THE HIGH COURT

[2020] IEHC 705

[2016/9072 P]

BETWEEN

KEN TYRRELL

PLAINTIFF

AND

DAVID WRIGHT

AND

ROPE WALK CAR PARK LTD

AND

LAUNCESTON PROPERTY FIANCE LIMITED DESIGNATED ACTVITY COMPANY

AND

PEPPER FINANCE CORPORATION DESIGNATED ACTIVITY COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 21st day of December, 2020.

1. This is my decision on the application by the Plaintiff ('the Receiver') to strike out the Defence and Counterclaim of the first Defendant ('Mr. Wright'). One important aspect of this motion is that the Defendant to the Counterclaim ('Launceston'), while named in the title to the action, had not at the time of the hearing of this application been served with the proceedings and therefore had not taken any part in the hearing before me.

2. At the outset of the hearing of the motion, counsel for the Receiver conceded that one portion of the Defence and Counterclaim must be allowed to stand, namely the challenge by Mr. Wright to the appointment of the Receiver. While it was submitted that this challenge should be confined to one narrow ground, this concession significantly changes the nature of the application. Having commenced as a motion which (if successful) would have meant that there would be no plenary hearing of the action taken by him, at the last minute the Receiver accepted that the application could not properly result in a termination of these proceedings. Given that the Receiver had initially sought not only to strike out the Defence and Counterclaim but also an order discontinuing the action, this was indeed a radical shift in position.

3. Of course, the Receiver is entitled to ask that I strike out certain portions of the Defence and Counterclaim even if there is to be a trial of certain remaining issues. However, in deciding whether to strike out some elements of Mr. Wright's pleadings I feel that I should take into account the fact that the parties now accept that there is to be a trial and that the costs and effort of such a hearing are now inevitable; the proceedings cannot be brought to a conclusion any other way (in the absence of settlement). The fact that there will be a trial is relevant, in my view, in exercising my discretion in deciding arguments grounded on the rule in *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313.

4. I propose to give my decision by reference to the paragraph numbers of the Defence and Counterclaim. While this is not a very elegant way of approaching my determination, it seems to me to be the most comprehensive way of setting out what I have decided.

5. Paragraph one constitutes an admission.

6. Paragraph two denies the loan by Anglo to Mr. Wright. It has been determined against Mr. Wright in the action taken against him by Launceston that there were loans, the terms of the loans, and the transfer to Launceston. These findings are made by Kelly P. (judgment of the 5th of October 2017); the appeal of Mr. Wright against this judgment was dismissed by the Court of Appeal (judgment of the 18th of December 2019). The Court of Appeal was asked by Mr. Wright to review its judgment; in a reserved judgment of the 3rd of June 2020 the Court of Appeal refused to do so. Mr. Wright has applied for leave to appeal to the Supreme Court against these judgments of the Court of Appeal. The parties agreed, however, that I should not put off the hearing of the motion (or my decision on the motion) to allow the decision of the Supreme Court to be made. As things stand, the judgments of the court of Appeal constitute the last word in the litigation between Launceston and Mr. Wright. Of course, in the event that Mr. Wright succeeds before the Supreme Court he is free to apply to reinstate any relevant portion of his defence which I strike out in this ruling.

7. Notwithstanding these judgments, Mr. Wright advanced three main reasons why he claims to be entitled to continue to challenge the finding that he is indebted to Launceston.

8. Firstly, he says that the original summary summons did not comply with the requirements of particularisation set out in the judgment of Clarke C.J. in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. However, this constitutes no basis for setting aside a final order. It was open to Mr. Wright, or the legal team retained by him at the time, to argue before Kelly P. that the claim against him was not sufficiently particularised. It appears that they did not do so or, if they did, they did not carry this argument further in the appeal to the Court of Appeal. A judgment will not be set aside because an argument available to a party, later found in other proceedings to be a winning one, is simply not made by that party. There would be a potential lack of finality in every judgment if a jurisdiction existed to set aside final orders on such a basis. The resulting state of legal uncertainty, and indeed economic and social uncertainty, would be profoundly undesirable.

