

APPROVED

[2024] IEHC 293

Record No. 2023/201 CA

THE HIGH COURT

CIRCUIT APPEAL

BETWEEN:

START MORTGAGES DAC

Plaintiff/Respondent

AND

JAMES LARKIN

First Named Defendant/Appellant

AND

CATHERINE LARKIN

Second Named Defendant

EX TEMPORE JUDGMENT of Ms. Justice Nuala Jackson of the 15th April 2024:

1. The Appellant herein appeals from the Order of Wexford Circuit Court, South Eastern Circuit of the 26th October 2023 in which Order the Circuit Court struck out the Appellant's motion dated the 10th March 2023 with costs to the Plaintiff to be taxed in default of agreement. There are a number of reliefs sought in the said Motion but, at the outset herein, it is necessary only to recite the first of these as if the Appellant is unsuccessful in respect of this first relief, the rest fall. The first relief sought is:

“The Defendant/s seeks an order from the Circuit Court overturning the “Strike Out” order issued at the call over hearing on the 6th of March 2023 by the County Registrar given that it was not on consent of the Defendant/s and it is depriving the Defendant/s the right to further litigate this matter and have the herein points of law addressed on the record of the court, which are matters of

Fraud, Malicious Deception and Contempt by the Plaintiff/s. This is subject but not limited to, the Rules of Court Order 18, 7. [6].”

2. The relevant history to these proceedings is that the Plaintiff instituted proceedings for possession against the Defendants by Civil Bill Record No. 2014/305. A verifying affidavit in the said proceedings was sworn by Deven Keshwala on the 17th April 2014. The First Named Defendant was and is dissatisfied with the said Affidavit and has raised issues concerning its contents. The Plaintiff has fairly acknowledged that the said Affidavit has shortcomings and inaccuracies but there is very considerable disagreement between the Plaintiff and the First Named Defendant as to the extent and nature of such shortcomings. In this regard, the First Named Defendant sought to cross-examine the Deponent, Deven Keshwala, and a motion seeking such relief was brought by him before the Circuit Court and an Order for cross-examination was made by Her Honour Judge Doyle on the 12th October 2021. It is important to note that the result of such permission to cross-examine is that the affidavit in question cannot be relied upon absent the production of the deponent for cross-examination. The Plaintiff appealed this Order but it was affirmed on appeal by this Court (Barr J.) by Order of the 10th November 2022. The legal principles applicable to affidavits and cross-examination thereupon are set out clearly in Order 5B, rule 6(1) of the Circuit Court Rules. It is clear and has been accepted and deposed to on behalf of the Plaintiff that Deven Keshwala's whereabouts is unknown, he cannot be located and therefore cannot be produced for cross-examination. The Plaintiff refers to the passage of time since the Affidavit was sworn. In these circumstances, when the proceedings came before the County Registrar on the 6th March 2023, the Plaintiff applied to strike out the proceedings. I do not believe that there is any dispute that the First Named Defendant did not have any prior knowledge of this application. There is some dispute between the parties as to what transpired before the County Registrar. The First Named Defendant contends that the proceedings were struck out on the application of the Plaintiff, without notice to him and without his consent. The Plaintiff contends that his view was elicited by the County Registrar and the First Named Defendant did not demur from the strike out. It seems to me that, most likely, the First Named Defendant was taken somewhat by surprise by the application made and he did not really appreciate the significance thereof and there was no informed reaction by him to it. While it is my

view that this striking out of proceedings in appropriate circumstances is a matter within the jurisdiction of the County Registrar if made on consent (in this regard I would refer to Order 18 rule 1(xiii); Order 21 rule 2 and Order 5B rule 7(1)(f) of the Rules of the Circuit Court), it would appear that an application to strike out is one which must be made to the Judge of the Circuit Court if not on consent (subject always to discontinuance provisions in Order 21 of the Circuit Court Rules). In any event, the First Named Defendant, being dissatisfied with the Order made by the County Registrar above, brought this motion before the Circuit Court. Such an application is often and colloquially referred to as an “appeal” but such description would appear to be incorrect. Order 18 rule 7 of the Circuit Court Rules states:

