THE COURT OF APPEAL

Approved
No Redaction Needed

Neutral Citation: [2023] IECA 31
Record Number: 2022/123
High Court Record Number: 2019/1850P

Costello J.

Noonan J.

Butler J.

BETWEEN/

CHARLES MCGUINNESS

PLAINTIFF/APPELLANT

-AND-

KEVIN MCGARRY

DEFENDANT/RESPONDENT

-AND-

STEPHEN TENNANT

THIRD PARTY

JUDGMENT of Ms. Justice Costello delivered on the 16th day of February, 2023

1. This is an appeal from the decision of the High Court of the 26th April, 2022 striking out the plaintiff's proceedings and awarding the defendant the costs of the proceedings to include reserved costs against the plaintiff. As appears later, the third party took no part in the High Court or on appeal.

Background

2. By a deed of mortgage dated the 23 May 2003 between the plaintiff and Allied Irish Banks Plc, the plaintiff charged the premises at 4 College Street, Cavan, County Cavan ("the Property") with the repayment of certain sums. On 7 September 2016 Mr. Stephen Tennant ("the receiver") was appointed by Allied Irish Banks Plc ("the bank") as receiver of the Property. As is explained further below, the plaintiff contends that neither the mortgage nor the appointment of the receiver are valid.

3. By letter dated 17 August 2016 the plaintiff was notified of the appointment of Mr. Stephen Tennant as receiver over the Property. The instrument of his appointment as receiver was enclosed with the letter.

4. Despite the fact that the plaintiff subsequently maintained there was no valid mortgage dated 23 May 2003 over the Property and that the receiver was not validly appointed, he chose not to challenge the validity of the appointment of the receiver or the mortgage under which he was appointed at any time thereafter.

5. The defendant says that in August 2018 the receiver instructed K-Tech Security Unlimited Company, a company of which he is an employee and/or director, to secure possession of the Property. On the 4 March 2019 the defendant, acting on the instructions of the receiver, took possession of the Property and changed the locks of the Property. At the time the Property was let to a tenant of the plaintiff.

6. The following day, the 5 March 2019 the plaintiff, as a litigant in person, issued proceedings solely against the defendant seeking interlocutory injunctions restraining the defendant, his servants or agents and all persons acting in concert with him and all persons having notice of the making of the orders from either watching, besetting, threatening, or

otherwise taking possession of the premises or from trespassing upon the property. He also sought an injunction in like terms against *"all third parties"* and damages including punitive, aggravated or exemplary damages.

7. The following day, on the 6 March 2019 the plaintiff applied *ex parte* for an order compelling the defendant to deliver up vacant possession of the Property to the plaintiff. This application was refused by the High Court (Reynolds J.).

8. The plaintiff delivered a statement of claim on the 4 April 2019. He pleaded that he had purchased the Property on the 19 June 1998 and that the Property had been leased by him to a tenant for approximately the previous seven years. He pleaded that he had been notified on 17 August 2016 of the appointment of the receiver and had been furnished with *"a document entitled Instrument of Appointment of Receiver"*.

9. He then pleaded:

> *"6. There is a dispute between the Plaintiff and Allied Irish Banks, plc as to whether there exists a valid mortgage dated the 23rd May 2003 over the Plaintiff's property, 4 College Street, Cavan, County Cavan.*
>
> *7. Even if a valid mortgage existed, the document which is alleged to have appointed Stephen Tennant is not a deed within the meaning 'deed' under Section 3 of the Land and Conveyancing Law Reform Act, 2009 and therefore no legal interest could pass by such a document to any validly appointed receiver."*

The plaintiff then pleaded the fact that the defendant had gained access to the Property and changed the locks and that the tenant could not enter the Property. Paras. 11 – 13 continue as follows:

> *"11. Notwithstanding whether there is or is not a valid mortgage in existence over 4 College Street, Cavan, County Cavan there is an obligation by anyone claiming to*

have a right through a mortgagee, of entry, by breaking into and changing door locks of a mortgaged property, to obtain an order of court prior to embarking on such a course of action.

