i) whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments;

(ii) the lateness of any step sought to be taken by a party;

(iii) the possibility of the adjournment being tactical;

(iv) the extent of real prejudice to the other side;

(v) the views and position of the other side more generally;

(vi) the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court;

(vii) the extent of dislocation and inconvenience to other litigants by time of the court being unnecessarily absorbed — in that regard there is a huge difference between a case that will take one or more days or even a substantial portion of a day and a short matter listed on a Monday; and

(viii) all other relevant circumstances."

Applying these to the case before him Humphreys J. considered that "*the interests of justice were overwhelmingly in favour of an adjournment*" (para 141).

40. Counsel for the defendant therefore argued that the starting position is that the adjournment should have been granted. He submitted that in the present appeal no tangible prejudice was asserted by the plaintiff on the application for the adjournment, but there was a clear prejudice to the defendant, regardless of the possibility that the defendant could sue to recover insurance moneys wrongly paid to the plaintiff. He pointed to delay on the part of the plaintiff and the lack of urgency in pursuing the matter post judgment in 2012 up to July 2022. He submitted that only a second adjournment had been sought and he denied that there was any 'track record' of the defendant seeking adjournments for tactical reasons. He asserted the adjournment application was sought on the "*basis of necessity*", and that the plaintiff did not point to any particular prejudice, and that the matter would not take up undue court time.

41. When pressed by the court as to whether there was any possible ground for setting aside the orders made by Butler J. and confirmed by Roberts J. counsel for the defendant again relied on delay as an arguable ground, and in particular the delay in bringing the receivership application after the sale of the property, when, it was said, the plaintiff ought to have moved more promptly.

42. In reply counsel for the plaintiff's core submission was that the court should not interfere with the trial judge's decision to refuse the adjournment because –

"(a) The decision was within the wide ambit of the Trial Judge's discretion in matters of case management; and

(b) It was the third occasion upon which the matter had been before the Court, and the second occasion upon which the Appellant had been offered an opportunity to adduce any evidence or oral submissions, or a basis of any kind, to substantiate the application to adjourn, or to set out what case might be made on affidavit;

(c) The Appellant and/or the Appellant's solicitor has again failed to provide any evidence or assertions which would have been put on Affidavit, on the basis of which the adjournment should have been granted, other than to complain about the fact that the Appellant does not have a property to live in, despite the fact that the very judgment upon which the within application arose, was as a result of the Appellant's failure to repay the mortgage loan for the purchase of said property;

(d) On the facts which were before the Court, the decision to refuse was plainly correct."

Counsel referred to *Bank of Ireland v O'Donnell* [2015] IESCDET 17 where, in a judgment refusing leave to further appeal, the Court observed that a decision on an adjournment application is "*quintessentially a matter for a trial judge.*"

43. Counsel in written submissions sought to equate adjournments (or refusals to adjourn) to orders of case management, where it has been held (see Geoghegan J. in *P. J. Carroll & Ors v Minister for Health and Children* [2005] 1 I.R. 294) that an appellate court should not interfere unless there is a clear error of law.

44. It seems to me that that comparison is overly simplistic. A refusal of an application for an adjournment of a hearing, the outcome of which has the consequence that a hearing will proceed, and a final determination/order will be made in that court, is of a different character to other case management orders. Typically, case management orders give directions in relation to pleadings, discovery, legal submissions and time lines for compliance – including orders refusing to grant adjournment or extensions of time in such matters – all of which are essentially procedural in nature and generally do not have the effect that matters of substance are determined.

45. Counsel sought to distinguish *Greene* on the basis that it concerned an application to file a corrective affidavit. It was also submitted that the reliance by the defendant on the decision in *Minogue* was unhelpful as "*an attempt by the Appellant to put himself in the shoes of a trial judge and dictate the manner in which the Court should have analysed the matter and subsequently*

exercised the applicable discretion…whether to grant or refuse an adjournment". However in oral submissions counsel did not really dispute that the test to be applied by the appellate court is that of "*significant unfairness*" as identified by Collins J. in *Greene.*

46. Counsel in his submission criticised the content (or lack of) in Mr. Byrne's affidavit, repeating many of the points which counsel had raised in the High Court, and which I have reprised earlier, where they found favour with the trial judge. I will address these shortly. Counsel in particular criticised the absence of any explanation for the failure to take instructions, and the failure to set out any possible ground for challenging the making of the receivership orders, either before or since the orders were made. As to delay, he pointed out that this had not been raised, and in any event there was ample evidence in the affidavit of Ms. McCarthy and the correspondence exhibited to show the steps being taken by the plaintiff post judgment.