7. [6]Any party dissatisfied with any certificate, ruling or decision of the County Registrar, may, within ten days from the date of such certificate or within ten days from the date of perfection of such ruling or decision, apply to the Judge by motion on notice to review such certificate, ruling or decision, and the Judge may thereupon make such order as he thinks fit. (underlining added)

3. The application to the Circuit Court is for a review of the decision of the County Registrar and the correct nature of this application is further clarified by the provision that this procedure is advanced by a motion on notice rather than a notice of appeal. There is, of course, following such review by the Circuit Court, an appeal from the Circuit Court to this Court in accordance with the provisions of the Courts of Justice Act, 1936 (“the 1936 Act”). In cases such as the present, where no evidence was heard by the Circuit Court, the appeal is pursuant to section 37 of the 1936 Act:

‘37.—(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given.

(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which

was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.'

4. There are two matters of relevance in this provision which should be referenced in this decision:
 - i. This is a *de novo* hearing – the matter is heard by way of rehearing of the matter which came before the Circuit Court Judge;
 - ii. No new evidence (over and above that heard in the Circuit Court application) may be given or received in the appeal save with special leave of the judge hearing the appeal.

5. In this case, there were two additional affidavits filed by the Appellant for the purposes of the application before this Court being Affidavits of the Appellant sworn on the 3rd April 2024 and on the 24th January 2024. The former was primarily a sworn response to the written submissions of the Plaintiff and the latter was primarily detailing the history of the proceedings and the shortcomings asserted by the First Named Defendant in respect thereof. In order that the fullest possible evidence be before me at the hearing of this motion, I have decided to grant special leave and to admit these affidavits.

6. In relation to the jurisdiction being exercised by me in this appeal, I was referred by Counsel for the Plaintiff to the decision of this Court (Simons J.) in **Promontoria (Field) DAC v. Mahon and Another** [2019] IEHC 218. This makes it clear that the jurisdiction of the High Court is to hear and determine an appeal from the Circuit Court Judge and not from the County Registrar (ref. Paragraphs 18 and 19 of the judgment).

7. Therefore, the issue before me is to provide a rehearing to the First Named Defendant's motion of the 10th March 2023. The essence of this motion is whether the within proceedings should be considered struck out or not based upon the Plaintiff's clearly expressed decision not to proceed with them. This decision was undoubtedly expressed as far back as the 6th March 2023 when it was so stated before the County Registrar and

has been consistently expressed since including in the replying Affidavit of Robyn Pim (in reply to the Affidavit of the First Named Defendant in the Circuit Court motion now under appeal), sworn on the 25th July 2023, at Paragraph 7 of that Affidavit. For the avoidance of all doubt, I had regard to the following Affidavits in the context of this hearing namely:

- The grounding Affidavit of the First Named Defendant of the 10th March 2023;
- The Supplemental Affidavit of the First Named Defendant of the 20th April 2023;
- The Replying Affidavit of Robyn Pim of the 25th July 2023;
- The Supplemental Affidavit of James Larkin of the 6th September 2023;
- The Supplemental Affidavit of James Larkin of the 31st January 2024;
- The Replying Affidavit of James Larkin of the 3rd April 2024.

8. I did not consider or substantively examine in any manner the Replying Affidavit of Robin Pim of the 11th October 2023 or the Affidavit of Service thereof as the First Named Defendant denied that he had received it and questioned the Affidavit of Service relating to it.

9. The discontinuance of proceedings is considered in the Circuit Court Rules at Order 21 thereof.

10. Order 21 (1) of the Circuit Court Rules provides:

'1. The plaintiff may, at any time before the receipt of the defendant's Defence, or after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application), by notice in writing wholly discontinue his action against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this order otherwise provided, it shall not be competent for

the plaintiff to withdraw or discontinue the action without leave of the Judge, but the Judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Judge may, in like manner, and with the like discretion as to terms, upon the application of the defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent for a defendant to withdraw his Defence, or any part thereof, without such leave.'

11. The provision for discontinuance in the Superior Court Rules is similar in nature and I reference it as I have had regard to decisions made in relation to it in the context of this application.

