THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 336

Appeal Record Number: 2018/00040CA

High Court Record Number: 2016/7422P

Noonan J.
Faherty J.
Collins J.

BETWEEN/

LESLIE FITZSIMONS

PLAINTIFF/APPELLANT

- AND –

TANAGER LIMITED AND BANK OF SCOTLAND PLC

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of December 2019

Introduction

1. The finality of litigation is a fundamental precept in our legal system. It was pithily summarised by Lord Simon of Glaisdale in *The Ampthill Peerage* [1977] AC 547 at 576: -

> "Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: 'we have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end we must accept what has been decided. Enough is enough."

2. These words were cited with approval by Denham J. in *Talbot v McCann Fitzgerald* [2009] IESC 25.

3. This appeal from the order and judgment of O'Connor J. of 24th January, 2018 raises this, amongst a number of other issues.

Relevant Facts and Chronology

4. The appellant (Mr. Fitzsimons) is the registered owner of the lands comprised in folios 19055 and 19056 of the Register of Freeholders, County Meath which comprise a dwelling house and lands. In 2001, Mr. Fitzsimons borrowed the sum of IR£116,000 from the Governor and Company of the Bank of Scotland and executed a deed of charge in respect of the borrowing on the 15th May, 2001 over the two folios mentioned.

- 1st July, 2004 - the charge was transferred to Bank of Scotland (Ireland) Limited.
- 18th May, 2007 - the Governor and Company of the Bank of Scotland were registered as owners of the charge on both folios coinciding with the registration of Mr. Fitzsimons as full owner.

- 4th September, 2008 - a demand for possession of the property was made, defaults having occurred in meeting the repayments due under the mortgage.
- 20th August, 2010 - by this date, arrears in the amount €15,566.48 had accumulated representing almost four years of instalments.
- 30th September, 2010 - Bank of Scotland (Ireland) Ltd issued proceedings seeking an order for possession of the property in the Circuit Court.
- 31st December, 2010 - by cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom, approved by the courts of both jurisdictions, all of the assets and liabilities of Bank of Scotland (Ireland) Limited transferred to Bank of Scotland Plc. by operation of law at 23.59 hours on that date. The transfer included the mortgage and charge, the subject of these proceedings.
- 25th March, 2011 Messrs. Mullan & Associates solicitors, entered an appearance on behalf of Mr. Fitzsimons. The matter appeared in the court list on a number of subsequent occasions when Mr. Fitzsimons was represented by both solicitor and counsel.
- 20th July, 2012 - the Circuit Court (His Honour Judge Griffin) granted an order for possession to Bank of Scotland Plc. with a stay on execution for six months. Mr. Fitzsimons was legally represented at the hearing.
- 6th June, 2013 – an Execution Order issued to Bank of Scotland Plc.
- 5th December, 2013 - the first respondent (“Tanager”) entered into a deed of purchase in respect of a portfolio of loans of Bank of Scotland Plc.
- 14th April, 2014 - a deed of assignment of the portfolio was executed which included the loan and charge of Mr. Fitzsimons.
- 24th April, 2014 - Tanager was registered as owner of the charge on folio 19056.
- 25th April, 2014 - Tanager was registered in respect of folio 19055.
- 13th October, 2014 - Tanager was substituted as plaintiff in the proceedings by order of the County Registrar.
- 16th January, 2015 – the Execution Order of 6th June, 2013 was renewed by order of the County Registrar.
- 25th March, 2015 - Mr. Fitzsimons issued a motion returnable before the Master of the High Court in which he sought an extension of time within which to appeal the order of the Circuit Court made over two and a half years earlier. He issued this motion as a litigant in person.

- 12th May, 2015 - Mr. Fitzsimons' motion was refused by the Master and he did not appeal the refusal.

- 4th August, 2015 - the property, which was vacant and boarded up, was repossessed by Tanager on foot of the renewed execution order.

- 10th August, 2015 - Melanie Berry, Mr. Fitzsimons' partner, issued proceedings against him and Tanager claiming an interest in the property inter alia.

- 7th September, 2015 - Ms. Berry registered a lis pendens on foot of her proceedings thereby preventing any sale of the property. Since that time, Ms. Berry, who resides in the United Kingdom, has taken no steps to progress this litigation.