12. The Defendant had not produced or referred to a court order which he was obliged to have obtained, that may have given him lawful authority to enter into the Plaintiff's building, 4 College Street, Cavan, County Cavan in the manner that he did, when he met with the plaintiff on the 4th March 2019.

13. The Defendant had no right to claim that he had taken lawful possession of the Plaintiff's property, 4 College Street, Cavan, County Cavan as he did not have a court order that he could rely on to obtain lawful possession."

The statement of claim concluded by pleading that the defendant had committed trespass and taken unlawful possession of the Property and sought the relief set out in the plenary summons.

10. The defendant delivered his defence on the 25th June, 2019. At the very beginning he asserted by way of objection his essential proposition, which is that the plaintiff was suing the wrong defendant.

"1. The Defendant pleads as preliminary objection to the within proceedings that the Statement of Claim herein fails to disclose a cause of action against the Defendant. In circumstances where the basis for the Plaintiff's claim is an allegation that the appointment of a Receiver to the relevant property was invalid (which allegation is denied), the Plaintiff's complaints should properly be directed to the said Receiver and/or to the person who appointed the Receiver, and not to the Defendant. The Plaintiff's claim is accordingly bound to fail.

2. Without prejudice to the preceding paragraph, the Defendant pleads as a further preliminary objection to the within proceedings that the Plaintiff's prosecution of this action against the Defendant, and not against the persons who are alleged to have acted unlawfully in appointing a Receiver, or in acting as a Receiver, constitute an abuse of the process of this Honourable Court."

11. The defence continued in para. 6; "*Without prejudice to the foregoing preliminary objections ...*" and:

"12. It is denied that there exists any legitimate or bone fide dispute between the Plaintiff and Allied Irish Banks Plc as to whether or not there exists a valid mortgage dated the 23rd day of May, 2003 over the Property. It is further denied that the existence of any such dispute discloses a cause of action against the Defendant.

13. It is denied that the said Deed of Appointment was invalid or defective having regard to the provisions of s. 3 of the Land and Conveyancing Law Reform Act 2009, whether in the manner alleged at paragraph 7 of the Statement of Claim or at all. It is further denied that the Plaintiff's allegations in that regard disclose any cause of action against the Defendant."

12. On 21 October 2009 the defendant issued a motion returnable for the 25 November 2019 seeking an order pursuant to Order 16, rule 1 of the Rules of the Superior Courts for leave to issue and serve a third-party notice on the receiver. The motion was served upon the plaintiff. The draft third-party notice sought an indemnity and/or contribution from the receiver *"against all or any claims or demands made by the Plaintiff... which the Defendant may be held liable to pay to the plaintiff"*.

13. The motion was heard by Ms. Justice Reynolds on the 25 November 2019. The plaintiff was present and he was asked whether he wished to join the proposed third party as

a defendant to the proceedings. He expressly declined the opportunity to do so and stated he was there simply as an observer. Accordingly, the order was made joining the receiver as a third party and not a co-defendant.

14. The receiver entered an appearance on the 22 October 2020. At an unknown date the defendant settled his claim as against the receiver who thereafter took no further part in the proceedings.

15. The matter proceeded to trial in the usual way. On the 7th September, 2021 the plaintiff served a schedule of damages which he claims against the defendant as follows:

"Actual Damages

1.	*Estimated bill of works including VAT at 13.5%*	*€92,099.46*
2.	*Loss of rental income from the 1st of January 2019 to the 31st of August 2021 32 months at €1,408.33 per month*	*€45,066.56*
3.	*€1,408.33 per month from 1st September 2021 until the completion of the required works, yet to be confirmed*	
4.	*€1,408.33 for two months vacant period negotiating a new lease*	*€2,816.66*
5.	*Auctioneers' fees to advertise and find new tenant*	*€2,000.00*

Damages for Trespass

6.	*Damages for trespass*	*€100,000.00*

Damages for breach of the plaintiff's constitutional rights

7.	*Damages for breach of the plaintiff's constitutional rights*	*€1,000,000.00*

Punitive and exemplary damages

8. Punitive and exemplary damages €10,000,000.00"

Thus, the total claimed against the defendant is approximately €11.25m.

