THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 205
Appeal Number: 2020/245

Whelan J.
Haughton J.
Binchy J.

BETWEEN/

TOM O'BRIEN AND HILARY LARKIN

RESPONDENTS

- AND –

MARTIN MEEHAN
(OTHERWISE MARTIN J. MEEHAN)

FIRST NAMED DEFENDANT

AND
DONAL MCNEELA

APPELLANT

Judgment of Ms. Justice Máire Whelan delivered on the 20th day of July 2021

Introduction

1. This is an appeal from the order of the High Court (Reynolds J.) of 8 October 2020 wherein the court *inter alia* made directions for the exchange of affidavits and adjourned the respondents' motion to 28 October 2020. The appellant contends that the High Court judge erred in accepting jurisdiction and making the said order.

2. The pre-litigation position is that the receiver (the first named respondent) was appointed on 26 February 2020 by Everyday Finance DAC pursuant to powers contained in two deeds of mortgage dated 31 May 2002 and 10 July 2008 over certain assets of the appellant which he

held as tenant in common with Martin Meehan, namely, the properties 85 and 86 Amiens Street, Dublin 1 and Units 120, 121, 122, 123 and 124 Waterford Industrial Estate, Co. Waterford. The sums outstanding in respect of the facilities secured by those mortgages appear to have been €1,344,695.86 as of September 2019.

Background

3. The above entitled proceedings were commenced by way of plenary summons on 27 July 2020. The plenary summons seeks interlocutory orders against the appellant and a co-defendant Martin Meehan (otherwise Martin J. Meehan) including injunctive orders restraining the said defendants from attempting to manage or otherwise interfere with the exercise by the first named respondent of his functions as receiver over certain properties known as Units 120 to 124 Waterford Industrial Estate, Co. Waterford and numbers 85 and 86 Amiens Street in Dublin 1 and seeking further orders in aid of recovery of possession of the said properties.

4. On 29 July 2020 the respondents applied *ex parte* to the High Court seeking directions in relation to the issue and service of a notice of motion seeking interlocutory injunctive reliefs. That application was grounded on the plenary summons, the *ex parte* docket and affidavits of Eoghan Keyes filed on 28 July 2020, Darren Das filed on 28 July 2020 and Tom O'Brien (the first named respondent) filed on 29 July 2020 together with a draft of the notice of motion. Reynolds J. granted liberty to the first respondent to issue and serve the notice of motion. Same was returnable before the High Court on 8 October 2020. Directions were given for the service of any replying affidavits to the said motion within a period of six weeks from the date of service of the motion and the first named respondent to file thereafter any response within a further period of two weeks.

5. The court directed that service be effected on the appellant at a specified address in Malahide, Co. Dublin by registered post and by certified post. Further directions were made including that the solicitor on record for the first named respondent write to the defendants to

"outline the court's concern regarding the provision of legal advice to them by an entity not known to the court" – an issue not directly relevant in this appeal.

Service

6. Service of the notice of motion returnable for 8 October 2020 together with the three grounding affidavits and the exhibits thereto was effected under cover of letter of 4 August 2020. It is common case that, through an oversight, the said documentation did not include a copy of the plenary summons. The cover letter is noteworthy in so far as it expressly states: -

> "We will send you the copy court order of Ms. Justice Reynolds made 29 July 2020 once perfected."

7. The appellant corresponded with the solicitors for the respondent on 7 August 2020 advising that the motion papers he had received were incomplete and in particular alerting them to the fact that no copy of the plenary summons was included. In response to that communication, under cover of letter of 11 August 2020, a copy of the plenary summons was received by the appellant. He disputes the validity of that service.

8. It is noteworthy that the said letter of 11 August 2020 also stated:-

> "We will send you the copy court order of Ms. Justice Reynolds made 29 July 2020 once perfected."

In fact, the order of the High Court had been perfected on 5 August 2020.

9. On 1 September 2020 the appellant communicated by email, reminding the respondents' solicitors of their commitment to send a copy of the order "once perfected". A further reminder was sent by him on 3 September 2020. Eventually, on 7 September 2020, a copy of the perfected order made on 29 July 2020 was served on the appellant. Under cover of letter of 8 September 2020 the appellant expressed concern that he was thereby prejudiced and he contended, in particular, that his ability to appeal against the said order was impacted in so far as the time permitted under the rules to appeal the said order had expired.

10. On 24 September 2020 the appellant entered a conditional appearance without prejudice to his right to contest the jurisdiction of the High Court.

11. On 29 September 2020 the appellant issued a notice of motion returnable before this court whereby the appellant sought an order extending the time permitted to file an appeal against the order of Reynolds J. made on 29 July 2020.

