APPROVED [2023] IEHC 246

THE HIGH COURT

Record No.: 2016/6718P

Between:

MICHAEL LEAHY and KATHLEEN LEAHY

Plaintiff

-AND-

BANK OF SCOTLAND PLC, PENTIRE PROPERTY FINANCE LIMITED, PEPPER FINANCE CORPORATION and TOM KAVANAGH

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on the 16th day of May 2023

Introduction

1. The Plaintiffs, a married couple, issued proceedings by Plenary Summons dated 25 July 2016 arising from the first Defendant's transfer of the benefit of two loans made to the Plaintiffs and of the security for those loans to the second Defendant, a mortgage dated 20 August 2004, and the appointment by the second Defendant of the fourth Defendant as receiver over the assets secured by the mortgage, being 11 Kilkenny Street, Castlecomer, Co. Kilkenny ("the Property").

2. The proceedings do not seek to challenge the transfer of the loans and mortgage or seek any injunctive relief in respect thereof. The only injunctive reliefs sought by the Plaintiffs in the proceedings are an injunction compelling the second and third Defendant to remove the fourth Defendant as receiver and an injunction compelling the receiver to vacate the Property.

3. The Plaintiffs delivered a Statement of Claim on 24 October 2016, an amended Statement of Claim on 4 July 2017 and a further amended Statement of Claim on 27 January 2018.

4. By judgment dated 5 April 2019, the High Court (Simons J) dismissed the Plaintiffs' claim against the first Defendant pursuant to Order 19, Rule 28 of the Rules of the Superior Courts. The Court found that the express terms of the Plaintiff's contract with the first Defendant provided for the transfer of the loans. The Court concluded that the Plaintiffs had, in any event, not suffered any loss or prejudice as a result of the transfer of the loans.

5. The Court also found that there was no statutory restriction on the first Defendant transferring the loans to the second Defendant. The Court relied, in this regard, on the decision of the Supreme Court in **Launceston Property Finance v Burke [2017] IESC 62, [2017] 2 IR 798**.

6. The Plaintiffs appealed to the Court of Appeal which rejected the appeal in a judgment dated 12 July 2021 ([2021] IECA 194).

7. In rejecting the appeal, the Court agreed with the finding of the High Court that there was no statutory preclusion on the transfer of loans, and rejected the Plaintiffs' contention that the decision in **Launceston** could be distinguished on the facts from those at issue in the Plaintiffs' proceedings. The Court rejected the arguments that the High Court had misapplied **Launceston** in its judgment on the strike out application in these proceedings and in a number of other judgments, **Hogan v Deloitte [2017] IEHC 673**, **Moroney v Property Registration Authority [2018] IEHC 379** and **Geary v Property Registration Authority [2018] IEHC 727**.

8. The Supreme Court refused an application for leave to appeal ([2022] IESCDET 3) on 13 January 2022.

9. The second, third and fourth Defendants delivered a Defence and Counterclaim on 24 July 2018 and an amended Defence and Counterclaim on 11 July 2023.

10. On 7 August 2020, the loans and mortgage were transferred from the second Defendant to the third Defendant. The third Defendant had, prior to then, operated as an asset servicing agent on behalf of the second Defendant.

11. On or about 16 March 2023, the second Plaintiff received a notice from the third Defendant stating that it had agreed to transfer the benefit of the Plaintiffs' loans and mortgage to Everyday Finance DAC ("**Everyday Finance**").

12. In this application, the Plaintiffs seek an interlocutory injunction restraining that transfer.

Arguments

13. There was no dispute between the parties as to the relevant principles to apply. The Plaintiffs referred to the **Campus Oil** test and also to the more recent refinement of that test in **Okunade v Minister for Justice** **[2012] IESC 49, [2012] 3 IR 152** and in **Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited** **[2019] IESC 65, [2020] 2 IR 1**.