16. The case was listed for hearing for three days on the 26 April 2022. The plaintiff refused to admit the mortgage as evidence. He subpoenaed a number of witnesses including the former and the current company secretary of AIB Group to give evidence on his behalf at the trial.

The hearing on the 26 April 2022

17. The trial judge commenced by stating that he had read the pleadings and he said that the essence of the plaintiff's dispute *"is a dispute both in relation to the mortgage entered into with AIB and in particular, the appointment of the receiver. And you say that the receiver has been invalidly appointed. And you say that because of that* [the defendant] *must necessarily have been committing trespass when he entered upon the premises on the 4th of March 2019".* The plaintiff confirmed that that was the case and then referred to para. 11 and 12 where he pleads that even if there is a valid mortgage and a valid appointment of a receiver, the defendant could not enter the Property without first obtaining a court order.

18. The trial judge took care to explain to the plaintiff the difficulty of his present course of action and explained that he could not argue that the mortgage is invalid or that the appointment of the receiver is invalid without suing the bank and the receiver respectively and giving them an opportunity to meet the case made against them. He pointed out that it was not a case made against the defendant who is merely a director and/or employee of K-Tech Security who had acted at the receiver's behest. He pointed out that the receiver had been joined as a third party and not as a defendant and that when a defendant joins a third party, that is an action between the defendant and the third party and not between the plaintiff

and the third party. He referred to the provisions of Order 16 and explained the operations of the rule to the plaintiff.

19. The trial judge said that only the bank or the receiver could address the issues of the invalidity of the mortgage or the invalidity of the appointment of the receiver *"but neither AIB nor Mr. Tennant are defendants to these proceedings."* In response the plaintiff said:

> *"But, Judge, AIB can answer them. And that's why they're here today; to give testimony on my behalf. So, in that regard I will be able to show that there is no valid mortgage, there is no valid appointment."*

20. The trial judge pointed out that he could not make any order against parties who were not before the court. At page 9 of the Transcript he expressly invited the plaintiff to think about that while he heard submissions from counsel for the defendant.

21. Counsel for the defendant concurred with the trial judge's summation of the problems presented by the plaintiff's approach to the litigation and he referred to other proceedings brought by the plaintiff in which the defendant was not a party as follows:

> *"*[The plaintiff] *has proceedings currently in being, which I think are listed for hearing at the end of May, against AIB in relation to a whole variety of loans. Some of which seem to overlap with these. I'm not involved in those proceedings. But in those proceedings, they give a first at this particular property* (*sic*). *Although they don't seem to the be subject of the relief claimed? in those proceedings."*

While the Transcript is unclear, it appears that counsel for the defendant understood that the plaintiff was suing AIB in relation to a variety of loans and that he was challenging the validity of the mortgage secured on the Property in *those* proceedings, though not in these.

22. Counsel submitted that the plaintiff had had the opportunity to sue AIB or the receiver when the application was made to join a third party and he did not avail of it. He said that

this decision has consequences. He submitted that it was too late for the plaintiff to apply now to join those parties because he had had his opportunity to do so and had not availed of it.

23. The trial judge then addressed the plaintiff stating:

> *"I just want to make it absolutely clear that the reason why I raised this at the very outset was because it seemed like an obvious problem to me. And I didn't want you developing your case in submissions if you were going to have to consider whether you would take a certain course of action or not. So, like, although I may seem to have embarked on criticising your proceedings at the very outset, it was done in ease of you rather than anything else, in bringing this problem to your attention at the outset. It does seem to me that the extent that your proceedings are predicated on matters which concern AIB or the receiver, effectively you require orders in those regards to proceed; to get to persuade this Court that orders against those entities are warranted. And I can't do that if they're not before the Court. So, I mean, I'm not sure what to suggest. And if you like I'll give you some time to consider your position."*

24. The plaintiff thanked the judge *"for briefing me on that"* and suggested that he could proceed on the one point which counsel for the defendant accepted was left *"which is peaceful entry".*

25. The trial judge identified that there were three options open and he set them out for the plaintiff. The first was to sue the defendant on the basis that both the mortgage and the appointment of the receiver were invalid, but this was not possible for the reasons he had explained. The second and third were described as follows: .