- 18th September, 2015 - Mr. Fitzsimons purported to issue a motion in the now concluded Circuit Court proceedings, seeking to set aside the order for possession.

- 26th July, 2016 - the application was dismissed by the Circuit Court evidently on the basis that the court was functus officio and had no jurisdiction to entertain it.

- 15th August, 2016 - the current proceedings were issued. In his plenary summons, Mr. Fitzsimons claims damages for breach of contract, breach of duty, negligence, fraudulent misrepresentation, trespass, and violation of his constitutional rights. He also seeks an injunction restraining the defendants from taking possession of, or disposing of, the property and an order vacating the order of the Circuit Court of the 20th July, 2012, over four years earlier.

- 22nd September, 2016 - Mr. Fitzsimons issued a motion seeking an order setting aside the order of the Circuit Court and an interlocutory injunction restraining the defendants from interfering with the property. Again, the summons and motion were issued by the plaintiff as a litigant in person. The motion was grounded on an affidavit of Mr. Fitzsimons sworn on 22nd September, 2016. The affidavit purports to be a detailed legal submission supporting Mrs. Fitzsimons' argument that the order of the Circuit Court was not lawfully granted. Although I do not propose to set out exhaustively all of the points raised in this affidavit, the main ones appear to me to be: -

    (i) Bank of Scotland Plc. never registered the charge on Mr. Fitzsimons' folios in its own name and thus was not entitled to exercise the statutory powers contained in s. 62 of the Registration of Title Act 1964. Consequently, Bank of Scotland Plc. had no "jurisdiction" to seek possession and the order of the Circuit Court was therefore invalid and bad in law.

    (ii) Tanager acquired its title to the charge from Bank of Scotland Plc., but because the latter was never registered on the folios, Tanager was not entitled to be so registered. A number of judgments of the Superior Courts is exhibited in support of this contention.

(iii) Tanager never acquired title to the charge from Bank of Scotland Plc., because the latter was never registered as the owner of the charge.

(iv) The letter of demand issued by Bank of Scotland Plc. prior to the institution of proceedings was invalid, as it only sought the arrears rather than the principal debt.

(v) Tanager did not exist when the original execution order was made and it is therefore void.

(vi) The loan sale by Bank of Scotland plc to Tanager was invalid as it breached the unfair contract terms legislation, because the loan sale was from a regulated to an unregulated entity and thus, prejudicial to Mr. Fitzsimons.

(vii) The order of the Circuit Court was made in breach of several articles of both the Charter of Fundamental Rights of the European Union and of the Constitution.

(viii) Tanager committed various offences under the terms of the Consumer Protection Act 2007.

(ix) The Circuit Court had, in any event, no jurisdiction to hear the case based on the rateable valuation of the property as a result of the decision of the Court of Appeal in Permanent TBS Plc. v. Langan [2016] IECA 229 (subsequently reversed by the Supreme Court).

- 7th November, 2016 - Mr. Fitzsimons' motion came on for hearing before Gilligan J. who dismissed it with costs to Tanager.

- 25th July, 2017 - Tanager brought the within motion to dismiss Mr. Fitzsimons' proceedings on the grounds that they are frivolous and vexatious, disclose no reasonable cause of action, are bound to fail, are res judicata, offend the Rule in Henderson v. Henderson, are an abuse of process and constitute a collateral attack on the order of the Circuit Court. Tanager further seek an "Isaac Wunder" order against Mr. Fitzsimons restraining him from instituting any further proceedings in this matter without the leave of the President of the High Court.

- 28th September, 2017 – Mr. Fitzsimons delivered a statement of claim.

The Judgment of the High Court

5. Tanager's motion came on for hearing before the High Court (O'Connor J.) on 24th January, 2018. Tanager's application was grounded upon an affidavit sworn by Ms. Rachael Connolly, solicitor, of Messrs Sherwin O'Riordan, the solicitors on record for Tanager. No replying affidavit was sworn by Mr. Fitzsimons. It appears from the transcript of the hearing before O'Connor J. that the motion originally appeared in a Monday Motion List, but as it was too long for a Monday List, it was transferred to a Wednesday list and ultimately, the court list for hearing on 24th January, 2018.

