

THE HIGH COURT

[2021] IEHC 676
[2021 No. 5504 P]

BETWEEN

MICHAEL IAN LARKIN

PLAINTIFF

AND

JOHN GAYNOR

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 15th October 2021

1. This is my judgment on a motion brought by the plaintiff, Michael Ian Larkin, who is the official assignee in bankruptcy, for the series of interlocutory orders in relation to the lands comprised three County Westmeath Folios and running, all told, to just short of 58 hectares.
2. I heard the motion yesterday and kept the judgment overnight, not because I was in any doubt as to what the appropriate orders should be, or because the application raised any points of law of any particular difficulty, but rather to marshal my thoughts in the hope that I will express myself as clearly as possible in giving the reasons for the decision I have come to.
3. The three folios the subject of the proceedings and the application are Folios 10753, 2538 and 7609 Co. Meath. The registered owner of all three folios is Christopher Lehane who was registered as the owner of all three folios on the 12th of December, 2017, in his capacity as official assignee. Mr. Larkin, as I have said, is now the official assignee.
4. It seems to me that the starting point of this application is the well-known and often cited *dictum* of Keane J. (as he then was) in *Keating & Co. Ltd. v. Jervis Street Shopping Centre Ltd.* [1997] 1 I.R. 512, in which, at p. 518 of the report, Keane J. said: -

"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel and Others v. W. H. Smith (Eziot) Limited and Another [1987] 1 W.L.R. 853 at p. 859: -

'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principle set out in American Cyanamid Company -v- Ethicon Limited [1975] A.C. 396 in relation to the grant or refusal of an interlocutory injunction'".

5. The uncontradicted evidence is that the official assignee has made two contracts for sale of the lands – one for Folio 2538 and the other for Folios 10753 and 7609 – and that it is not possible to complete those sales because of the defendant's interference. Specifically, complaint is made that Mr. Gaynor has put up signs suggesting that the lands are not for sale; that he has interfered with the advertisement for the sale of the lands; that he has

made various claims in respect of the lands; and that he has put cattle on the lands so as to prevent the official assignee from giving vacant possession.

6. There is no issue on this application that Mr. Gaynor has done what the official assignee has sworn that he has done, and it seems to me then that the first issue is whether Mr. Gaynor has put in evidence to seek to establish that he has a right to do what would otherwise be trespass. If he has not done so, the plaintiff is entitled *ex debito justitiae* to the orders which he seeks. If Mr. Gaynor has put forward such evidence, and only in that event, will the court proceed to consider the balance of convenience and the balance of justice.
7. Mr. Gaynor was formerly the owner of the lands the subject of these proceedings until he was adjudicated bankrupt by order of the High Court Costello J. made on the 7th December, 2015 on the petition of Sheridan Quinn Solicitors who had before that acted as his solicitors.
8. An application by Mr. Gaynor to show cause was dismissed by O'Connor J. on the 20th April, 2016.
9. Thereafter, Mr. Gaynor lodged an appeal out of time to the Court of Appeal against the adjudication and that was dismissed on 10th October, 2016.
10. Following that decision, Mr. Gaynor applied to the Supreme Court for leave to appeal against the judgment and order of the Court of Appeal, but that application was refused on 6th December, 2017. On 17th December, 2020 Mr. Gaynor lodged a further application to the Supreme Court for leave to appeal against the adjudication order made on the 7th December, 2015: and that application for leave was also refused.
11. Mr. Gaynor's core argument is that he ought not to have been adjudicated, but that is an argument that he is not permitted by law to make. Mr. Gaynor points in particular to that part of the order of Costello J. which records that proof satisfactory had been given that the requirements of s. 11 (1) of the Bankruptcy Act, 1988 had been complied with: that is that the debt owing to the petitioning creditor amounted to more than €20,000. Mr. Gaynor does not agree with the conclusion of the court on that issue and does not accept the conclusion of the court on that issue, but that conclusion and order is final and conclusive, and it is binding. Mr. Gaynor has exhausted his rights to challenge the adjudication by his application to show cause, his appeal to the Court of Appeal, and his applications to the Supreme Court for leave to appeal. As a matter of law he cannot now be heard to obliquely challenge the adjudication order.
12. By the way, Mr. Gaynor would make the case that the petitioning creditor's debt had been paid before the petition was presented and at the same time that a sum of money which he paid to his own solicitor at the time was not paid over to the petitioning creditor. Those positions are obviously inconsistent, but it is important not to be distracted by looking at the merits of an argument that Mr. Gaynor, as a matter of law, is not entitled to make.

13. Mr. Gaynor also seeks to advance an argument that his sister Ms. Cecelia Gaynor has an interest in one of the Folios, that is Folio 2538, which comprises a little more than 16 hectares. The fundamental flaw in that argument is that Mr. Gaynor is not entitled to attempt to rely on a *jus tertii*. In other words he is not entitled to rely on any claim that his sister might have against the land.
14. By the way, Cecilia Gaynor's claim to an interest in the land has already been determined against her by a judgment of Mr. Justice Feeney of the 14th September, 2009 on an issue that arose in an action by Mr. Gaynor's former solicitors, Sheridan Quinn, against Mr. Gaynor, but even if it had not been so determined, any claim which Cecelia Gaynor might have had against the land would not justify Mr. Gaynor in trespassing on it.
15. Mr. Gaynor contends that if the order sought is made, he will be made homeless. The uncontroverted evidence on this application is that Mr. Gaynor's home is not on the lands the subject of this action but on another identified folio which is Folio 11874, County Westmeath. By order of 29th April, 2019, Pilkington J. sanctioned a sale of that land and an appeal by Mr. Gaynor was dismissed by the Court of Appeal on 9th November, 2020. However, the official assignee hopes that the sales which he has agreed of the lands the subject of this action will allow the bankruptcy to be concluded and the estate closed without the necessity for the sale of Mr. Gaynor's home. Whether that hope can be realised remains to be seen. The hope will continue to recede as long as Mr. Gaynor harries and distracts the official assignee, so giving rise to what will be very significant costs which will have to be borne by the estate.
16. Mr. Gaynor's suggestion that he might be rendered homeless is rather roundabout. He would argue that if the lands the subject of the proceedings are sold he will have to transfer his remaining lands to family and friends from whom he has borrowed money from time to time. Ignoring the fact that none of these family and friends have proved any debt in the bankruptcy, the fundamental flaw in this suggestion and indeed the flaw in the very premise of the suggestion is that the lands are his. They are not. The lands were Mr. Gaynor's until he was adjudicated bankrupt but, on his adjudication, by s. 44 of the Bankruptcy Act, 1988, all of his property vested in the official assignee for the benefit of his creditors. If Mr. Gaynor cooperates with the official assignee, he may get some property back, but for the moment he owns nothing.
17. Mr. Gaynor's affidavit traverses a number of issues upon which it is not useful or necessary to dwell, such as a decree of nullity of marriage granted by Mr. Justice Kinlen on 21st June, 2001; an order made in family law proceedings on 28th July 2005 by Mr. Justice White; and the fact that he had neither signed over the property to the official assignee – which of course he had not – nor authorised North's Auctioneers to sell the lands – which of course he had not. None of these matters are relevant to this application, the core issue on which is whether Mr. Gaynor has adduced or pointed to evidence which would establish that he has a right to do what would otherwise be trespass.

18. I am satisfied that Mr. Gaynor has not pointed to any such evidence and that the official assignee is entitled to the orders which he now seeks.
19. I will make orders in the terms of paras. 1 to 5 of the notice of motion.
20. The plaintiff is entitled to his costs in the bankruptcy.