"It seems to me that [the plaintiff] is entitled to proceed on the basis he suggests; that he will not seek any orders against AIB or Mr. Tennant, or air any disputes with them. But he will air the dispute that he has with your client and attempt to get damages against your client on that basis. That's option No. 1 (sic).

Option No. 2 would be that the case is adjourned, but on terms. And that he is given the opportunity to apply to Court to add parties. And to proceed against them on that basis. If I don't do that, I effectively shut Mr. McGuinness out from making those arguments …"

26. The plaintiff indicated that he would not be attempting to try to challenge the validity of the mortgage or the instrument of appointment of the receiver. This then left two options identified by the trial judge. The first was to proceed with his case against the defendant *"on the basis that he didn't have a court order when he 'broke in' to the property"* and the other remaining option was the possibility of adjourning the proceedings and making an application to join AIB and the receiver as defendants. The trial judge indicated that he would give the plaintiff a short time to consider the matter and the plaintiff responded stating that a very short time would do.

27. The plaintiff clarified that he was making the case that whether the entry was effected peacefully or not, it was unlawful in the absence of a court order. The trial judge said that he could not reach a conclusion on this issue without effectively reaching a conclusion against the bank and the receiver who were not before the court.

28. After some further exchanges when the plaintiff did not apply to adjourn the proceedings with a view to joining the bank and receiver as defendants, the plaintiff said that he was happy to advance the argument based on legal argument alone, without evidence, to the effect that *"you must have a court order before you enter that property, regardless of*

what other lawful right you may have. And there's no need then to look behind that." The judge said that he did not think that you could de-couple the question in the manner suggested and that it would be an inappropriate way to proceed, that it would result in a *"completely artificial exercise"*.

29. Counsel for the defendant asked the judge to determine whether or not the plaintiff could proceed in the manner he sought. The trial judge then gave his decision, commencing on page 23 of the transcript:-

> *"It seems to me that the proceedings are not properly constituted, because essentially, they seek through … it's clear from the statement of claim that the gravamen of the plaintiff's case depends on the issue of the validity of the AIB mortgage and the appointment of the receiver being resolved. Now, that is the essence of Mr. McGuinness' case. And he needs to bring his allegations in that respect home in order to persuade the Court that the orders which he seeks are appropriate. The difficulty is that the central allegations as to the invalidity of the AIB mortgage and the appointment of Mr Tennant are allegations essentially against AIB and Mr Tennant respectively. And those parties unfortunately are not before the court."*

He then referred to the defence filed by the defendant and the application to join the receiver as a third party. He noted that the defendant and the receiver resolved their differences, although it would appear that no formal order was made striking out or dismissing the defendant's claim against the receiver. He referred to Order 16, rule 2 of the Rules of the Superior Courts and the opportunity afforded to a plaintiff to join the prospective third party as a defendant. He noted that the plaintiff had been afforded that opportunity and he did not take it and that the receiver remained as a third party. *"In those circumstances, the only action involving Mr Tennant was between him and the defendant. And it is not open to the*

plaintiff to air allegations with a view to seeking orders against parties who are not parties to the action itself. The only party to Mr McGuinness' action, being the defendant, Mr McGarry."