6. Mr. Fitzsimons was called at the sitting at the court and there was no appearance. However, on the previous occasions when the matter appeared before the court in the Monday list, Mr. Fitzsimons was present and it was put into the subsequent Wednesday when solicitors appeared on behalf of Mr. Fitzsimons indicating that they intended to come on record. Counsel was also present on behalf of Mr. Fitzsimons. Consequently, there is no doubt that Mr. Fitzsimons was aware that the matter

was fixed for hearing and the solicitors and counsel who appeared on his behalf were so aware also. However, as I have said there was no appearance by Mr. Fitzsimons at the hearing of the motion and clearly the court was satisfied about service.

7. Indeed, in fairness to Mr. Fitzsimons, he did not at any stage of the hearing before this court complain that he was unaware of the trial date in the High Court. Rather, he initially submitted a written submission to this court which largely consisted of complaints about both his own lawyer and those of Tanager. Mr. Fitzsimons says that he instructed a gentleman called Gabriel Canning, whom he describes as a legal executive, to assist him in the matter and gave him a sum of money to retain solicitor and counsel. Mr. Fitzsimons suggests, again, by way of submission rather than sworn evidence, that a purported appearance was entered by the solicitor who subsequently denied any knowledge of it.

8. Mr. Fitzsimons appears to suggest that he was present in the Four Courts on the day of the hearing and was told by his counsel that the matter was listed. Mr. Fitzsimons says it subsequently transpired that the solicitor he understood to be representing him and to have entered an appearance, in fact, knew nothing of the matter. Obviously, this Court can express no view on any of these issues, which are entirely irrelevant to this appeal. It does however, demonstrate that Mr. Fitzsimons undoubtedly was aware that the matter was listed before the court on that day and for whatever reason, was not present.

9. Submissions were made by counsel for Tanager to the learned trial judge that the proceedings are an abuse of process as an attempt to re-litigate an issue finally determined in an unappealed ruling of the Circuit Court. Relevant authorities were opened to the court and in particular the judgment of the High Court (Kelly J. as he then was) in *Lynch v. English & Ors* [2003] IEHC 24, which held that an issue, once finally determined by the Circuit Court and not appealed, could not be relitigated by separate High Court proceedings concerning the same subject matter. The decision of Kelly J. in that case was affirmed by the Supreme Court [2005] 10 JIC 2002.

10. In his *ex tempore* judgment, the trial judge referred to the history of the matter as I have set it out and found the proceedings to be a collateral attack on the order of the Circuit Court. He concluded that the proceedings should be dismissed as being *res judicata* and offending the Rule in *Henderson v. Henderson*, so as to amount to an abuse of process. He noted that no replying affidavit had been delivered on behalf of Mr. Fitzsimons to the grounding affidavit of Ms. Connolly. O'Connor J. cited with approval the judgment of Kelly J. in *Lynch v. English & Ors*, noting that once a final and binding determination had been made, such issues should not be reopened save in the most extraordinary circumstances, such as fraud. The trial judge noted that no fraud was alleged in this case.

11. The trial judge indicated that he was satisfied that Mr. Fitzsimons had brought, and continues to bring, proceedings which are unnecessary and a deliberate intention to thwart the administration of justice. He proceeded to make a restraining order against Mr. Fitzsimons in relation to the institution of any further proceedings concerning the property in question without the leave of the President of the High Court or such judge as may be nominated by the President.

Grounds of Appeal

12. The notice of appeal lists five grounds of appeal which are rather generic and concise: -

    (1) The learned trial judge erred in not allowing the appellant appropriate due process, through the right to be heard.

    (2) The trial judge erred in failing to take cognisance of the constitutional obligations to ensure fair procedures.

    (3) The trial judge erred in failing to take cognisance of the guarantees enshrined under the constructions (sic) of Art. 1, protocol 1 of the European Convention.

    (4) The trial judge erred in failing to take cognisance of the guarantees enshrined under the constructions (sic) of Art. 6(1) of the European Convention.

    (5) The trial judge erred in failing to take cognisance of the guarantees enshrined under Art. 8 of the European Convention.

