THE HIGH COURT

[2023] IEHC 677

[2012 9106 P]

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

BRENDAN O'ROURKE

and

MOUNTVIEW CONSTRUCTION (UK) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of November, 2023

1. These proceedings concern premises known as Furness Hall, Furness, Naas, County Kildare. The plenary summons was issued on the 7th September 2012, and the statement of claim (delivered on the 29th May, 2013) claimed the following primary relief: -

> "(1) An injunction restraining the defendants, their servants and/or agents and other entities or persons acting under his or their direction or control from trespassing on or otherwise occupying the Mortgaged Property …"

2. The mortgaged property is Furness Hall.

3. In an amended defence and counterclaim (delivered on the 31st January 2014) the first defendant, Brendan O'Rourke, pleads the following: -

(a) A preliminary objection, to the effect that "the substantive issues alluded to in the [current] High Court proceedings are the same substantive issues involved in … Equity Circuit Court proceedings and Family Law Circuit Court proceedings and therefore, the Circuit Court Equity and Family Law proceedings are first in time.";

(b) Dermot O'Rourke joins issue with the claim made by the plaintiffs in their statement of claim;

(c) Dermot O'Rourke sets up a counterclaim in respect of an interest which he says he has in Furness Hall, and seeks a number of reliefs including orders to the effect that Ulster Bank should be restrained from entering Furness Hall, removing Mr. O'Rourke from Furness Hall, or interfering with the property.

4. In its defence, the second defendant ("Mountview") denies the claims against it and seeks the payment of monies allegedly due to it in respect of works carried out by that company.

5. The preliminary objection pleaded on behalf of Brendan O'Rourke is particularly important. It identifies all issues in the current proceedings as being ones which are to be found in family law proceedings and Circuit Court equity proceedings. The equity civil bill was issued on the 10th August, 2012 - in other words, a matter of weeks before the current proceedings commenced. The equity proceedings were brought by Brendan O'Rourke, and in them he sought a number of reliefs relevant to Furness Hall. In particular, he sought a declaration that he had a legal and beneficial interest in the property, despite being nowhere on the title to the property. He also sought orders against Ulster Bank which are similar (though not identical) to the orders which he seeks in the counterclaim made in the current proceedings. If anything, the order sought by Brendan O'Rourke in his equity proceedings are more extensive than those which he seeks in the counterclaim in this action.

6. The equity proceedings were initially transferred from Kildare Circuit Court to Dublin Circuit Court. They were then further transferred to the High Court, where they were ultimately heard by Ms. Justice O'Hanlon. Three sets of proceedings were listed before O'Hanlon J. for what is described (in the grounding affidavit for the current application) as "a three part modular hearing". Of the three proceedings, the first (the family law proceedings). The second were the equity proceedings, which went to hearing and concluded after twenty three days of evidence and what are described as "extensive" written submissions. The only aspect of the current claim determined by O'Hanlon J. during the course of the three part modular hearing was Ulster Bank's application for an interlocutory injunction, in effect, seeking possession of Furness Hall as against Brendan O'Rourke.

7. The 143 paragraph judgment of O'Hanlon J. was delivered on the 25th October 2018. In his submissions on the current motion, counsel for Ulster Bank described the judgment as "blistering" in its assessment of Brendan O'Rourke. That is, in my view, a fair characterisation of the views taken by O'Hanlon J. of the evidence of Brendan O'Rourke, and the case advanced by him. At paragraph 142 of her judgment, O'Hanlon J. finds: -

> "142. The reality of this case is that [Brendan O'Rourke] has failed to show this Court that there were any representations made to him and if he undertook substantial works on the premises it was not on foot of any alleged representation as clearly the legal position was well established. Looking at all of the evidence and his capacity as a business man with property dealings in the past, it is inconceivable and simply not credible that the plaintiff was not fully aware of the circumstances in which he was moving into the said property and residing there on foot of his wife's licence in same. It is only if the plaintiff had managed to establish positively such representations that the court would then have to deal with the issue of beneficial interest. The plaintiff however insisted in elongating this trial despite being asked on

many occasions to stick to what was relevant. The court also notes that the second and third named defendants had absolutely nothing to benefit from defending this case and yet have made themselves available over a long period of time to ensure that the case was fully defended. This Court dismisses the plaintiff's claim on the grounds set out in this judgment, having fully accepted the submissions of the second, third and fourth named defendants, this Court therefore dismisses the plaintiff's claim."