47. It seems to me that in *Minogue,* although very much framed by the particular facts before it, this court has given helpful guidance on the factors that a trial judge should consider when faced with an adjournment application, and these by extension assist the analysis in this court on an appeal. Further it seems to me that the test of "*significant unfairness*" suggested by this court in *Greene* is the appropriate overall test for the appellate court. While it is true that *Greene* was somewhat different, in that the plaintiff had sought to put in a further affidavit, it followed that if the court acceded to that application the matter would have to be adjourned. Accordingly it seems to me that in his judgment Collins J. was addressing more generally the matters that should be considered when an adjournment is sought in order to bring evidence before the court.

48. I agree with Collins J.'s observations that the appellate court can interfere where it considers that the refusal of an adjournment involves significant unfairness, or where, in the words of Kearns P. in *Lawlor,* "*there is real, manifest or potential prejudice to the applicant*". I also agree with his observation that the assessment of unfairness "*must also be sensitive to the interests of the other party or parties and wider considerations of the proper administration of justice*."

49. As to *Minogue*, while noting the argument made by counsel for the plaintiff in his written submissions, in my view this fails to engage with the list of factors postulated by Humphreys J. as relevant to "*the interests of justice*", and which the court did consider in that appeal. In principle I agree that the overriding objective is to do justice, and I find that the factors listed in *Minogue* are helpful in approaching this appeal. One factor listed by Humphreys J. at (iv) is *the extent of real prejudice to the other side;* it seems to me that the question or real prejudice to the party seeking the adjournment is also a relevant factor.

50. In my view therefore the principles that should guide this court in approaching this appeal may be restated as follows:

(a) An adjournment application is a matter of discretion and "*quintessentially a matter for the trial judge*", and the appellate court will therefore give significant weight to the views of the trial judge;

(b) However, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal or permit the court to interfere only where an error of principle is disclosed;

(c) The trial judge in addressing the adjournment applications is bound to act judicially and within constitutional parameters, and to afford fair procedures;

(d) The test to be applied by the appellate court to a decision to refuse an adjournment is whether there was significant unfairness;

(e) The test includes considering whether there is real, manifest or potential prejudice to the applicant;

(f) This test must be sensitive not only to the interests of the party seeking the adjournment, but also to the interests of/potential prejudice to the other parties and the wider considerations of the proper administration of justice;

(g) The factors identified by Humphreys J. are a useful template for a trial judge approaching an adjournment application, and by extension an appellate court reviewing the decision.

Applying the law

51. The first factor listed by Humphreys J. is *whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments.*

52. The defendant had already had the benefit of one adjournment. But the opportunity to respond to the threat of a receivership application arose earlier. Following receipt of the letter from Fieldfisher of 24 June 2022 threatening an injunction or an application to appoint a receiver, Mr. Byrne should have appreciated the need to obtain his client's instructions as a matter of some urgency. He fails to set out in his affidavit what, if any, steps were undertaken by him or other staff in Burns Nowlan LLP to contact the defendant.

53. More particularly, he fails to set out in his affidavit what efforts were made to contact the defendant in the Midlands Prison after receipt of the notice of the *ex parte* order on 28 June. This is a significant omission. The fact that full papers were not delivered until two days later cannot excuse a failure to contact, or make arrangements to contact, the defendant (if that be the case), or to set out fully for the benefit of the court what efforts were made.