13. I think it is fair to say that at the hearing of the appeal, Mr. Fitzsimons netted his argument down to the simple proposition that the order of the Circuit Court could not be allowed to stand as it was invalid for the reasons identified in his affidavit grounding the injunction application and the statement of claim.

14. Mr. Fitzsimons also referred to the interim ruling given by me in the High Court in the case of *Tanager v. Kane* [2017] IEHC 697, in which I stated a case for the opinion of the Court of Appeal on certain points of law arising in those proceedings. That ruling was delivered shortly before the hearing before O'Connor J. and Mr. Fitzsimons was of the opinion that this assisted his case. Whether that is so or not, Mr. Fitzsimons was critical of counsel for Tanager in failing to draw this decision to the attention of the court in Mr. Fitzsimons' absence. He claimed that the Kane case "mirrored" his own. In his written submissions, Mr. Fitzsimons seeks to re-argue all of the points referred to in the statement of claim and affidavit grounding the injunction application, but does not engage in any way with the substance of this application and the grounds upon which it is advanced by Tanager.

Discussion

15. With regard first to Mr. Fitzsimons' contention that he was not afforded fair procedures in the High Court, it appears to me that the trial judge properly satisfied himself as to service of the motion on Mr. Fitzsimons and indeed Mr. Fitzsimons in effect concedes that he was aware that the matter was listed but blames his putative solicitor and/or counsel and/or legal executive for the fact that there was no appearance on the day. It is clear however, that the trial judge was correctly satisfied of the fact that Mr. Fitzsimons was aware that the case was on, and so there could be no conceivable basis upon which it could be suggested that there was any unfairness arising as a result of the matter proceeding in the absence of Mr. Fitzsimons. In fairness to him, he did not seriously advance this argument at the hearing of the appeal, nor do I believe he could do so having regard to the facts.

16. The order of the Circuit Court of the 20th July, 2012 constituted a final and conclusive order as between the parties which determined the right of Bank of Scotland Plc. to possession of the property in issue. Tanager subsequently became entitled to the benefit of that order. Thus, a *res judicata* came into effect on the making of that order as between the parties, one of whom was Mr. Fitzsimons. That order became unimpeachable in the absence of an appeal or an application for judicial review. Barring either of these remedies being sought, the only other conceivable basis upon which the order could be challenged would be that it was obtained by fraud. There is no evidence of that nor is it alleged.

17. The operation of the res judicata rule was explained by Keane C. J. in *Dublin Corporation v. Building and Allied Trade Union* [1996] 1 I.R. 468, at 481, where he referred to: -

> "…the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes. However severe the stresses of litigation may be for the parties involved - the anxiety, the delays, the costs, the public and painful nature of the process - there is at least the comfort that at some stage finality is reached. Save in those exceptional cases where his opponent can prove that the judgment was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again."

18. One of the complaints ventilated by Mr. Fitzsimons, as I have said, is that counsel for Tanager failed to alert the court to a relevant precedent and somehow thereby breached his duty to the court and to Mr. Fitzsimons. I am satisfied that this suggestion is entirely without foundation. It is true to say that in moving an *ex parte* application, counsel has a duty of candour towards the court and must draw to the court's attention not only matters which assist his case, but those which do not. Whilst it might be debatable as to the extent of that duty in circumstances where the opposing party is on notice of the application, but does not participate, that is of no relevance on the facts of this case. The decision of the High Court in *Tanager v. Kane*, even if it could be said to be in some sense supportive of the arguments that Mr. Fitzsimons now advances, which I very much doubt, was of absolutely no materiality to the application before the High Court to strike out the proceedings. I am satisfied from perusing the transcript that counsel acted with absolute propriety and any suggestion to the contrary by Mr. Fitzsimons is groundless.

19. Even in the absence of a *res judicata* arising, Mr. Fitzsimons had another insurmountable difficulty in this case. The fundamental issue he now raises is that the Circuit Court never had jurisdiction to entertain this application for possession because Bank of Scotland Plc. did not become registered on the Folios as the owner of the charge following the cross-border merger. If that is true now, it was equally true in July 2012 when the Circuit Court made the order, at a hearing in which Mr. Fitzsimons was legally represented. The identity of the party seeking the possession was obviously known to Mr. Fitzsimons and his legal advisors, and the identity of the registered owner of the charge was evident from the folio.