12. On the same day, some days outside the period of six weeks afforded to the appellant to file any replying affidavits by the order of 29 July 2020, the appellant also swore two affidavits; one at 10.13am, the other at 11.42am. They are substantially similar, albeit the latter deposed that "these purported and alleged proceedings of 29/07/2020 are currently before the Court of Appeal also…" (para. 9)

High Court hearing of 8 October 2020

13. On 8 October 2020 the motion for interlocutory orders was returnable before the High Court. On that date the court struck out the proceedings as against the first named defendant with no order as to costs. Accordingly, Martin Meehan (otherwise Martin J. Meehan) is no longer a party to these proceedings.

14. Having heard the procedural arguments advanced by the appellant who was present in court and noting that he was seeking an extension of time within which to appeal the order of 29 July 2020, the court ordered that the appellant file and serve any replying affidavit by 22 October 2020 and that the respondents file and serve any affidavit in response thereto by 27 October 2020. The motion seeking interlocutory injunctions was otherwise adjourned to 28 October 2020 with costs reserved.

28 October 2020

Motion to Court of Appeal to extend time to appeal

15. That motion was heard by this court on 28 October 2020. The key issue under consideration was whether the appellant had identified any arguable ground of appeal such that

the court could exercise its discretion to extend the time to appeal in the manner sought. The court noted that the appellant had exhibited the plenary summons in his affidavit grounding the motion. Of his contention that the order of 29 July 2020 should not have been made in the High Court in circumstances where the plenary summons had not at that time been served upon him, the court held, having duly considered O. 9, r. 1 and O. 52, r. 11 of the Rules of the Superior Courts ("RSC"), that it was "abundantly clear that an *ex parte* application is entitled to be made prior to the service of that originating summons." The court went on to determine that there was no arguable ground of appeal on the basis of lack of jurisdiction as had been contended. The respondents were entitled to bring the *ex parte* application on 29 July 2020 without serving the plenary summons.

Events in the High Court

16. The motion to extend time to appeal the order of Reynolds J. made on 29 July 2020 was heard on the afternoon of 28 October 2020 in the Court of Appeal. That morning the respondents' notice of motion in respect of which leave to issue and directions had been granted on 29 July 2020 and which sought various interlocutory injunctions was listed before the High Court having been previously adjourned on 8 October 2020 to that date. The High Court registrar communicated at 9.49am with the appellant and the solicitor on record for the respondents stating:-

> "As Mr. McNeela is not legally represented, the matter cannot be dealt with today in a remote court sitting and will be adjourned for mention to a date to be fixed by Ms. Justice Reynolds."

Counsel for the respondent was not apprised of that email before the High Court sitting. The appellant, understandably, did not link in to the remote court sitting. Having heard submissions from counsel for the respondents, the High Court ordered the appellant be afforded a further period of two weeks for the filing of a replying affidavit and the respondents to file and serve

any affidavit in response thereto within a period of one week thereafter. The motion was then adjourned to 8 December 2020.

17. When the misunderstanding was discovered, in the course of the Court of Appeal hearing that afternoon, agents for the respondents took a step to address the matter and by an email dated 28 October 2020 at 8.41pm to the registrar, stated:-

> "We are conscious that Mr. McNeela was not present this morning when those directions were given. Mr. McNeela was informed of the court's directions in the course of the hearing in the Court of Appeal this afternoon and is copied on this email. Given the court has now fixed a hearing date in this case, which the plaintiff is most anxious to retain, we feel that it is appropriate for the matter to be re-listed for mention only at the earliest possible opportunity to permit Mr. McNeela address the court in relation to the directions should he wish to do so."

The matter was accordingly relisted before the High Court on Friday 6 November 2020. There was no appearance by or on behalf of the appellant on that occasion. In the circumstances that had transpired, the High Court ordered that the date for hearing of the motion seeking interlocutory relief on 8 December 2020 be vacated and that the motion would stand adjourned for mention to 17 January 2021.

Notice of appeal

18. In his notice of appeal filed 24 November 2020 the appellant sought orders setting aside/vacating the orders made by Reynolds J. on 8 October 2020, 28 October 2020 and 6 November 2020. He confirmed at the hearing that the appeal was confined solely to the order of 8 October 2020.

19. He sought an order dismissing the respondents' notice of motion for lack/want of jurisdiction and/or due process; an order dismissing the respondents' plenary summons for lack/want of jurisdiction and/or due process; and, an order instructing "the [respondents']

principal to sit down with the defendant's representatives with the intent of coming to an agreement which is acceptable to both parties, where genuine attempts will be made to bring an end to the entirety of the herein matter(s)."