8. The second and third defendants to the claim brought by Brendan O'Rourke were his father in law and mother in law, who had funded the purchase of Furness Hall in which Brendan O'Rourke was to live with their daughter (Diane O'Rourke). The fact that all of these parties bear the same surname is a slightly unhelpful coincidence. The fourth defendant, against whom all of Brendan O'Rourke's claims were dismissed, was Ulster Bank.

9. O'Hanlon J. also granted an interlocutory injunction in favour of Ulster Bank against Brendan O'Rourke in the current proceedings; this is the injunction which I have briefly described at para. 6 of this judgment.

10. Mr. O'Rourke appealed the decision of O'Hanlon J. to the Court of Appeal. Judgment in that court was delivered on the 14th March, 2022. In summary, Faherty J. (delivering the court's judgment) found as follows: -

"274. The four appeals brought by Brendan O'Rourke in the Equity Proceedings and his appeal of the interlocutory Order granted in the Bank Proceedings are dismissed."

11. Giving these findings, Ulster Bank now bring an application seeking the following orders: -

(1) An order pursuant to Order 19, rule 28, or pursuant to the inherent jurisdiction of the court, striking out Brendan O'Rourke's amended defence and counterclaim in these proceedings;

(2) an order, pursuant to Order 19, rule 28 or the inherent jurisdiction of the court, entering judgment in Ulster Bank's favour as against Brendan O'Rourke. In that regard, the only relief in the statement of claim in respect of which Ulster Bank seeks to be granted final judgment against Brendan O'Rourke is the relief at (1), set out at para. 1 of this judgment;

(3) an order striking out the defence and counterclaim of Mountview, pursuant either to O. 19, r. 28 or the inherent jurisdiction of the court.

Other ancillary reliefs are also sought.

12. As far as the reliefs against Brendan O'Rourke are concerned, counsel relies not only upon the provisions of O. 19, r. 28. This Rule was preceded by Order XXV Rule 4 of the Rules of the Supreme Court (Ireland) 1905 which provided (in materially identical terms to the current Rule) that: -

> "4. The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and any such case or in case of the action or the defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be ordered accordingly, as may be just."

13. Wylie on the Judicature Acts (1906 Edition) suggests that applications under this rule "must be tried upon the allegations contained in the pleadings" but that evidence may be given "when applications made to the inherent jurisdiction of the court to stay, dismiss or strike out frivolous actions or defences …".

14. One of the authorities referred to in *Wylie* is *Reichel v McGrath* [XIV] AC 665.

15. The facts of *Reichel* are straightforward, and of their time. In 1886, Reverend Oswald Joseph Reichel (described in the headnote as Clerk and Pauper) sought a declaration that he was Vicar of Sparsholt, and that his resignation of the 2nd June, 1886 of that year was null and

void. He lost that claim. In subsequent proceedings, the Reverend John Magrath brought an action in July 1887 seeking a declaration that he (and not Reverend Reichel) was entitled to possession of the parsonage house and glebe lands as he had been appointed as Vicar of Sparsholt consequent on the valid resignation of Reverend Reichel.

16. The defence of the Reverend Reichel to this claim was "the same case as that on which [he] had been defeated in his action against the Bishop of Oxford and the Provost and scholars of Queen's College"; at page 666 of the report.

17. The judgment of Lord Halsbury LC (with which towards Watson and Fitzgerald agreed) can be set out in full (as is possible in judgments of that era): -

> "My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set out the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. McGrath to occupy the Vicarage that he (Mr. Reichel) is still Vicar of Sparsholt. If by the hypothesis he is not Vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action.
> I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed."

18. This authority has been relied upon in the courts of this jurisdiction, even after the establishment of Saorstát Éireann, but in the main for the purposes of striking out portions of a plaintiff's case. On the face of it, the judgment of Murphy J. in *Phonographic Performance (Ireland) Limited v Chariot Inns Limited* (Unreported, 16th February, 1998, Supreme Court) suggests a refusal (albeit a reluctant one) on the part of the courts in this jurisdiction to strike

out any portion of a pleaded defence merely on the grounds that it is inconsistent with a position previously taken by defendant. However, in that case *Reichel* does not appear to have been opened to the court and certainly was not considered in the course of the judgment of Murphy J. More importantly, the *PPI* litigation did not involve a party trying to run a claim (or a defence) employing a contention the validity of which had previously been conclusively rejected by a competent court.