9. Secondly, Mr. Wright complains about the fact that Launceston has waived the element of it claim against him referred to plenary hearing by Kelly P. While that decision by Launceston may speak volumes about its confidence in its ability to succeed in this element of the claim, it may equally be the result of a calculation that the costs of going to trial for this outstanding sum made no commercial sense. Whatever the reason, the decision not to carry on to plenary hearing does not undermine the conclusive findings made by this Court and the Court of Appeal that Mr. Wright is indebted to Launceston in the sum awarded by them.

10. Thirdly, Mr. Wright says that he reserved the right to challenge the transfer to Launceston. When I asked him to tell me where and when and in what circumstances he had reserved the right to challenge the validity of the transfer, Mr. Wright replied:-

> "Okay. Well, these have been somewhat ventilated in the other case. But Launceston, IBRC supposedly transferred my loan, my full loan documents, sorry, my loan agreements, my accounts. The account numbers that they've supposedly transferred are incorrect; they're not my account numbers. The mortgage that they've supposedly transferred, these guys have a mortgage date of the 12th, they have transferred the mortgage dated the 18th. So, that doesn't seem to have been transferred either. And there isn't any great detail in the transfer of my details from, and this is the stuff that has been ventilated in the other case, in the summary judgment case. But, I believe that it's still live and I believe until it's been determined in the other case that it can't be knocked out of this case."

11. Mr. Wright is correct in suggesting that the question of the transfer to Launceston belongs in the summary judgment case. As the transfer to Launceston was a central proof in that company's application for final judgment against Mr. Wright, I cannot see how Mr. Wright could have (in any meaningful way) reserved his right to challenge the validity or fact of the transfer in other proceedings. The matter has now been determined by the High Court, the Court of Appeal on appeal from Kelly P., and the Court of Appeal on Mr. Wright's "review" application. It cannot be revisited now, in the absence of the exceptional circumstances described by Irvine J. at paragraphs twelve to fourteen of her judgment of 15th November 2018, in these proceedings.

12. However, the loan referred to in the judgment of Kelly P. and the judgment of McCarthy J. in the first of the two Court of Appeal judgments is the loan of September 2008 as amended in February 2012. While it may be of little or no practical importance, I therefore will not strike out paragraph two, three, four or five. I will however strike out paragraphs nine, thirteen, fourteen and fifteen as the contentions made in these paragraphs of the Defence are inconsistent with the core findings of the High Court and the Court of Appeal in the Launceston proceedings. Paragraphs ten and eleven, which involve admissions by the Defendants, remain. I will return to paragraph twelve.

13. Paragraphs six, seven and eight deal with the security allegedly provided by Mr. Wright in respect of loans from Anglo. In his affidavit grounding this motion, the Receiver says that these pleas should be struck out because:-

> "Paragraph 6 – 8 of the defence are answered by the judgment of Costello J. in these proceedings. It is also not open to Mr. Wright to deny that he entered into the mortgage and the fact that it was registered in circumstances where he accepted before the High Court (Costello J.), with the benefit of legal advice from solicitors and senior and junior counsel, that they had done so. I beg to refer to exhibit "KT2" above, which is the Folio for Summercove clearly showing that the Mortgage was registered as a burden on Folio 48025F, County Wexford on 30 May 2007."

14. Unfortunately, the Receiver does not exhibit the affidavit or note of the hearing before Costello J. which show that Mr. Wright accepted that he entered into the relevant mortgages and that these securities were registered. This averment is not referred to at

all in the written legal submissions of the Receiver. Instead, reliance is placed on the judgments of Costello J. and (in the Court of Appeal) Whelan J. to the effect that Mr. Wright had not disputed the validity of the mortgages, the entry into the mortgages or their registration.

15. Equally, in his oral submissions counsel for the Receiver did not rely strongly on the evidence of the Receiver that Mr. Wright had accepted before Costello J. that he had entered into the mortgages and that they had been registered. Instead, counsel relied primarily upon the rule in *Henderson v. Henderson* as the reason why these paragraphs should be struck out; this would be a surprising approach if it were felt (on the Receiver's side) that Mr. Wright had actually agreed that the security was entered into and registered. He also relied upon the proposition that these issues had been determined in the summary proceedings but I do not believe this is the case.