54. The excuse of other court work is non-specific, except that some of it is said to be criminal in nature, and it is said to be commitments personal to Mr. Byrne. This affidavit was Mr. Byrne's opportunity to set out precisely what was so demanding in his court commitments (or other workload) that he could not even initiate attempts to contact the defendant. It is surprising that he does not depose to any attempts at contact or setting up a remote consultation in a four week period, and judicial notice can be taken of the routine use by the courts and wider legal community of remote communication using Zoom or other platforms during the period of the Covid pandemic.

55. The unfortunate death of Mr. Byrne's aunt is relied upon, but this did not occur until 19 July, and – apart from his understandable desire to attend the funeral – it is hard to see how this should have prevented him attending to what was by then an urgent need to contact the defendant to take instructions.

56. It is also puzzling that Mr. Byrne makes no reference to why he did not enlist help from other solicitors or staff in Burns Nowlan LLP, of which firm he was a 'Senior Partner'. The firm's notepaper (which appears in exhibits) discloses it is based in Newbridge, and that there are four solicitors, one of whom is described as a Consultant. If Mr. Byrne was too busy, then other solicitors or staff should have been enlisted to help, or he should at least have set out in his affidavit why that might have been impossible.

57. There are some other disquieting features of Mr. Byrne's affidavit:

- At para. 3 he refers to corresponding with "*both parties for the purpose of dealing with payment out of this policy*", and then refers to the proceedings brought by the defendant against Zurich, seeking to compel them to pay over the balance of insurance monies. However that correspondence was primarily between Mr. Byrne and Zurich/their solicitors MHC, and Start Mortgages was not a party to the specific performance proceedings (which commenced on 31 January 2021) and was kept in the dark. It is notable that on 20 June, 2022 Mr. Byrne seems to have had instructions not to furnish copies of those proceedings to Fieldfisher, and had "*our client's clear instructions*" not to give any undertaking with regard to the insurance monies.
- In para.4 Mr. Byrne says he had no indication of the present proceedings until Fieldfisher contacted him. I have touched on this earlier. If it is true, it is extraordinary, because Mr. Byrne seems to have first acted for the defendant in late 2017 when he engaged in correspondence with the plaintiff and its then solicitors O'Brien Lynam when the receiver Karl O'Neill was actively selling the property. Mr. Byrne at that time went so far as to

challenge the validity of the appointment of Mr. O'Neill, and intimated that if the sale proceeded an injunction would be sought – a threat that would not have been made if all appropriate searches had been carried out. No such challenge materialised. At any rate, if Mr. Byrne's averment is true it indicates that at no point prior to 2022 had the defendant informed him of the existence of these proceedings, of the judgment obtained in default, or of the writ of *fi fa*, which is a consideration that does not weigh in favour of the defendant.

- In para.5 Mr. Byrne is incorrect in averring that no efforts were made in these proceedings to enforce the judgment obtained in 2012. As evidenced by Ms. McCarthy's affidavit (which was served Burns Nowlan LLP on 30 June 2022) the plaintiff obtained the writ of *fi fa*, and engaged in extensive correspondence with the defendant over planning permission for reconstruction, and also in 2016 appointed Karl O'Neill who realised the property resulting in reduction of the debt due.
- Mr. Byrne makes no mention at all of the first adjournment to 14 July, and the hearing before O'Moore J., and his requirements as to what should go into any affidavit dealing with attempts to take instructions.

58. Furthermore Mr. Byrne makes no attempt to suggest any basis upon which the orders made by Butler J. should not be confirmed, or might be set aside. This in my view is a very significant omission, because the result is that the affidavit fails to set out how an adjournment might prejudice the defendant.

59. It raises another issue which may more properly come within factor (viii) – *"all relevant circumstances"*. Following the order of Roberts J. (the order was made on 27 June 2022 and perfected on 3 August 2022) Mr. Byrne must have consulted with the defendant to advise him of the outcome and to obtain instructions to appeal. He should then have been able to take the defendant's instructions in relation to the substance of the receivership application, and to have been in a position to advise the court of the basis upon which the defendant seeks to have the

orders set aside. No further affidavit has been filed - and arguably that could have been done without leave of this court, but in any event leave could have been sought if it was required. The consequence is that, apart from counsel's belated reliance on delay, this court is left in the dark as to any potential ground for setting aside the orders.