Arguments of the appellant

20. A key argument by the appellant is that service of the plenary summons was not effected upon him in accordance with the requirements of O. 52, r. 11 and/or O. 9, r. 2(1)(iii) RSC and further that such service should have been effected prior to service of the notice of motion which issued on 30 July 2020. Neither, he asserts, was the said notice of motion with grounding affidavits and all exhibits re-served with the plenary summons and he contends that as a result the High Court lacked the necessary jurisdiction to deal with the notice of motion or make orders pertaining to same and that the judge ought not to have permitted same to be opened before the court. It is contended that the orders subsequently made on 8 October, 28 October and 6 November 2020 are likewise tainted and that the judge lacked jurisdiction to make same. As such, it is contended that there was an absence of jurisdiction, that the judge exceeded her jurisdiction and that the respondents were improperly and unlawfully before the court.

Arguments of the respondents

21. The respondents contend that the appeal is substantially *res judicata* and/or moot in circumstances where at the hearing of the motion to extend time for an appeal, this court on 28 October 2020 considered the issue which was fully argued before it and determined that no arguable case had been identified by the appellant in regard to the issue of service. It is contended that the appellant has not identified any basis on which the order made on 8 October 2020 was improperly made and further that the appeal is moot since the directions which had been ordered on 8 October 2020 are no longer applicable and/or were ultimately vacated on the 6 November 2020.

Appellate review of case management decisions

22. In *Dowling v. Minister for Finance* [2012] IESC 32, para. 3.1 Clarke J. (as he then was) referred to the "undoubted jurisprudence" of the Supreme Court "to the effect that an appellate court should be slow to interfere with case management directions made by the court of first instance" and cited, as examples, *P.J. Carroll & Co. Ltd. v. Minister for Health and Children* [2005] 1 I.R. 294 and *Dome Telecom Ltd. v. Eircom Ltd.* [2007] IESC 59, [2008] 2 I.R. 726. Clarke J. held at para 3.2 that the test to be applied was whether:-

> "…the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred."

Clarke J. reiterated this test at para. 6.3 of *Farrell v. Bank of Ireland* [2012] IESC 42, [2013] 2 I.L.R.M. 183 in the context of an application for security for costs and clarified that the reference to an appeal to "this Court" was:-

> "…to an appeal which might occur after final orders had been made in the High Court and when this court is required, if the question is raised on an appeal, to assess the overall fairness of the process which led to the making of the orders concerned."

23. In *Dowling*, after noting that procedural directions are rarely written in stone and that it remains open to a trial judge to redress any prejudice which might be shown to flow from case management directions, Clarke J. indicated that an appellate court should only intervene immediately where:-

> "…there is demonstrated a degree of irremediable prejudice created by the relevant case management directions such as could not reasonably be expected be remedied by the trial judge (or at least where the chances of that happening were small) and where

> therefore, unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions." (para. 3.5)

He further observed in *Farrell*:-

> "…The proper conduct of litigation requires parties to engage with the process in the High Court, to comply with procedural directions given by that court, and to only invoke the appellate jurisdiction of this court either at the end of the process or in the very limited circumstances where the jurisprudence of this court permits a review of individual procedural and case management directions." (para. 6.4)

24. In *Rice v. Muddiman* [2018] IECA 402 Irvine J. (as she then was) held that:-

> "…an appellate court will only set aside what was…effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice." (para. 31)

This passage was quoted with approval by Costello J. in *Defender Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd.* [2019] IECA 337 at para. 39. In that case the court was not satisfied that the appellant had demonstrated "any real, manifest or potential prejudice" such that it should interfere in the exercise of the trial judge's discretion to adjourn a recusal motion, generally, with liberty to re-enter. Similarly, Mahon J. in *Thomas v. Commissoner of an Garda Síochána* [2016] IECA 203 accepted that an appellate court retains the jurisdiction to review case management directions but observed that generally it is "slow to do so" and "will only do so in the face of compelling reasons" (para. 31).

Non-compliance with rules

25. This court in *Gladney v. Coloe* [2021] IECA 115 considered the implications of non-compliance with a practice direction or with the Rules of the Superior Courts. At issue here is compliance with the Rules rather than a practice direction. The latter has no statutory force and

cannot alter the general law, it being no more than guidance on matters of practice issued under the authority of the President of the relevant court. At para. 68 the judgment states: -

> "In considering the appropriate approach to be taken where non-compliance with a relevant practice direction is established it is appropriate to have regard to the Rules of the Superior Courts in relation to procedural irregularities in O. 124: -
>
> > '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 proceedings 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.'
>
> 69. The court enjoys considerable latitude and has a wide discretion in approaching non-compliance with a relevant practice direction or the Rules of the Superior Courts. This discretion must be exercised with due regard to the overriding obligation of advancing the interests of justice and ensuring that the constitutional right of access to the courts as enjoyed by all litigants is properly respected.
>
> 70. The factors to be taken into account and weighed in the balance will vary from case to case in the due exercise of this discretion but include having appropriate regard to:
>
> > i. the nature and extent of the breach of the practice direction or Rules of the Superior Courts that is established;

ii. whether such breach has visited tangible prejudice or hardship on the other party to the proceedings;

iii. the nature and extent of such prejudice or hardship;

iv. the objective of the direction or rule which has been breached;

v. the extent to which the purpose of the direction or rule has been irredeemably defeated or whether its objective was otherwise achieved; and

vi. where the balance of justice lies in all the circumstances of the case."