16. There is a very real difference between not contesting an aspect of a claim (especially at an interlocutory stage) and actually accepting that a particular assertion is true. This is a pretty trite proposition. It may well be that Mr. Wright or his lawyers accepted during the hearing before Costello J. that the mortgages had been entered into and registered, though if that had happened it is likely that such an acceptance would have been recorded by the judge. For the purpose of the motion before me, it is not satisfactory that the Receiver's bare assertion about the position taken by Mr. Wright before Costello J. is not supported in any way.

17. The second reason given in the Receiver's affidavit for the striking out of these paragraphs is that they are "answered" by the judgment of Costello J. Of course, the judgment of Costello J. was deciding an application by the Receiver for an interlocutory injunction; she was not purporting to make any final determination of factual or legal questions. However, more importantly the decision of the High Court was not the end of the matter. The judgment of Costello J. was appealed, the Court of Appeal dismissed the appeal, Mr. Wright sought to have that decision set aside, and (in refusing his application) it was made quite clear to Mr. Wright by Irvine J. (delivering the judgment of the Court of Appeal) that:-

> "Substantive issues of law are not determined on an application for interlocutory relief and are inevitably left to be resolved at a plenary hearing."

18. It is noteworthy that this clear statement of the position was made in the context of an assertion by Mr. Wright that the decision of the Court of Appeal should be set aside because of discrepancies in different copies of the mortgage documentation.

19. Irvine J. continued:-

> "Thus, it remains open to Mr. Wright to seek to force on that action for hearing as a means of challenging the validity of the receiver's appointment and his entitlement to sell the property. Should he do so he will be entitled to rely upon all of the

evidence that was before this court on the hearing of the appeal and if successful in that challenge, he would of course be entitled to damages."

20. I do not accept that it has been established on this motion that Mr. Wright agreed as a matter of fact that the mortgages were executed and registered. The Receiver's unsubstantiated statement to this effect is inconsistent with the careful wording of the judgment of Costello J. Had Mr. Wright acted as the Receiver has sworn he did, this would have been a powerful reason to strike out the relevant pleadings. The fact that counsel did not press this point suggests that a correct decision was made that this argument could not be supported.

21. I also do not believe that these pleadings should be struck out because of the rule in *Henderson v. Henderson*. A decision not to contest a particular assertion or piece of evidence put forward in the course of an interlocutory application may well be driven by tactical considerations. It would be a disproportionately strict application of *Henderson* to preclude a party at trial from disputing evidence that it had not contradicted (or reserved its position on) during the course of some or all of the preceding interlocutory motions. Not only would such a rule make for lengthy interlocutory hearings, it would be quite unfair on parties who want to dispute such hearings (especially injunctive hearings) on limited and relevant grounds. For the reasons which I have identified, and in particular given the crystal clear position taken by the Court of Appel through the judgment of Irvine J, I am not prepared to strike out the paragraphs of the Defence and Counterclaim relating to the provision of security, its registration, or the appointment of the Receiver. For the same reasons, I am not prepared to confine Mr. Wright (in advancing the contentions at paragraphs sixteen to eighteen inclusive of the Defence) to the narrow grounds suggested by the Receiver's counsel.

22. I should say that the Receiver also relies upon the judgment of Costello J. in an application by Mr. Wright to dismiss a bankruptcy summons against him. The schedule attached to the Receiver's grounding affidavit refers to paragraph nine of that judgment, which reads:-

> "The issue of the validity of the security he agreed to grant to his lender when he borrowed the monies the subject of the summary judgment is not an issue which can arise in relation to the validity of the bankruptcy summons. In this judgment I am solely concerned with the issue as to whether or not the bankruptcy summons should be dismissed [...] I make no observations whatsoever as regards the validity of the mortgages or of the appointment of Mr. Tyrell as receiver over the secured properties."

23. This paragraph does not advance the Receiver's case at all. The general reference to security does not involve a finding that a specific mortgage was executed by Mr. Wright or was registered. More relevant is the previous paragraph of the judgment, which reads:-

> "Much of his case was directed towards challenging two versions of the mortgage he granted to his original lender [...] and the appointment of a receiver on foot of

the mortgage to the secured properties. He argues that the receiver could not have been properly appointed over the secured properties by reason of the discrepancy between the two versions of the mortgage which he exhibited to the court."