30. The trial judge then dealt with the suggestion that he could have heard a limited part of the claim and stated:

> *"On the face of it, it appears to be an allegation solely against Mr McGarry rather than against AIB or the receiver. But having heard the submissions of Mr McGuinness and counsel for the defendant, it doesn't seem to me that it would be appropriate to hear an allegation based solely on the proposition that Mr McGarry wasn't entitled to affect (sic) entry in the absence of a court order. Because it seems to me that it would be necessary to have regard to whether or not* [Mr. Tennant] *was appointed at all. As I've pointed out to Mr McGuinness, a finding in favour of Mr McGarry could lead to the very strange proposition that I would find that Mr McGarry had lawfully affected entry to the property without pronouncing upon the central allegations in the statement of claim aired by Mr McGuinness, which are that the mortgage with AIB which gave rise to the appointment of the receiver is itself faulty. And indeed, the appointment of the receiver also is faulty, and should not have led to the appointment of Mr. McGarry to affect re-entry. It seems to me that there is an artificiality about that process. The Court's responsibility, as reflected in the rules of Court, is to have all issues of the controversy resolved in the proceedings before it. And it doesn't seem to me that I can resolve the issue in paragraphs 11 to 13 of the statement of claim, in a proper or satisfactory manner, without resolving the issues which are truly at the root of Mr. McGuinness's grievances, which are those set out at paragraphs six and seven of the statement of*

claim, in relation to what he says is the invalidity of the mortgage and the appointment of the receiver, respectively."

31. He noted that he had taken care to put to the plaintiff the various options open to him and that there had been no application for an adjournment. Counsel for the defendant had applied for the matter to be struck out and that was the appropriate order to make.

32. After the judge had given his decision and ordered that the proceedings be struck out, the plaintiff then asked could he make an application to join the bank and the receiver as parties to the proceedings. The judge said he would not allow it at this point. He said *"We're here to hear the case. And I can't be dragging in parties at this level of notice, no"*. The plaintiff then asked about his options and the trial judge clarified *"What I said was we could adjourn the case today so you could consider whether or not to make an application in the future to join other parties. But I did say that would have costs consequences and counsel for the defendant has suggested that you may not be in a position to meet any award of costs, in any event."* The plaintiff responded that he had no evidence before the court to that effect. On this basis the proceedings in their entirety against the defendant were struck out.

The appeal

33. The plaintiff filed a notice of appeal on 19 May 2022. His primary ground of appeal was that he was entitled to have the issues for trial heard by the trial judge, that he had a constitutional right to a fair trial which was denied and that he had an implied constitutional right to fair procedures, which also was denied. He pleaded that the defendant was a tortfeasor, that his constitutional right to have his property rights and the right of his good name protected was violated and that he was entitled to a written reasoned judgment delivered in public post the trial of the action. He said that the trial judge erred in holding that his case was not properly pleaded.

34. In his written submissions the plaintiff expanded his grounds of appeal in a manner which is not permitted under the RSC. He maintained that the receiver was before the court by virtue of the fact that he had been joined as a third party and that he had not delivered a defence. He submitted that the receiver was now bound by the consequences of any judgment that may be delivered by the trial judge hearing his case. He submitted that his case was properly constituted against the defendant, and it was not an abuse of process nor was it bound to fail. He submitted that his claim is against the defendant/respondent as it is the defendant/respondent who is the tortfeasor and that the case was well pleaded against the defendant/respondent; that the proceedings ought not to have been struck out and that the case should be referred back to the High Court for hearing. He also sought an order setting aside the award of costs to the defendant and an order awarding him the costs of the appeal.

Submissions on the appeal

35. At some stage subsequent to the service of the notice of appeal, the plaintiff instructed solicitors and counsel and at the hearing of the appeal, the plaintiff was represented by Mr. Dornan BL. In answer to a query from the court Mr. Dornan clarified that there was no challenge in any other proceedings to the validity of the mortgage or the appointment of the receiver in relation to the Property and, to the extent that appeared otherwise from the transcript of the hearing in the High Court, this was a misconception.

36. In answer to a direct question from the court, counsel said that the plaintiff did not sue the bank or the receiver in order to avoid a potential exposure to costs.