60. The second factor referred to by Humphreys J. is *the lateness of any step sought to be undertaken by a party.* It is not clear from Mr. Byrne's affidavit that *any steps* were taken by him or his firm to contact the defendant. Mr. Byrne's affidavit itself was sworn only the day before the adjourned hearing date of 27 July 2022. The application for a further adjournment therefore came at the eleventh hour.

61. Factor (iii) is *the possibility of the adjournment being tactical.* This warrants consideration, in light of the defendant's attempts through Mr. Byrne's correspondence, and ultimately by issuing specific performance proceedings against Zurich, to intercept the balance of the insurance monies, and the refusal to give information/copies of the proceedings to Fieldfisher. It is not clear what the defendant could have hoped to gain by further delay, but it may well be, as counsel for the plaintiff suggests, that it was to allow the specific performance proceedings to be pursued to a conclusion that would benefit the defendant. Indeed counsel for the defendant agreed with the court that if the adjournment application had succeeded the consequence could well have been that the application for the appointment of a receiver would have become linked to and heard with the specific performance proceedings, to which it was also possible Start Mortgages might have been joined as a party, and that this could have entailed delay until at least 2023, if not 2024. While it is quite possible that seeking an adjournment was tactical, I must also bear in mind the possibility that it was genuinely sought because Burns Nowlan LLP had not obtained instructions, and with no other agenda. While on balance I consider that there was a tactical aspect to the adjournment application, I do not find that to be a decisive consideration.

62. Factor (iv) is *the extent of real prejudice to the other side.*

In my view it is appropriate to first consider potential prejudice to the defendant arising from refusal to adjourn. It meant that instructions could not be taken from the defendant, and the defendant was effectively closed off from seeking to have the orders made by Butler J. set aside in the course of the applications that were before the High Court, save insofar as his opposition was based upon legal argument, which was still open to him. However, in my view this cannot amount to prejudice in the absence of any suggested basis in law or in fact for challenging the validity of the receivership orders, and in circumstances where the defendant and his legal advisors have had, at least before this court, ample time in which to give/take instructions and to formulate a basis for challenge. Furthermore, the appointment of receivers of this nature is generally made on foot of an *ex parte* application, and it would have been open to the defendant when duly served to have applied to set aside the orders. Instead he pursued the adjournment application.

63. In submissions it is suggested that the defendant will now be left homeless, although again that is not said on affidavit and was not raised in the High Court. Therefore, he cannot now seek to argue a case which was neither advanced in the court below nor grounded upon any evidence. If this were really his case, it is most surprising that this was not deposed to as it would require the most minimal of instructions to enable Mr Byrne to include it in the affidavit he swore on behalf of his client. However the dissipation of €85,000 of the insurance monies in 2009, albeit that €30,000 was paid to the plaintiff (and it is clear from Ms. McCarthy's affidavit that the plaintiff was unaware of the source of that payment), was effectively what prevented the defendant progressing reconstruction work. For that the defendant must be held responsible – no fault lies with the plaintiff. I also note that registered against the property (Folio 19045F County Waterford) in 2012 was an earlier judgment mortgage in favour of Bank of Ireland (Start Mortgages registered a judgment mortgage in 2014).

64. Counsel then raised delay as a possible ground for setting aside the receivership orders, and argued that the refusal of an adjournment meant that this could not now be pursued. However this was never suggested in Mr. Byrne's affidavit, or argued before Roberts J. (or O'Moore J.). It was also not disputed that enforcement of the judgment would not be statute barred until the lapse of 12 years (from 2012), and therefore the receivership application was not precluded by reason of delay (applying the statutory time limits to an equitable relief for the purpose of the argument). The validity of judgment itself was never challenged, nor was it denied that a substantial sum remained due on foot of the judgment, and that the defendant had not made any payments since the judgment. The legal basis upon which any delay might afford a ground for challenge was therefore never laid out. Moreover the affidavit evidence of Ms. McCarthy indicating the efforts made by the plaintiff to enforce over the years, and its forbearance during a period when the defendant appeared to be trying to obtain planning permission for reconstruction, and the events leading to the sale of the property, was uncontested. In my view this left little or no scope for any suggestion that the plaintiff should be deprived of the right to appoint receivers by way of equitable execution over the insurance monies.