24. This passage does suggest that Mr. Wright accepted that security documents in favour of Anglo were executed by him, but is in no way categoric in establishing that the particular security relied upon in these proceedings is security which Mr. Wright unequivocally agreed was put in place and registered.

25. Paragraphs six, seven and eight of the Defence will therefore remain. If it is the case that Mr. Wright expressly accepted that he executed the relevant security documents then it may well be that the dispute about these pleas will take very little time at the trial. However, there is no clear evidence of this on the motion before me.

26. Paragraph twelve of the Defence will be struck out to the extent that it denies that Launceston acquired the interest of Irish Bank Resolution Corporation Ltd. (in Special Liquidation) under the 2008 and 2012 facility letters. However, as the Receiver has to prove the Mortgage (as defined at paragraph six of the Defence) that portion of paragraph twelve must stand.

27. The Receiver accepts that paragraphs sixteen to eighteen of the Defence must remain, but submits that Mr. Wright can make the case outlined in these paragraphs (very broadly, to the effect that the Receiver was invalidly appointed) by reference to the specific discrepancies in the mortgage documents as claimed by Mr. Wright and noted in the judgment of Irvine J. to which I have referred. The reasons put forward by the Receiver's counsel for this narrowing of the argument available to Mr. Wright are:-

> "[T]he execution of a mortgage by Mr. Wright over the properties, the registration of mortgages over those properties in the relevant Land Registries […] fail to meet the summary judgment threshold because they had been conclusively determined in other proceedings or had already been conceded by Mr. Wright in other proceedings […]."

28. In fairness to the Receiver's counsel, some of the issues which he listed in this passage (at page nine of the agreed note of the hearing) are ones which I find have been conclusively decided against Mr. Wright. However, the fact and validity of the mortgages and their registration as well as the general issue of the validity of the Receiver's appointment has not been 'conclusively' determined against Mr. Wright. As already noted in this judgment, the proposition that Mr. Wright has 'conceded' the mortgages in the fashion asserted by the Receiver in his grounding affidavit is not returned to by counsel in the balance of his submissions.

29. As the basis suggested by the Receiver's counsel is not made out, I am not going to restrict Mr. Wright in the case he can make in respect of the pleas at paragraphs sixteen to eighteen.

30. Paragraph nineteen denies that Mr. Wright has breached the terms of the Mortgage (as defined) on the relevant properties. The evidence of the Receiver in his first affidavit (that this plea is 'answered' by the judgments of Costello J. and Irvine J. in the injunction proceedings) is not persuasive, for the reasons I have already set out. I have also already determined that the entry into the Mortgage by Mr. Wright must be established in evidence. This paragraph therefore stands.

31. Paragraphs 20 and 22 are admissions.

32. Paragraph 21 denies that the Receiver has suffered loss and other adverse consequences. The Receiver swore to the proposition that this plea is 'answered' by the judgment of Costello J. In a table exhibited by the Receiver in the same affidavit, it is stated that the relevant portion of this judgment is paragraph 108., which reads:-

> "In my judgment, in respect of investment properties (absent special circumstances) an undertaking as to damages will normally be capable of compensating a defendant who ultimately establishes at trial that he suffered damage as a result of the grant of an interlocutory injunction to a plaintiff to which, it turns out after the trial of the action, he was not entitled. Thus damages would provide an adequate remedy to the first named defendant in relation to the application for possession of Summer Cove and 1A Swan Lake as these on his own case are investment properties. The loss the first named defendant may sustain could be measured as the difference between the sum realised from the sale of the property by the plaintiff in its current condition as opposed to the amount which might have been realised had the first named defendant been in a position to implement the planning permission (taking account of any increases in the outstanding sums due and the costs associated in carrying out the planning permission and the subsequent sale of the property)."

33. I fail to see how this section of Costello J.'s judgment in any way disentitles Mr. Wright to plead that the Receiver has suffered no loss, damage, inconvenience and expense. It is difficult to understand why evidence was given that it did. Paragraph 21 of the Defence will therefore remain.

34. Paragraphs 23 and 24 deny that the properties, which the Receiver says are charged to secure the sums advanced to Mr. Wright, are either sold or are in the process of being sold. Of course, the Statement of Claim is dated the 22nd of October 2019 and, the Receiver avers, both properties have now been sold.