Order 9, r. 2

26. O. 9, r. 2(1) provides:-

"Service of any summons on the defendant shall, except in the cases of the following rules of this Order specified, be effected:

…

(iii) by the sending of a copy of the summons by registered prepaid post in an envelope addressed to the person to be served at his last known residence or place of business in the State, or at an address in the State for service provided by the person to be served, provided that such service shall not be deemed effective without proof of delivery of the said envelope to the address of the person to be served…"

27. As is clear from O. 9, r. 2, service of the plenary summons may be effected by the sending of a copy of the summons by registered pre-paid post in an envelope addressed to the person to be served at his last known residence or place of business in the State.

28. Clearly in the instant case the service effected on 4 August 2020 was insufficient and did not comply with the Rules by reason *inter alia* that it omitted to deliver a copy of the plenary summons to the appellant in the manner prescribed.

Hearing of 28 October 2020 before the Court of Appeal

29. Having carefully considered the transcript of the hearing before this court on 28 October 2020, it is clear that the appellant acknowledged that he had in his possession a copy of the plenary summons which was served upon him and included with the documentation under cover of the letter of 11 August 2020. He denies that this constitutes valid "service", maintaining the stance that he has not been validly served with the proceedings.

30. At p. 8, lines 2 to 6 of the transcript the appellant stated, referring to the High Court judge:-

> "She erred in law where she determined the absence of a credible and incontestable evidence that the plenary summons which she claims to have read was properly served and the plenary summons was not in fact served on the defendants at all times leading up to and during the said hearing on 29 July 2020."

31. Further referring to the notice of motion which had issued on 30 July 2020, returnable before the High Court on 8 October 2020, the appellant at p. 10, lines 11 to 12 stated: –

> "…which motion could not have been valid without the service of the plenary summons in the first instance."

The appellant further reiterated at lines 25 and 28 that the service was "not in accordance with law".

32. Again at p. 18 in his submissions to this court on the extension of time motion at line 11 onward he stated:-

> "But there was no summons served when they went before the court and then the key element of this is that on 8 October the judge went ahead with the matter, making more directions in relation and has done so today in relation to a motion which was issued when there was no service of the actual plenary summons. None of what they are arguing is true as the plenary summons was not served."

He further contended at p. 18, lines 26 to 27:–

> "The other motions could not have issued until the plenary summons was served and that is what my argument is."

Referring to events at the *ex parte* hearing on 29 July 2020, he stated at line 28 *et seq*: -

> "I'm saying that the plaintiff and the court had no right to proceed with that notice of motion when there was no plenary summons served at the time. Controversy is that they had no valid service in place when the plaintiffs were before the court on an *ex parte* motion and most unfairly turned a period of a motion for interlocutory reliefs and obtained the order from the court."

33. He further advanced the proposition by stating at p. 19, lines 28 to 29:-

> "Until a plenary summons is served, the court does not have any business involving itself in the matter."

34. The court noted that the appellant had exhibited the plenary summons in his affidavit grounding the motion seeking an extension of time to bring an appeal. The following exchange with the court is worthy of note: -

> "Judge: …are you saying you never got the summons from the other side or that you never got it in accordance with rule 9 [*sic*] which requires it to be served by registered post? Which are you saying?
>
> Mr. McNeela: I'm saying that I've never properly been served in accordance with rule 9 [*sic*] by registered post in accordance with rule 9, section 3 [*sic*] –
>
> Judge: And you're not saying you didn't get it from them by ordinary course?
>
> Mr. McNeela: I am saying that you have what I got in my booklet. But that was never properly served. It is incomplete. There's no dates on it. And it's a terrible copy.
>
> Judge: Sorry, I have at tab 8 of my book the plenary summons which was their exhibit. And it has the date on the front page…it gives the record number, it gives the title and

one can see a date and the general…is entirely legible. Now, do you accept you got that with the letter of 11 August?

Mr. McNeela: That I got that on 11 August? Yes.

Judge: And you accept you have it in your physical possession? …

Mr. McNeela: Sorry, the summons was served by me on the first named defendant. It's incomplete, it's not served in full.

…

Judge: How is it incomplete?

Mr. McNeela: It's incomplete in that it said that the summons was served by me and endorsed by me – who was it served by?

Judge: No. I'm asking you a very specific question. Did you get a copy – did you get that document with a letter of 11 August? I'm not trying to trap you into saying that it was served on you. I'm not trying to trap you in that way so I'm just asking you a question. Did you get those pages, that document, along with the letter of 11 August?