19. More consistent with the speech by Lord Halsbury in *Reichel* is the approach of Kelly J. in *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] 2 IR 694. In his judgment, and in considering the jurisdiction of the court in respect of such applications, Kelly found: -

> "15. But is it open to a plaintiff to seek summary judgment in respect of the unliquidated claims?
>
> 16. I am satisfied that the answer to that question is in the affirmative. I come to that conclusion by reference to both the inherent jurisdiction of the court and the specific rules which apply to cases transferred to the commercial list.
>
> 17. I can see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but, not be so in the case of an action seeking unliquidated damages or other substantive reliefs."

20. I do not see the reference by Kelly J. to the Rules of the Commercial Court as suggesting that applications of the current type can only apply to cases which appear in that list. It would be quite unjust if that were the case, and there is no logical reason why a plaintiff who would otherwise bring an application like this in Commercial Court cases is prevented from doing so (as a matter of jurisdiction) where the case is to be found in other lists of the High Court.

21. I therefore accept the submission made to me by counsel for Ulster Bank that the inherent jurisdiction of the court, as set out in *Reichel* and *McGrath*, permits me to make an order striking out the defence in these proceedings and entering judgment in favour of the plaintiff.

22. As is accepted by Brendan O'Rourke in the preliminary objection contained in his amended defence and counterclaim, all of the issues which he seeks to agitate in these proceedings were raised by him in the equity civil bill. These were ultimately found to be without merit in judgments of the High Court and of the Court of Appeal. Even were it not for the unqualified assertion made on behalf of Brendan O'Rourke in the preliminary objection, consideration of the judgments of O'Hanlon J. and of the Court of Appeal (*per* Faherty J.), together with the case pleaded by Mr. O'Rourke in his defence and counterclaim, satisfy me that the case made by him in the equity civil bill replicates the case sought to be made by him in defending and counterclaiming in the current action.

23. Given that Brendan O'Rourke is not entitled to raise, as a point of defence or counterclaim, exactly the same issues which have been found to be groundless in other litigation involving the parties, Ulster Bank is entitled to an order striking out the defence and an order in terms of relief 1 sought in the statement of claim..

24. With regard to Mountview, the evidence is that this UK registered company was struck off the Register as of the 3rd March, 2020. However, the legitimacy of the issues raised by it in its defence and counterclaim has not been determined by any court. It is possible Mountview may be restored to the Register and, under those circumstances, any order striking out its defence and counterclaim would have to be set aside: - see *Steans Fashions v Legal and General* [1995] 1 BCLC 332 at 335. The appropriate order to make, therefore, is an order staying the prosecution of its counterclaim by Mountview. It is plain

that Ulster Bank does not intend to progress its claim against the second defendant, so an order staying that claim would be inappropriate and unnecessary.

25. Ulster Bank seeks no order for costs against either Brendan O'Rourke or Mountview in respect of this application or in respect of these proceedings. I agree that that is an appropriate order to make. In so ordering, I am not purporting to disturb any existing orders for costs (in favour of any party) in this very elderly action.

26. Finally, and for the purpose of completeness, I should record the fact that Brendan O'Rourke is an undischarged bankrupt. The Official Assignee was represented at the hearing of this motion before me, and it was indicated that there would be no opposition from that quarter to the making of the order sought by Ulster Bank. Despite the fact that Mr. O'Rourke has no standing on the current application, given his status as a bankrupt, he was nonetheless informed in correspondence (before the motion was issued) of the intention on the part of Ulster Bank to seek these reliefs. Mr. O'Rourke responded to this notification with a two page email which advances no reason as to why the court should not enter judgment in favour of Ulster Bank. One section of the email, highlighted by counsel for Ulster Bank in his submissions, reads: -

> "To be quiet (*sic*) clear, I find the Family Home Declaration in 2004 when Furness Hall was my home and I lived there, I was not 'akin to trespasser'. I was told to 'stay put, and go nowhere, as someone will go to jail on this.'"

27. The reference to him being "akin to trespasser" is undoubtedly a rejection of the judgment of Faherty J. in the Court of Appeal (at para. 270) where the judge made that very finding. If anything, this continued refusal by Brendan O'Rourke to recognise findings of the courts (to the effect that he has no interest in Furness Hall) demonstrates how desirable it is that these long running proceedings should be brought to an end, rather than have the same

issues litigated yet again. I will do so, at least at the level of this court, by making the orders which I have indicated earlier in this judgment.