Order 26(1) Rules of the Superior Courts provides:

'1. The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing in the Form No 20 in Appendix C, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed. The plaintiff may, however, at any time prior to the setting down of any cause for trial wholly discontinue his action, with or without costs to be paid by any party, upon producing to the proper officer a consent in writing signed by all parties or by their solicitors and such costs (if any) shall be taxed. Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may, in like manner, and with the like

discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.'

12. It is clear that there are different discontinuance processes which operate depending upon the stage of the proceedings. The first such process has no court involvement and simply requires service of appropriate notice by the plaintiff to the defendant. In the present case, no Defence had been delivered so it was, arguably, open to the Plaintiff to invoke the first process. However, in this regard, I note that the special regime provided for in Order 5B of the Circuit Court Rules does not provide for a Defence but rather that a defendant “shall defend the plaintiff’s claim by filing of a replying affidavit to the plaintiff’s affidavit ...” (Order 5B, rule 5(3)). It is unknown to me if the Defendants or either of them filed such affidavit by way of defence. It is most likely that they did. Whether or not the Plaintiff was in a position to comply with the first requirement of Order 21 (in relation to the stage of the proceedings) in order to invoke the first process envisaged under that Order, the Plaintiff ought to have served “*notice in writing*”. In this context, the Plaintiff would be responsible for the Defendants costs “*occasioned by the matter so withdrawn*”. I do not believe that this process was invoked here as (a) there was no notice in writing and (b) the mandatory responsibility for the Defendants’ costs was not assumed. The second process for discontinuance (albeit primarily directed at the timing of same), is preceded by the phrase “*Save as in this Order otherwise provided, ...*” and therefore, in circumstances in which the earlier provisions of Order 21 rule 1 were not complied with, I am of the view that discontinuance by the Plaintiff herein must be subject to the applicable rules for this alternative process. This second process requires the leave of the court and permits discontinuance “*upon such terms as to costs, and as to any other actions, and otherwise as may be just*”.

13. This is precisely the same wording as in the Rules of the Superior Courts, Order 26. This was considered by Laffoy J. in **Shell E & P Ireland Ltd v McGrath (No. 3)** [2007] 4 IR 277 where she stated:

“Going back to the wording of O. 26, r. 1, it is clear that, in a situation where a plaintiff cannot discontinue without obtaining the leave of the Court, the Court has a discretion as to whether to grant such leave or not. There is little or no guidance given as to the basis on which the Court should exercise the discretion and, in that sense, the discretion is a broad discretion. It is also clear that the Court may impose terms as a condition to granting leave, but, again, little guidance is given as to how the discretion to impose terms should be exercised, save that the Court should strive to maintain justice between the parties. In relation to the imposition of terms as to costs, the provision for discontinuance at an early stage suggests that the underlying precept is that the requirement of justice will normally result in liability for the costs to the date of discontinuance being borne by the plaintiff. Notwithstanding that, it is clear that what is just must be determined in each case having regard to its particular circumstances.”

14. The dicta of Noonan J. in **Joint Stock Co. Togliattiazot v Eurotoaz Limited** [2019] IEHC 342 are also instructive:

“37. In principle therefore, a defendant has no right to insist that a case proceeds in order that he may disprove what is alleged against him. While the plaintiff enjoys the position of dominus litis he may call a halt to the proceedings no matter how strongly the defendant may object, provided, of course, he does not do so for an improper purpose. The position changes once a certain point is passed and the court then must grant leave to discontinue.

38. This suggests an implicit rationale that some additional detriment or injustice beyond the mere making of a legations in pleadings may accrue to the defendant at that stage which requires the court to adjudicate to avoid such injustice. In general, as Laffoy J. puts it, it is difficult to conceive of circumstances in which a court would refuse to a low discontinuance once any potential unfairness could be addressed by the imposition of terms on the plaintiff.

39. This is also consistent with the jurisprudence which shows that there is no reported case where leave to discontinue was refused in advance of the commencement of the trial.”

15. Referencing the general principles applicable, Delany and McGrath state (Paragraphs 17-29 and 17-30):

'17-29

Order 26, rule 1 specifies that the discontinuance of proceedings or the withdrawal of part thereof is not a defence to any subsequent action and proceedings that have been discontinued cannot found a plea of res judicata.⁶⁶ Neither will it generally be considered to be an abuse of process to discontinue proceedings and claim the same reliefs in another set of proceedings.⁶⁷ However, subsequent proceedings may be statute barred or the delay on the part of the plaintiff may debar him from obtaining relief.