Mr. McNeela: Hang on. Yes, judge.

Judge: So, as I understand it, your point is not that you don't have a copy of the summons. Your point is that you weren't properly served within the meaning of Order 9.

Mr. McNeela: That's correct. That is correct." (p. 23, line 22 to p. 24, line 22, emphasis added)

He repeatedly asserted that the proceedings were not validly served on him and offers no explanation as to how he came into possession of the letters of 4 August and 11 August 2020 with their respective contents which he acknowledges on the later date included a copy of the issued plenary summons.

Entry of an appearance

35. The appellant entered a conditional appearance on 25 September 2020. It is stated to be entered:-

> "…without prejudice and solely to contest the jurisdiction of the court at the Central Office, Four Courts, Inns Quay, Dublin 7, for the above defendant Donal McNeela to the originating plenary summons 2020/5367P, *ex parte* docket heard on 29/07/2020 and motion on notice the subject matter of the *ex parte* docket, where motions were heard, orders made, other motions issued, in this action, where the plenary summons was never served prior to same, consequently denying the court jurisdiction."

However, regard must be had to the fact that the appearance is entered to an originating summons in the first place.

36. The appearance, conditional as it is in the tenor above outlined, nevertheless confirms that service of a copy of the plenary summons was effected upon the appellant under cover letter dated 11 August 2020.

37. The authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) observe at para. 4-13 regarding an appearance entered to contest jurisdiction:-

> "The concept of an appearance to contest jurisdiction derives from the principle of submission to jurisdiction whereby, regardless of whether a court would otherwise have jurisdiction, it will acquire jurisdiction where a defendant submits to the jurisdiction of the court by entering an unconditional appearance in proceedings before that court. This basis of jurisdiction was recognised at common law."

High Court hearing of 8 October 2020 – Attendance in court

38. Having previously entered the appearance "without prejudice" as outlined above the appellant appeared in person before the High Court on 8 October 2020. His presence before the court in all the circumstances is relevant. Whereas he continued to assert that the service upon

him of the plenary summons was not in accordance with the Rules and indeed had sworn two prior affidavits, both on 29 September 2020, nowhere did he dispute or contest the substance of the significant claims being advanced in the plenary summons or deny the various matters deposed to in the three affidavits of Darren Das, Eoghan Keyes and Tom O'Brien to ground the application for interlocutory relief. Instead he confined himself to narrow technical and procedural matters around service. The procedural orders made by Reynolds J. in the High Court on 8 October 2020 are unremarkable. The motion was adjourned to 28 October as against the appellant, affording him until 22 October 2020 to file his replying affidavit and reserving costs.

Order 52

39. Order 52 provides:-

> "1. All interlocutory applications to the Court and all applications authorised by these Rules to be made to the Court shall be made by motion, save as otherwise provided by these Rules.
>
> 2. Save as otherwise provided by these Rules, all such applications other than such as under the existing practice are made *ex parte* or are authorised by these Rules to be so made, shall be made by motion on notice to the parties concerned…" (emphasis added)

40. Order 52, r. 11 provides:-

> "The plaintiff may, by leave of the Court to be obtained *ex parte*, serve any notice of motion upon any defendant along with the originating summons, or at any time after service of the originating summons and before the time limited for the appearance of such defendant."

41. It is clear from the language of O. 52, rr. 1, 2 and 11 when considered together that there is no obligation on a plaintiff to serve a plenary summons on a defendant prior to moving an application seeking leave of the court *ex parte* to issue and serve a notice of motion upon a

defendant. Such applications are brought *ex parte* prior to service of the plenary summons routinely. The Rules provide for such an application and it was not necessary to have served the originating summons on the defendants prior to moving the application *ex parte* seeking leave to serve the notice of motion. Thus, to the extent that the appellant contends otherwise he is mistaken. This point has been clearly addressed already by this court on 28 October 2020. The appellant has identified no new basis or ground in support of his contention.

42. The language of O. 52, r. 11 contemplates that the notice of motion would be served "along with the originating summons" where an application is made *ex parte* seeking leave to issue a notice of motion and effect service of same on a defendant.

43. On the facts as presented this did not occur on 4 August 2020. However, once the letter of 11 August 2020 and its enclosures were received by the appellant – which they demonstrably were as they were later exhibited by him in support of the application to this court to extend time to appeal against the order of the High Court made on 29 July 2020 and he confirmed that he received them to this court on 28 October 2020 – then he had all the documentation required to meet the claim of the respondents. The appellant has not identified any substantive prejudice arising from the oversight in not serving the plenary summons upon him along with the papers concerning the motion on 4 August 2020. Accordingly, I am satisfied that the plenary summons was served upon him and assertions to the contrary are unmeritorious.