65. Turning to prejudice to the plaintiff, I am satisfied that there is prejudice to the plaintiff relating to the costs and inconvenience of successive court appearances. If the trial judge had granted the adjournment it would have meant at least one further outing in court, and probably more than one if a replying affidavit was filed, whereas if the defendant's instructions and replying affidavit had been filed on time the matter could, potentially, have proceeded on 27 July 2022. There were various Statements of Affairs prepared by the defendant over time and the reality seems to be that, leaving to one side the insurance monies (to which, *prima facie*, the plaintiff is contractually entitled), he has no assets from which court costs could be paid. The prejudice is therefore that as a matter of probability if the adjournment was granted the plaintiff would have to bear its own costs of at least one further hearing. This is so despite the fact that the trial judge made no order

as to costs (an order that is not the subject of any cross-appeal). Counsel for the defendant suggested this was not a significant prejudice; however in my view it is a moderate prejudice. There would also have been some prejudice in the mere fact of delay in having the matter finalised, and thus allowing the defendant to pursue his specific performance action in tandem with opposing the plaintiff's application, and the complications that could arise from that (for example, a joinder of the plaintiff to the specific performance proceedings).

66. Factor (v) is *the view and position of the other side more generally.* Much of this has already been covered. The plaintiff has consistently sought recovery on foot of its judgment, and it opposed the adjournments sought on 14 July 2022 and 27 July 2022. While the defendant sought an adjournment twice the real weakness of his position is that his solicitors could and should have taken his instructions before 27 July 2022, and no where is any basis for contesting the receivership orders made out.

67. Factor (vi) is *the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court.* I do not think that this is of great relevance to the present case, where the court was concerned with adjournment of a motion of the sort regularly disposed of on a busy Monday. For similar reasons factor (vii), which speaks to *the dislocation and inconvenience to other litigants by the time of the court being unnecessarily absorbed* is not particularly relevant. I would observe however that if litigants are facilitated by adjournment, in the face of opposition, it is incumbent on them to ensure that the matter is ready to proceed on the next occasion, and were the court to routinely grant further indulgence the time of the court and the orderly flow of business would be adversely affected. Factor (viii) refers to *all other relevant circumstances*, and I have sought to consider them earlier in this judgment.

68. On this analysis I am led to the conclusion that the trial judge acted judicially, and did not act unfairly in exercising her discretion to refuse the adjournment. I am satisfied that the defendant, having had ample time and opportunity to indicate a basis for setting aside the order of Butler J.,

singularly failed to present any factual or legal basis for a set aside either to the High Court or this court. I am satisfied that the defendant has not demonstrated any real prejudice, whereas the plaintiff has demonstrated some prejudice to it were the adjournment to have been granted. In all the circumstances I am satisfied there is no error of law, and no significant unfairness, that would justify this court in interfering with the trial judge's exercise of her discretion. In all the circumstances in my view justice was met by the refusal to adjourn the matter, and the confirmation of the orders made by Butler J.

69. I would therefore dismiss this appeal.

70. I note that the balance of the insurance monies are currently held by Fieldfisher pending the outcome of this appeal. As the appeal has been unsuccessful it follows that as far as these proceedings and this appeal are concerned Fieldfisher is released from any undertaking given to retain the fund and is free to release those monies according to the plaintiff's instructions.

71. As the plaintiff was entirely successful in opposing this appeal it follows from s.169 of the Legal Services Regulation Act, 2015 that the plaintiff should be entitled to its costs of this appeal to be adjudicated in default of agreement. I would propose such an order, but in the event that either party wishes to seek a different order they will have 10 days from the electronic deliver of this judgment to apply to the Office of the Court of Appeal and in that event a short hearing will be arranged accordingly. Should a party be unsuccessful in seeking a different order that party runs the risk that they will be fixed with the costs of that application.

Costello and Pilkington JJ. have indicated their agreement with this judgment and the orders proposed to be made.