37. Counsel submitted that the established jurisprudence is that a court should be very slow to strike out a claim on the basis that it is bound to fail where there are *"alternatives available"* which may save the proceedings. In this case he said that the option available

was to adjourn the proceedings and to join the bank and the receiver as co-defendants to the proceedings. In the alternative he submitted that the proceedings were sufficiently constituted by reason of the fact that the receiver had been joined as a third party. He argued Order 16, rule 5 of the RSC provided that:

> *"If a third party duly served with a third-party notice … makes default in delivering any pleading which he … is bound to deliver, he shall be deemed to admit the validity of and shall be bound by any judgment given in the action …"*

38. Counsel submitted that the trial judge erred in not trying the issues identified in paras. 11, 12 and 13 of the statement of claim. In response to a question from the court he accepted that the receiver is the real and necessary *legitimus contradictor* to the argument that the receiver required a court order before he could recover possession of secured property. He submitted that the onus rested on the defendant to prove the validity of the mortgage and the appointment of the receiver as that was the basis upon which he claimed he was authorised to enter the Property; it was for the defendant to establish that he had lawful authority to enter the Property and this required the defendant to show that the receiver had title and this in turn required the defendant to show that the mortgage was valid.

Discussion

39. The first question to consider is the issue of fair procedures and a fair trial. I have set out in considerable detail the pleadings, the steps taken to bring the case to trial and the extensive extracts from the transcript in order to show that the plaintiff was informed from the date of the delivery of the defence on the 25 June 2019 of the fundamental flaw in his proceedings and he had every opportunity to rectify the difficulty and to save the proceedings. He received a letter from the receiver notifying him of the appointment of the receiver which enclosed the instrument of appointment on the 17 August 2016. It was open

to him to challenge the validity of the appointment of the receiver at any time thereafter, but he elected not to do so. He also chose not to challenge the validity of the mortgage under which the bank had appointed the receiver. He instituted proceedings on the 5 March 2019 suing the defendant but not the bank or the receiver. This was a deliberate choice on his part. Despite this glaring omission, he maintained in his proceedings that there was a dispute between him and the bank as to whether there was a valid mortgage over the property. While there may have been a dispute in correspondence, it was confirmed to this court that the plaintiff has not claimed in legal proceedings against the bank that the mortgage dated 23 May 2003 over the property is invalid nor that the mortgage does not extend to the Property.

40. Likewise, while he pleaded that the instrument appointing the receiver was not a deed within the meaning of S.3 of the Land and Conveyancing Law Reform Act 2009 and that therefore the receiver had no title to the property, he elected not to sue the receiver in this regard.

41. When the defendant applied to join the receiver as a third party, the plaintiff had the opportunity to join him as a co-defendant but chose not to do so. It is absolutely clear that his choice not to sue either the bank or the receiver was deliberate and conscious. It was done to avoid costs and expenses. It was a tactical choice, not any oversight on his part and he is bound by the consequences of that choice.

42. When the matter came on for hearing, the trial judge went to very considerable lengths to explain the fundamental problem with his proceedings as so constituted and to afford him the opportunity to apply for an adjournment for the purposes of joining the bank and the receiver as co-defendants on terms if he wished. He was afforded that opportunity in the context of the difficulties which were explained to him, and he did not avail of the lifeline thrown to him. It was only after the trial judge decided that the proceedings should be struck out that the plaintiff belatedly applied to adjourn the matter.

43. I am satisfied that the trial judge afforded the plaintiff fair procedures and that he had the benefit of a fair trial. The difficulties in his case - arising from the manner in which he chose to pursue it - and the options available to him were clearly explained and he was given every opportunity to both present his case and to rectify the difficulties in it. He chose to proceed on one narrow ground and did not apply to adjourn his proceedings to rectify the flaws in the case. The trial judge ruled that even the narrow point remaining could not properly be determined in the absence of the receiver and so, at the application of the defendant, struck out the proceedings. In the circumstances there was no want of the fair procedures and there is no ground to set aside the decision of the High Court on the basis that the plaintiff was not afforded an opportunity to be heard or to have his case tried.