The purpose of service

44. The authors of *Delany and McGrath on Civil Procedure* (4th Ed., Round Hall, 2018) succinctly pinpoint the purpose of service at para. 3-01:-

> "In *Fox v. Taher* [(Unreported, High Court, Costello P., 24 January 1996)], Costello P. identified the object of service as being 'to bring home to defendants the nature of the proceedings and the documents relating to the claim being made against them'. The Supreme Court in *Danske Bank A/S v. Meagher* [[2014] IESC 38 *per* Laffoy J. at para.

48], adopted the *dictum* of Dixon J. in *Royal Bank of Ireland Ltd. v. Nolan* [(1958) 92 I.L.T.R. 60], where he explained the importance of ensuring that service was regular as follows:

> 'One could not overlook the fundamental purpose of service which was to give the defendant notice and sufficient warning of the proceedings that he might have to contest.'"

The question arises as to when could it be reasonably said that the appellant had been effectively served with the plenary summons such that he could be said to have sufficient warning and notice of the proceedings should he choose to contest same. His own evidence to this court on 28 October 2020 suggests that this occurred on 11 August 2020.

45. The authors of *Delany and McGrath on Civil Procedure* at para. 3-21 note: -

> "Where an issue arises or is likely to arise as to the sufficiency of service effected, an application may be made pursuant to Order 9, rule 15 to have the service actually effected declared sufficient. This Rule provides that the court may 'upon just grounds, declare the service actually effected sufficient'. The exercise of the court's power in that regard is informed by what Morris J. identified in *Lancefort Ltd. v. An Bord Pleanála* [(Unreported, High Court, Morris J., 13 May 1997)] as the purpose and object of proper service, namely 'to ensure that the party concerned is adequately informed of the matters contained in the notice so as to suffer no prejudice'. Thus, in general, failure to effect service in strict compliance with the requirements laid down in the Rules will not be fatal and service will be deemed good where the proceedings have actually been brought to the attention of the defendant and he has not suffered any prejudice by reason of the defect in service."

The authors note that this passage was cited with approval by the Supreme Court in *Re Sean Dunne (a bankrupt)* [2015] IESC 42, [2015] 2 I.L.R.M. 103 at para. 84.

46. It is clear, on the appellant's own admission and having due regard to the exhibits put before this court in the extension of time application, that a copy of the plenary summons was actually served upon him with the letter of 11 August 2020. He has not identified any prejudice by reason of the non-service upon him of a copy of the plenary summons on 4 August 2020 or by reason of the delay between 4 and 11 August in being furnished with a copy of same.

Affidavit of service

47. In the course of the hearing of this appeal on 28 June 2021, an affidavit of Josh Thompson filed on 6 October 2020 was furnished to the court. At para. 7 the deponent avers to having served true copies of the motion papers on the appellant by posting same to a specified address. He exhibits a copy of the letter addressed to the appellant dated 4 August 2020 together with a certificate of posting by registered post.

48. Exhibit JT3 is of an email exchange between the appellant and a number of parties including the respondents' solicitors. It states:-

> "Dear Sirs,
>
> I received two binders from Byrne Wallace…with a cover letter dated 4th August 2020.
>
> On first perusal there is paperwork missing.
>
> In a binder with 32 tabs there is an index listing 17 items [only] but marked page 2 (see attached…)
>
> In a binder with 20 tabs where tab 20 should have the plenary summons behind it, there is nothing there. There may be other items missing and I am concerned that in your copying process items may have been mislaid.
>
> As a matter of urgency can you forward a DIGITAL copy of ALL the documentation relating to this matter to…"

Email contacts for the appellant, the first named defendant and Fitzpatrick Financial were furnished.

49. Exhibit JT5 provides a copy of the letter of 11 August 2020 and there is a certificate of registered post on the appellant bearing that date. Proof of delivery is exhibited as having been effected on 12 August 2020 at 8.22am.

50. Order 9, r. 12(1) RSC provides:-

> "The person serving a summons shall, within three days at most after service, indorse on the summons the day and date of the service thereof; and every affidavit of service of such summons shall mention the date on which such indorsement was made."

In fact the affidavit of Josh Thompson does not identify the date on which compliance with O. 9, r. 12(1) was effected by indorsing on the plenary summons the day and date of service thereof. To ensure strict compliance with the Rules it is appropriate that a further supplemental affidavit be sworn by Josh Thompson to confirm the date of service which has been indorsed on the plenary summons in accordance with O. 9, r. 12(1).

51. There is no doubt but that the appellant was served with a copy of the plenary summons under cover of letter dated 11 August 2020 and that the service was effected on the morning of 12 August 2020 by prepaid registered post. The affidavit exhibits proof of delivery of the envelope in which the appellant acknowledges a copy of the plenary summons was contained.