14. In order to obtain an interlocutory injunction, the Plaintiffs must show –

    i. That there is a serious issue to be tried;
    ii. That damages are an adequate remedy;
    iii. That the balance of convenience or balance of justice lies in favour of granting the injunction.

15. As made clear in the more recent cases, a rigid application of the above tests should be avoided and any application should be approached with a recognition of "*the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice where the legal rights of the parties have yet to be determined.*" (see, **Merck, Sharp & Dohme** at paragraph 64(8)).

16. The Plaintiffs are representing themselves in these proceedings and it was the first Plaintiff who presented the application for the injunction. In so doing, he placed

emphasis on the flexible nature of the remedy, especially where, as in **Okunade**, personal rights were in issue.

17. The first Plaintiff argued that there was clearly a serious issue to be tried. His principle submission in this regard was directed to the entitlement of the second Defendant, as an unregulated entity, *to acquire* the benefits of the loans and mortgage from the first Defendant. He very fairly accepted that "going forward" the Plaintiffs would have to deal with the implications of the decision of the Court of Appeal that the first Defendant was entitled *to transfer* the benefit of the loans to the second Defendant. However, the Plaintiffs contend, as they did in the Court of Appeal, that the decision in **Launceston v Burke** is not authority for the proposition that a regulated entity may transfer a loan and mortgage to an unregulated entity and that the Court of Appeal had accordingly erred in relying on that decision when concluding that such a transfer was lawful. He says, therefore, that he has identified a serious issue to be tried.

18. The first Plaintiff also relied on the history of the Defendants' dealings with him and his wife, as set out in the pleadings, and what he claims is the Defendants' unfair and unlawful treatment of them, as evidencing a serious issue to be tried. He says that they paid in excess of €250,000 in order to avoid the loans going into default between 2009 and 2015. He further states that they did not seek forbearance from the first Defendant as that would have affected their ability to buy back the loans, something which was being discussed with the first Defendant and that an "agreement in principle" was reached allowing them to buy back the loans. He says that notwithstanding this agreement in principle, the first Defendant delayed in providing the name of an approved valuer and the loans were transferred to the second Defendant in April 2015. The second Defendant appointed a receiver in February 2016.

19. When the loans were transferred to the second Defendant and the fourth Defendant was appointed as receiver, the Plaintiffs had discussions with the third Defendant (as agent for the second Defendant) and the receiver. They were told that forbearance was not available and that they would have to repay the loans in full. The Plaintiffs say that there was a failure to advise them when the second Defendant became a regulated entity.

20. What the first Plaintiff describes as the Plaintiffs' core point was the failure by the Defendants to provide the Plaintiffs with the benefit of the moratorium contained in the Code of Conduct on Mortgage Arrears (CCMA). In this regard he notes that the Code of Conduct for Business Lending to Small and Medium Enterprises (CCBLSME) expressly incorporates the CCMA. Under the heading '**Security**', the CCBLSME provides, at paragraph 10 that:

> *Any enforcement of a personal guarantee over a principal private residence must be in accordance with the Code of Conduct on Mortgage Arrears.*

21. The Plaintiffs say that this applies to them because the Property is now their principal private residence, although this is disputed by the Defendants. As a consequence of this 'incorporation by reference' of the CCMA in to the CCBLSME, the Plaintiffs claim that they are entitled to the benefit of the judgment in **Irish Life and Permanent v Dunne** **[2015] IESC 46, [2016] 1 IR 92**. That case concerned the legal implications of Provision 56(b) of the CCMA which provides:

> 56. Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower's primary residence, where:
>
> a) the lender has made every reasonable effort under this Code to agree an alternative arrangement with the borrower or his/her nominated representative; and
>
> b)
>
> (i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or
>
> (ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29.

22. As appears, Provision 56 provides for a moratorium period before which a lender cannot commence legal proceedings for repossession. The Supreme Court concluded in **Irish Life and Permanent** that a Court hearing an application for possession cannot make an Order for possession unless that Court is satisfied that there had been no breach of the moratorium set out in the CCMA.