44. In reaching this conclusion I am conscious of the fact that counsel for the defendant quite fairly conceded that there was no *res judicata* between the plaintiff and the defendant in relation to the manner in which the defendant entered the property in March 2019. Whether there are other hurdles which might preclude the plaintiff from succeeding in any new proceedings which he might choose to bring in the future is not a matter for this court to comment upon.

45. Insofar as the plaintiff says that his proceedings were in fact properly constituted, he says this is so by reason of the third-party proceedings issued by the defendant against the receiver and he asserts that as a result the receiver was a party to his action. The plaintiff then argues that the receiver as a third party will be bound in any event to a judgment delivered in his proceedings pursuant to Order 16 r.5 RSC and that the receiver's non-participation in the proceedings was merely due to the defendant's *"abandonment"* of the third-party proceedings (which is presumably a reference to the settlement of those proceedings.)

46. Quite apart from the fact that this argument appears not to have been made in the High Court or as a ground of appeal, the plaintiff's case is fundamentally misconceived because there is no *lis* between the plaintiff and the receiver. The commencement by the defendant of third-party proceedings against the receiver did not have the effect that the receiver became a defendant to the plaintiff's action and nor did it otherwise constitute the receiver as a respondent to the plaintiff's claim. The plaintiff did not amend his pleadings or serve them on the receiver after the receiver was joined as a third party, and this is consistent with the fact that the parties to the plaintiff's action remained unchanged after the third-party proceedings against the receiver were commenced. The effect of issuing and serving a third-party notice is to create a *lis* between the defendant and the third party which can - though need not - be tried in conjunction with the proceedings between the plaintiff and the defendant. It does not create a *lis* between the plaintiff and the third party. The plaintiff must join the intended third party as a co-defendant for this to occur. The distinction between a third party and a defendant is made clear in Order 16, rule 2 which expressly refers to a plaintiff adding the third party as a defendant if he so wishes. It follows logically, that if this is not done, then the third party is not a defendant.

47. The plaintiff's reliance on the provisions of Order 16, rule 5 is misconceived. A defaulting third party is deemed to admit the plaintiff's claim only insofar as the defendant relies on that claim in seeking an indemnity and contribution against it. Rule 5 does not provide that a defaulting third party admits the plaintiff's claim *to the plaintiff*. It cannot be interpreted as having the effect that the receiver in this case, when he settled the defendant's third-party claim, was rendering himself liable to defend the plaintiff's claim when the plaintiff had not in fact brought any claim against him.

48. I entirely agree with the conclusions of the trial judge that the receiver was not a party to the plaintiff's proceedings by virtue of the fact that he had been joined as a third party to the proceedings.

49. The trial judge was correct in holding that it was not open to the plaintiff to seek substantive relief *i.e.*, the invalidity of the mortgage deed or the invalidity of the appointment of the receiver without the interested parties, the bank and the receiver being a party to the proceedings and being in a position to be heard in their defence. He could not seek to get around this difficulty by suing the defendant alone and then requiring the defendant, in defence of the claim in trespass made by the plaintiff, to prove the validity of the mortgage and the appointment of the receiver in order to establish the lawfulness of his entry onto the Property.

50. Counsel for the plaintiff quite correctly acknowledged that the receiver is the *legitimus contradictor* to any argument that even a validly appointed receiver must obtain an order for possession from the court before the receiver is lawfully entitled to take possession of the secured lands. This effectively precluded the court in these proceedings-to which the receiver is not a party- from hearing the narrow issue which the plaintiff wished to pursue regarding the necessity for a receiver to obtain an order of court before his agent can affect entry of a premises on his instructions. There can of course be no case requiring a security firm to obtain an order for possession in advance of acting upon instructions of a receiver to affect a possession of a premises, contrary to what was submitted in oral argument. Any such party could never have a proprietary interest in the secured property and therefore could never been entitled to such an order. Their entitlement to act is as agent of the party with the relevant interest, not as principal.