52. It is of course open to the respondents should they deem it necessary or appropriate to do to invoke the provisions of O. 9, r. 15 RSC. Same provides:-

> "In any case the Court may, upon just grounds, declare the service actually effected sufficient."

It is further open to the High Court at the hearing of the substantive motion being brought by the respondents to deal with the issue of any alleged irregularity as to service as it considers appropriate including pursuant to O. 9, r. 15 and/or O. 124, r. 1.

High Court hearings of 28 October 2020 and 6 November 2020

53. It is accepted by all parties that through circumstances of mutual misunderstanding the appellant was not present at the remote hearing on 28 October 2020 when the matter was being dealt with in the High Court by Reynolds J. When the respondents were apprised of the state of affairs and the circumstances giving rise to same, they immediately moved to address same. The order of 28 October 2020 included granting the appellant a further period of two weeks for filing a replying affidavit with a week thereafter for the respondents to file and serve any affidavit in response.

54. The said order was vacated on 6 November 2020 on notice to the appellant. Accordingly, the order of 28 October 2020 does not now stand. It is not clear why the appellant did not attend on 6 November 2020. He appears to have been put on notice of the proposed application and a body of email exchanges has been exhibited. The order made on 6 November 2020 simply vacated the date for hearing of the motion which had issued on 30 July 2020 which hearing date had been fixed for 8 December 2020. The motion was otherwise adjourned for mention only to 17 January 2021. I am satisfied that on each occasion in which she dealt with the matter Reynolds J. had full original jurisdiction.

Mootness

55. As a general principle, an appellate court should decline to decide any question which is in the form of a moot in respect of which a decision is not necessary for the determination of the rights of the parties before it (see, *Murphy v. Roche* [1987] I.R. 106 at p. 110 *per* Finlay C.J.).

56. As the Supreme Court of Canada noted in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, "[a]n appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties." That *dictum* has been adopted by the Supreme Court in this jurisdiction on a number of occasions, including by

Hardiman J. in *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M. 1 at p. 16 and Denham C.J. in *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274 at para. 16.

57. McKechnie J. in *Lofinmakin v. Minister for Justice* summarised the legal position as follows:-

> "(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;
>
> (ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a *lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined;
>
> (iii) the rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model;
>
> (iv) it follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions…" (para. 82)

58. In *Irwin v. Deasy* [2010] IESC 35 Murray C.J. accepted that the general practice was to decline, in principle, to decide moot cases, but acknowledged that:-

> "…In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the court may, in the interests of the due and proper administration of justice determine such a question.

> However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard. Exceptions may only arise where there is a question of exceptional public importance at issue and there are special reasons in the public interest for hearing the appeal."

59. In the instant case a constellation of factors are relevant and clearly demonstrate that this appeal concerns a wholly moot issue. Firstly, the appellant does acknowledge that he was in possession of a copy of the plenary summons with effect from 11 or 12 August 2020. He entered a conditional appearance without prejudice to his right to contest the jurisdiction of the High Court on 24 September 2020. That appearance, which is dated by hand 24 September 2020 and stamped 23 September 2020 (quoted *ante*), clearly states on its face that it is entered "to the originating plenary summons 2020/5367P"

60. Practically speaking the order appealed against of 8 October 2020 has been wholly superseded by subsequent events which are not the subject of this appeal as the appellant expressly confirmed to the court at the outset of the hearing and had previously confirmed to this court at the directions hearing. The appellant was given time to serve any replying affidavit until 22 October 2020. The motion for interlocutory orders was adjourned to 28 October 2020 against the appellant and costs were reserved. The order subsequently made on 28 October 2020 enlarging time for the filing of a replying affidavit and adjourning the motion for interlocutory reliefs to 8 December 2020 was in turn vacated on 6 November 2020. Moreover the appellant delivered an affidavit sworn on 11 November 2020, and while that largely addresses his arguments as to jurisdiction, rather than the substantive issues raised by the motion, the delivery of such an affidavit in which he expressly acknowledges the order of Reynolds J. of 28 October 2020, extending time for delivery of a replying affidavit, serves to underscore the mootness of this appeal.

61. The sole benefit accordingly in pursuing this appeal is to delay the orderly progress of the proceedings. It is noteworthy that the appellant issued a further notice of motion being "a motion on notice to strike". It issued on 30 September 2020 and was returnable for 1 February 2021. It would appear that part of the *modus operandi* of the appellant is to have a rolling series of motions and applications which sequentially become the subject of appeals to this court thereby suspending, delaying and deferring the expeditious hearing of the interlocutory application for injunctive relief.

Conclusion

62. The contention that since the plenary summons was not served on the appellant prior to 29 July 2020 same denied the High Court jurisdiction is entirely groundless and lacks any legal basis. The appellant has failed to identify any rule or authority for the proposition advanced that the plenary summons is required to be served upon a defendant prior to an *ex parte* application being moved by a plaintiff. The High Court was not denied jurisdiction; the contention is wholly misconceived.