23. The Plaintiffs claim that the Defendants failed to provide the benefit of the moratorium and improperly classified them as “not co-operating” in breach of the terms of the CCMA.

24. In addition, the first Plaintiff places significant emphasis on the extent to which he and his wife have invested in the Property the subject matter of the mortgage and the degree of upset that has already been caused to them and that may be caused to them if they lose possession of the Property. He says that the Plaintiffs have been maintaining the premises at their own expense since the proceedings commenced. It is in this respect, in particular, he relies on **Okunade** and in arguing that damages would not be an adequate remedy.

25. The first Plaintiff explains that the purpose of the proceedings was to have the properties returned to him and his wife and that that was their understanding of what would happen if they won their case.

26. Taking all those issues together, the Plaintiffs say that they have made out an arguable case and that the balance of convenience favours the grant of an injunction. They note that if the third Defendant is not permitted to transfer the loan to Everyday Finance, this will have very limited impact on it – it will still have the benefit of the loan. By contrast, if the loan is transferred, the Plaintiffs will be put to the trouble of having to join Everyday Finance to the proceedings and their statutory rights will be put in jeopardy.

27. The Defendants dispute much of the foregoing and, in particular, the Plaintiffs contention that this Court can ‘look behind’ the Court of Appeal decision in these proceedings in considering the lawfulness of the acquisition by the second Defendant from the first Defendant. They also dispute the Plaintiffs’ entitlement to rely on the provisions of the CCMA.

28. However, for the purpose of this application, the Defendants do not ask this Court to conclude that there is no arguable case in the proceedings. In this regard, it is worth noting that the second to fourth Defendants had issued a motion to have the proceedings struck out on the basis that the proceedings were improperly pleaded. However, they

elected not to proceed with that application on foot of an agreement by the Plaintiffs to provide an amended Statement of Claim.

29. Rather than argue that there is no arguable case at all, the Defendants resist the application for an injunction on the basis that the Plaintiffs have no arguable case for seeking to restrain the proposed transfer the subject of the injunction application. As the Defendants put it, there has to be a link between the injunctive relief sought and the reliefs sought in the proceedings and here, they say, there is no such link.

30. The Defendants make this argument, principally, by reference to the case pleaded by the Plaintiffs. In particular, they note that the Plaintiffs have not sought any relief in these proceedings to restrain or reverse the transfer from the first Defendant to the second Defendant. Moreover, the Defendants claim that none of the reliefs sought in the proceedings would be in any way adversely affected by the proposed third transfer of the loans – from the third Defendant to Everyday Finance – and thus there is no arguable basis for seeking to restrain that transfer.

31. Insofar as the Plaintiffs claim that their goal is to have the properties returned to them, it is accepted that that may be the Plaintiffs' hoped for outcome if the proceedings are successful, but "the elephant in the room" as counsel for the Defendants puts it, is that there is no claim in relation to the mortgage at all. The Defendants refer to the first of the steps referenced in **Merck, Sharp & Dohme**, that where a permanent injunction is unlikely to be granted at the trial, it is "extremely unlikely" that an injunction would be granted on an interlocutory basis.

32. The Defendants contend that the effect of the transfer will be 'neutral' as far as the Plaintiffs are concerned, or could even have a positive impact on the Plaintiffs' position. The Defendants will still have to answer the claims made against them by the Plaintiffs, and all of the reliefs sought will remain available. However, the proceedings include a counterclaim by the third and fourth Defendant for possession of the properties. That counterclaim will fall away unless, as may be anticipated, Everyday Finance seek to be substituted in the proceedings and instruct the fourth Defendant to maintain the claim. If that occurs, the Plaintiffs will be in the same position as they are now; if it doesn't, then their situation will be improved (as they will no longer be facing possession proceedings).

33. Regarding the Plaintiffs' arguments about their attachment to the property and their investment in it, the Defendants say that those are matters which might be relevant if what was proposed was the transfer of the property to a third party, but all that is proposed here is the transfer of the benefit of the loans and security.