17-30

Order 26, rule 4 provides that, if a subsequent action is brought before payment of the costs of a discontinued action, for the same or substantially the same cause of action, the court may stay those proceedings unless the costs of the discontinued action have been paid. In Lenaghan International Transport Ltd v Lombard Ireland Ltd,⁶⁸ Barrett J identified a number of principles to be applied on such an application: (1) the power of the court is discretionary; (2) as a general rule, where a plaintiff, having failed in one action, commences a second action for the same matter, it should be stayed until the costs of the first action have been paid; (3) a like discretion arises to be exercised in the context of any subsequent action for the same, or substantially the same, cause of action as the discontinued action; (4) the discretion may be exercised despite a technical difference in the capacity in which the subsequent action is brought; and (5) the prospect of success in the subsequent action is generally not a relevant factor. In that case, the learned judge exercised his discretion to stay the proceedings against the first defendant in circumstances where he was satisfied that the second action by the plaintiff was for substantially the same cause of action against the first defendant as the first discontinued action and no explanation had been offered for the non-payment of costs.'

16. O’Floinn, *Practice and Procedure in the Superior Courts* (2022, 3rd Ed., Bloomsbury Publishing) states:

“The Court has a broad discretion to give leave to discontinue or not, although the rule has been characterised as a complete cove for the discontinuance of an action: Smyth v. Tunney [2004] 1 ILRM 464. The Court may impose terms as a condition of granting leave. What is considered just must be determined in each case having regard to its particular circumstances: Shell E&P Ireland Ltd v. McGrath & Ors [2007] 4 IR 277. The balance of justice will normally result in liability for the costs to the date of discontinuance being born by the plaintiff: Shell E&P Ireland Ltd v. McGrath and Ors..”

17. I must therefore consider what is fair in the current circumstances. In this regard, I do not believe it fair or appropriate that a party would be compelled to continue proceedings which he does not wish to continue. As Hyland J. states in **Galway Roscommon Education and Training Board v. Macken Walsh** [2022] IEHC 235 at Paragraph 8

“A court will not ordinarily refuse to allow a party to discontinue proceedings.”

18. It is clearly fair that the Defendant(s) should have an order for costs in respect of the proceedings to the date of discontinuance (in my view the date of the Circuit Court Order herein being the 26th October 2023). The issue then is whether there is any other conditionality to discontinuance required herein to achieve fairness? I have formed the view, having regard to the totality of the evidence before me, that it would be unfair to disallow the subsequent proceedings having regard to the substantive issues between the parties. However, the First Named Defendant asserts substantial grievances in relation the verifying Affidavit in the within proceedings and he has sought to cross-examine on it in circumstances in which it has been acknowledged that there is “an error” in it (Affidavit of Robyn Pim of the 25th July 2023) and this has been allowed by the Circuit Court and by this Court on appeal. In these circumstances, it would appear unfair that he would not have an opportunity to raise these matters in the subsequent proceedings. I therefore am permitting discontinuance on the basis that the Affidavit of Devan Keshwala of the 17th April 2014 is to be considered as if sworn/filed in the subsequent proceedings and the Orders of Judge Doyle of the 12th October 2021 and of

Barr J. of the 10th November 2022 in respect of that Affidavit are to be considered as if ordered in the subsequent proceedings. However, it must be remembered that liberty to cross-examine on an affidavit results in the exclusion of such affidavit if the deponent is not available subject to whatever arguments may be made pursuant to Order 5B rule 6(2) of the Circuit Court Rules. This will permit the First Named Defendant and the Plaintiff to make such arguments in respect thereof at the hearing as they deem appropriate. Of course, the Plaintiff and the Defendants will be entitled to rely on such other evidence as arises in the subsequent proceedings and I make no comment in this regard.

19. In circumstances in which the within proceedings are discontinued, it is not necessary for me to consider the additional reliefs sought in the motion before me.
20. I am making no order for costs in respect of this appeal in circumstances in which there has been partial success (and partial failure) on both sides.