63. The appellant has identified no basis for setting aside, vacating or otherwise interfering with the order made by Reynolds J. on 8 October 2020. Neither is there any valid basis for dismissing the respondents' notice of motion which issued on 30 July 2020 seeking interlocutory reliefs. Neither has any basis been identified for dismissing the respondents' plenary summons. A suggestion that this court should interfere with, or direct parties on whose behalf the respondents are acting to engage with the appellant or his representatives in connection with any compromise would be wholly improper and cannot under any circumstance be acceded to or entertained.

64. Furthermore, in light of O. 124 and O. 9, r. 15, it is noteworthy that the initial irregularity appears to have arisen by virtue of an oversight and was addressed immediately when the respondents' solicitors were apprised of same. The appellant has failed to identify any tangible

prejudice or hardship visited upon him by reason of the omission to serve a copy of the plenary summons upon him on 4 August 2020, which oversight was addressed on 11 August 2020. Since, as stated above, the purpose and objective of the rule as to service is to ensure that a litigant is fully apprised of the proceedings in early course, I am satisfied that that purpose was satisfied and fully met by the service effected upon the appellant on 11 August 2020.

65. I am satisfied that his presence before the High Court cured any procedural defects with regard to service relevant to the issues before the court on that date.

66. I am satisfied that the learned High Court Judge had full jurisdiction to deal with the notice of motion on the return date, being 8 October 2020.

67. It appears that the appellant is raising these procedural points repeatedly for the purposes of delay. He has not engaged with the merits of the claim or filed an affidavit to address the substantive issues in the grounding affidavits. He informed this court that he has collected rents from the properties in Amiens Street, Dublin.

68. I am satisfied that the issues in this appeal are substantially moot and a consideration of the order made on 8 October 2020 can have no practical impact now or indeed effect upon the resolution of the plenary proceedings and the interlocutory application that stands adjourned before the High Court for determination in due course.

69. With regard to the question of the validity or otherwise of the service of the plenary summons having regard to the sequencing of same, and in particular the fact that the notice of motion and grounding affidavit together with the exhibits were served first in time and a copy of the plenary summons was served some days later after the solicitors on record for the respondents became aware of an omission in the initial service, it will be a matter for the trial judge to evaluate where the justice of the case lies; whether any application is brought to the court to deem service good, whether any further affidavit of service addressing the specific requirements of O. 9, r. 12 and having due regard to O. 9, r. 12(1) and/or (1A) is of relevance.

It will be a matter for the trial judge to determine any applications that may be moved pursuant to O. 9, r. 15 and insofar as a court may consider that the oversight on the part of the respondents led to a sequencing different than that envisaged by O. 52, r. 11, it is open to the court to deem such service good and effective, there being in the instant case no evidence of prejudice. Further, it is for the judge seised of the matter before the High Court to evaluate in each case the effect of non-compliance in light of O. 124, r. 1 as that court thinks fit having due regard to the justice of the case and the respective interests of the parties.

70. One relevant element of course is the interest of Mr. Meehan in the proceedings and in particular his moiety interest in the equity of redemption in this property. He is not now a party to these proceedings, he having given undertakings to the court in terms which no longer require his involvement. Nonetheless, it is a cause for concern that continued litigation and protracted serial appeals to this court may result in a substantial erosion of the equity of redemption to the loss and detriment of the co-owner who is not engaged with this appeal.

Costs

71. It is noteworthy that the first named defendant has been struck out as a defendant in these proceedings. Accordingly, in circumstances where this appellant has sought to agitate issues which have already been the subject of considerable consideration by this court on 28 October 2020, it is appropriate that costs should follow the event. The respondents have been entirely successful in opposing the appeal. The appellant has sought to re-agitate issues pertaining to the initial service of the plenary summons in the face of a determination of this court made on 28 October 2020 that service of the plenary summons prior to moving the *ex parte* application before the High Court on 29 July 2020 was not necessary. I am satisfied that such conduct was not reasonable in all the circumstances. Accordingly, I am satisfied that the costs must be borne by the appellant. In particular, it is incumbent on the respondents to ensure that in the first instance the said costs in their entirety be borne by this appellant's distributive share in the net

proceeds at the conclusion of the realisation of the assets in the receivership and insofar as possible that the interests of Martin Meehan (otherwise Martin J. Meehan) not bear any part of the said costs.

72. If either party wishes to contend for a different order as to costs they should notify the Office of the Court of Appeal within five days of the date of this judgment whereupon a date will be fixed for an oral hearing on the matter of costs.

73. Accordingly, I would dismiss the appeal and reserve to the High Court a determination of all the outstanding issues.

74. Haughton and Binchy JJ. agree with this ruling and the proposed orders.