34. The Defendants argue that damages would be an adequate remedy for the Plaintiffs and rely on the decision in **Dagenham Yank Limited and v IBRC [2014] IEHC 192**, in which the High Court (Gilligan J) refused an injunction to restrain the sale of a loan even though an arguable case had been established, on the basis that damages would be an adequate remedy. Even if the Plaintiffs can overcome the difficulties presented for them by the Court of Appeal decision in these proceedings, any loss which they suffer can be adequately compensated in damages.

35. The Defendants argue that the balance of convenience lies against the grant of the injunction in circumstances where it will have to incur inconvenience and expense in omitting these loans from the transfer to Everyday Finance if the injunction is granted but, by contrast, the Plaintiffs will not be affected at all if the loans are transferred. The Defendants noted the absence of an undertaking as to damages and, in any event, query the value of such an undertaking. I note that the first Plaintiff subsequently confirmed the Plaintiffs' willingness to grant an undertaking.

Decision

36. Much of the Plaintiffs' argument was concerned with the correctness of the Court of Appeal judgment in these proceedings in which it struck out the proceedings against the first Defendant on the basis, *inter alia*, that there was no barrier to the first Defendant, a regulated entity, transferring the benefit of the Plaintiffs' loans and security to the second Defendant. The Plaintiffs argue that this decision involved a misapplication of the Supreme Court decision in **Launceston Property Finance DAC v Burke**.

37. In circumstances where the Defendants have not asked me to refuse the injunction on the basis that the Plaintiffs have no arguable case against the other Defendants in light of that judgment, I will refrain from offering any view on the impact of that judgment

on the Plaintiffs' remaining claims. However, I should say, that this should not be taken by the Plaintiffs as an encouragement to pursue arguments in these proceedings that the Court of Appeal decision was wrongly decided. It does not seem to me that there is any substance to the argument that the Court of Appeal misapplied the decision in **Launceston** and, in any event, this Court is clearly bound by the decision of the Court of Appeal even if there were grounds for considering that it had somehow erred.

38. Whatever about the merits of arguments advanced by the Plaintiffs in these proceedings, I am satisfied that they have not made out an arguable case for the grant of the injunction sought here. The injunction sought does not relate to any relief sought in the proceedings. There is no relief sought challenging the loans or the security granted for them, no relief seeking to restrain the transfer of those loans and security – which has occurred twice already – and none of the reliefs claimed will be compromised if the loans are transferred again, to Everyday Finance.

39. As noted in **Merck, Sharp & Dohme**, the grant of a temporary injunction will be "extremely unlikely" where the grant of a permanent injunction at the trial of the action is not a possibility. On the basis of the pleaded case, there is no possibility of such a permanent injunction here. Although the first Plaintiff referred to amending pleadings, this application must be assessed on the basis of the case as pleaded. It may be that the Plaintiffs' goal is that, if successful in these proceedings, the Property will be returned to them, unencumbered. That may well be the commercial outcome that they seek to achieve, but it is not a relief which they have sought in these proceedings.

40. In circumstances where I have concluded that the Plaintiffs have not made out an arguable case for the grant of an injunction, it is not strictly necessary for me to consider the question of the adequacy of damages or the balance of convenience. For completeness, I am satisfied that damages would be an adequate remedy if there were any claim regarding the transfer of the loans. Just as in **Dagenham Yank Limited** the transfer of the loans will not deprive the Plaintiffs of any of their remedies, which appear to be quantifiable in damages.

41. Moreover, I am satisfied that the balance of convenience would favour the refusal of relief. Although I think that the inconvenience to the Defendants is relatively slight, they are *prima facie* entitled to exercise their contractual rights. It is difficult to see any

inconvenience to the Plaintiffs - they are not obliged to join Everyday Finance to the proceedings and it is even possible that the transfer will work to the Plaintiffs' benefit.

42. In the circumstances, I will refuse the Plaintiff's application.