20. Since *Henderson v. Henderson* (1843) 3 Hare 100 was decided, parties to litigation are bound to bring forward their entire case at the time when it is heard. They cannot be heard subsequently to

raise an issue which could have been raised in the original proceedings. As Lord Bingham said in *Johnson v. Gore-Wood* [2002] 2 AC 1 (at pp. 31-32): -

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

21. This passage was approved by the Supreme Court in *A.A. v. Medical Council* [2003] 4 I.R. 302.

22. While the so-called rule in *Henderson v Henderson* is discretionary rather than an absolute preclusion of further claims, nothing that could conceivably amount to an explanation or justification for the failure to raise the issue now sought to be relied on by Mr. Fitzsimons, was identified before this Court: see Transcript at pages 26-27.

23. I am satisfied therefore, that these proceedings constitute the clearest abuse of process and the trial judge was fully justified in dismissing them on this ground.

The Isaac Wunder Order

24. With the increase in recent years in the amount of litigation pursed in our courts by litigants in person, the making of restraining orders has perhaps become more common. However, by no measure can the making of such orders be regarded as in any sense routine. They are, of course, a serious restriction on the constitutional right of access to the court and, as the authorities make clear, should only be made sparingly and in relatively rare circumstances. Where the circumstances warrant however, the court has the inherent jurisdiction to make such orders and indeed a duty to do so to protect parties from habitual and costly vexatious litigation. The making of an Isaac Wunder order is not an abrogation of the constitutional right of access to the court, but rather a proportionate filtering mechanism to protect the opposing party from the injustice of having to incur what are often very significant and unrecoverable costs, in meeting oppressive and abusive claims. The right of access to the court is not absolute – *see O'Reilly v. McCabe v. Minister for Justice, Equality and Law Reform* [2009] IECA 52.

25. Quite apart from the interest of the oppressed party, the court must also have regard to protecting its own processes from abuse, which result in scarce court resources being wasted to the detriment of other parties with genuine claims. All the cases recognise that a primary indicator of the necessity for a restraining order is the habitual or persistent institution of frivolous and vexatious proceedings against parties to earlier proceedings – see *McMahan v. W.J. Law and Co. LLP* [2007] IEHC 51 and *Tracey v. Burton* [2016] IECS 16.

26. However, in *Gill v. Bank of Ireland* [2009] IEHC 210, Feeney J. considered that there could not be a basis for making an Isaac Wunder order against a party who had not previously instituted proceedings.

27. In the present case, the original proceedings were not, of course, instituted by Mr. Fitzsimons, as he was the defendant. As such defendant post the determination of the Circuit Court proceedings,

he made two applications, first, to the Master of the High Court for an extension of time within which to appeal and second, to the Circuit Court to set aside the earlier order. For valid reasons, both applications failed.

28. The proceedings now before the court are in fact the first proceedings instituted by Mr. Fitzsimons. While I have held these proceedings to be an abuse of process, viewed from Mr. Fitzsimons' perspective they represent an attempt to agitate issues which have not previously been considered by any court. In fairness to Mr. Fitzsimons therefore, I do not think it can reasonably be said that he is attempting, by the bringing of these proceedings, to re-litigate issues that have previously been determined, because as far as he is concerned they have never been determined.

29. In my view, the criteria for the making of an Isaac Wunder order have not been met in this case. As this is in fact the first set of proceedings instituted by Mr. Fitzsimons as plaintiff, at this juncture at any rate, it cannot be said of him that he has habitually or persistently instituted abusive proceedings against Tanager. For the same reasons as identified in Gill v. Bank of Ireland therefore, to my mind, Tanager has not made out a case for the granting of a restraining order against Mr. Fitzsimons at this stage. Clearly, the position may change were Mr. Fitzsimons to institute further proceedings seeking to re-litigate substantially the same issues again. For that reason, I am of the view that Mr. Fitzsimons' appeal should be allowed in part in relation to the restraining order.

30. The balance of his appeal will be dismissed.