51. The plaintiff was afforded a fair trial of his case and there was no question of the court failing to uphold his constitutional right to property or his good name because his

proceedings were struck out in the manner I have described. Dismissing a case against a defendant because it is bound to fail does not infringe a plaintiff's constitutional rights and it upholds the rights of defendants not to be vexed by wholly unmeritorious litigation which is bound to fail, quite apart from ensuring that the processes of the court are not abused by the progressing of such litigation, which can only bring the administration of justice into disrepute if allowed to continue.

52. As to the counsel for the plaintiff's argument that, in effect, the claim was struck out as being bound to fail when no motion has been brought pursuant to 0.19 r.28 or the court's inherent jurisdiction, that argument is entirely misconceived insofar as it suggests that a defendant cannot raise this by way of objection or defence at the trial proper without having first brought such a motion. Such a motion is merely an interlocutory step that a defendant *may* wish to take to avoid the cost and inconvenience of a full trial, but in no sense can it be said that the failure to do so somehow precludes the defendant from making the same argument at the trial itself. This contention was not, in any event, raised in the High Court or in the notice of appeal and cannot be raised now. Furthermore, the issue raised by the court at the outset was one which had been squarely pleaded by the defendant in the opening paragraphs of his defence. Therefore, the plaintiff was aware at all times that he was going to have to deal with the issue and the fact that no motion was brought did not materially alter this position.

53. The plaintiff also complains that it was unjust for the judge not to have adjourned his case to enable the joinder of additional parties and such course would not have prejudiced the defendant, whereas the refusal to adjourn was terminally prejudicial to the plaintiff. I have already explained why, in my view, there was no injustice to the plaintiff arising in circumstances where the non-joinder of relevant parties was not mere oversight by a litigant in person, but on the contrary a deliberate and conscious choice by the plaintiff to embark

on this course for what he saw as tactical reasons. Whether or not the plaintiff would have been in a position to pay costs, there would have been undoubted general prejudice to the defendant in an adjournment which was sought again on a tactical basis to enable a change of horses in mid-stream as it were. Further, it is not clear to me that there was in reality any real prejudice to the plaintiff in circumstances where he remains free to pursue the bank and the receiver if he wishes to do so.

54. Finally, no party is entitled to a written reserved judgment and so this ground of appeal is misconceived. It is a matter solely for the trial judge whether they deliver an ex tempore judgment or chose to reserve judgment and deliver a written judgment thereafter. The requirement is that the judge addresses the fundamental arguments and essential facts and gives reasons for the decision, but this may be done orally and need not be in writing.

Conclusions

55. The trial judge was correct to hold that he could not determine the validity of the mortgage of the Property or the appointment of the receiver in the absence of each from the proceedings, as neither were sued by the plaintiff. The fact that the receiver was joined as a third party, but not a co-defendant, did not rectify this fundamental flaw in the plaintiff's pleadings.

56. The plaintiff could not pursue the issue whether a court order for possession was required before a receiver (or his agent) could lawfully repossess secured property in the absence of the receiver who was the appropriate *legitimus contradictor.*

57. The plaintiff was offered the opportunity to apply to adjourn his case with a view to applying to join the bank and/or the receiver as co-defendants but he declined to do so. He only applied to adjourn the trial after the trial judge had heard further argument and struck out his proceedings against the defendant. The trial judge acted fairly and within his

discretion in refusing the adjournment application at that stage, there was no want of fair procedure or denial of a fair trial. There is no basis for this court to interfere with that decision.

58. For these reasons I would reject the appeal.

59. My provisional view is that the plaintiff has failed in his appeal and the defendant has been entirely successful and so should be entitled to the costs of the appeal. If the plaintiff wishes to contend for a different order he may contact the office of the court of appeal within ten days of the delivery of this judgment and request a short hearing. It should be borne in mind that if a hearing is requested and the proposed order is not varied, the party requesting the hearing may be required to pay the additional costs thereby incurred.

Noonan and Butler JJ. have authorised me to indicate that they have read this judgment in draft and agree with it and the order proposed.