35. In his written submissions, Mr. Wright states at paragraph sixteen:-

> "The Plaintiff […] has sold all of my properties at an undervalue, and lower than his own valuations prior to the injunction. Damages for the under-value sale of my properties can only be evaluated in a plenary hearing."

36. In a Speaking Note which Mr. Wright prepared for this motion, he repeats this submission (at paragraph 28).

37. The pleas at paragraph 23 and 24 of the Defence are plainly unsustainable in light of Mr. Wright's acceptance that the properties have been sold. In fact, the details of the sale of the properties form the basis of a new allegation that Mr. Wright wants to introduce into his Counterclaim; very properly, counsel for the Receiver accepts that Mr. Wright cannot be barred from applying to make this amendment. In those circumstances, I think that paragraphs 23 and 24 are essentially redundant and, in any event, constitute pleas which Mr. Wright cannot support.

38. Paragraph 25 denies that the Receiver is entitled to the reliefs claimed or any relief. While the Receiver originally sought an order striking out this paragraph, given that his counsel now accepts that Mr. Wright can defend these proceedings it follows that Mr. Wright is entitled to the benefit (such as it is) of this standard and formulaic plea.

39. I now turn to the Counterclaim. As they stand, all of the constituent parts of the Counterclaim appear to involve allegations against Launceston, Pepper Finance Corporation (Ireland) DAC, and Anglo. Launceston had not, at the time of the hearing of the motion, been served with these proceedings; this is notwithstanding the fact that the undated Defence and Counterclaim had been served on the Receiver's solicitors some months before the motion was before me in May and July of this year. Pepper, as I will call it, is not listed in the title of the action as set out in the Defence and Counterclaim. Anglo (or IBRC) is not described in any way as a defendant to the Counterclaim.

40. As a result, I am faced with a very unusual set of circumstances. I am asked by a defendant to a counterclaim to strike out pleadings making a case, not against that defendant, but against other defendants who are either not served or not properly joined. The basis for this application is the rule in *Henderson v. Henderson*. The application is made despite the fact that the moving defendant to the counterclaim is the plaintiff in the action, who accepts that he must undergo a trial of the action which he has himself commenced and accepts that one of the issues in that hearing will be the validity of his appointment as receiver (one of the reliefs sought in the counterclaim).

41. If the challenge to the pleadings in the Counterclaim would, should it succeed, mean that there would be no trial involving the Receiver I would be more inclined to consider the application of *Henderson v. Henderson* at this point. However, that is not the position. The proper course of action, in my view, is for the parties actually affected by the relevant pleas to challenge them (if they wish to do so) in the event that the proceedings are ever served on them. As things stand the impugned pleas in the Counterclaim are, to employ a once overused phrase, legally sterile. The Receiver has not identified how he is advantaged by their removal; indeed, his counsel has carefully and comprehensively shown how the pleaded Counterclaim relates to entities other than the Receiver. Unless these other parties are properly involved in these proceedings, Mr. Wright will simply not be able to agitate these issues at the trial of the action.

42. For these reasons, I do not intend at this time and on the application of this party to consider the striking out of the pleadings in the Counterclaim that relate to Launceston, Anglo or Pepper. I am not, of course, in any way shutting out any other party from making an application that some or all of the Counterclaim be struck out.

43. There are two other aspects of the Counterclaim that I should address.

44. Firstly, while the body of the Counterclaim does not contain allegations which the Receiver has to meet two of the reliefs claimed certainly concern the Receiver. Relief 1 seeks an injunction restraining the Receiver from dealing with any of Mr. Wright's properties. As I understand it, this relief relates to the 'secured' properties. As these have already been sold, this claim is redundant and cannot realistically be pursued. Relief 3 seeks the setting aside of the appointment of the Receiver; this relief remains alive, as it is sought on the basis of the pleas which remain in the Defence.

45. Secondly, Mr. Wright wants to add to the Counterclaim. He wishes to claim that the Receiver has failed to provide proper accounts in respect of his receivership. He also wants to claim, as I have already noted, that the Receiver has sold the relevant properties at an undervalue. I will give directions at a separate hearing as to whether these amendments will be allowed and, if so, on what terms.