APPROVED [2024] IEHC 116

THE HIGH COURT

Record No: 2022/5055 P

Between:

DAVID IAN JACOB and CHARLES WILLIAM ALLEN

Plaintiffs

-AND-

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY, CORMAC RYAN and IAN WIGGLESWORTH

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 1 March 2024

Introduction

1. On 26 February 2019, in proceedings entitled *Shoreline Residential DAC v David Ian Jacob, Record No. 2017/156* ("**the Possession proceedings**"), the Circuit Court granted the plaintiff in those proceedings ("**Shoreline**"), an Order for possession of a property known as Park House, Bree, Enniscorthy, County Wexford ("**the Property**"). Mr Jacob, the defendant in those proceedings and the first plaintiff in these proceedings, appealed that order by Notice of Appeal filed on 7 March 2019.

2. In April 2019, Shoreline transferred all its rights, title and interest in the facility and security the subject matter of the Possession proceedings to the first Defendant herein ("**Pepper**"). Pepper was added as a co-plaintiff in the Possession proceedings by order of the High Court (Meenan J) made on 16 March 2020.

3. The appeal was heard on 8 July 2021 and judgment delivered on 26 August 2021 (**[2021] IEHC 654**). By order dated 6 October 2021, the High Court granted Pepper possession of the Property. Mr Jacob applied to the Supreme Court for leave to appeal. That application was refused by determination dated 30 March 2022. As a consequence, Pepper's entitlement to possession of the Property has been finally determined by the courts.

4. Notwithstanding the final determination of Pepper's entitlement to possession of the Property, the plaintiffs issued proceedings in this Court by plenary summons dated 30 September 2022 in which, in substance, the plaintiffs query Pepper's entitlement to possession.

5. Unsurprisingly, in those circumstances, the defendants have brought an application to strike out the plaintiffs' case, either pursuant to Order 19, Rule 28 of the Rules of the Superior Courts or, in the alternative, pursuant to the inherent jurisdiction of the Court.

The Plaintiffs' Claim

6. The Plenary Summons seeks a total of 23 substantive reliefs, principally in the form of declarations and damages. The second and third Defendants are named in the plenary summons on the sole basis that they are directors of Pepper.

7. The plaintiffs claim that Pepper has not established that it has sufficient title to the Property to be entitled to possession and that its failure to do so prevents the plaintiffs from discharging the charge on the Property. The basis for this claim is far from clear. In part, it appears to rest on the proposition that Pepper has not provided something called a "*certified, Formal Letter of Redemption*". It is pleaded that without this letter "*declaring all of the alleged contractual obligations and under what authority [Pepper] is holding beneficial title absolute*", the plaintiffs are left in a position of confusion such that they cannot discharge the charge on the Property. The Plenary Summons seeks a declaration that the Circuit and High Court orders made in the Possession proceedings be vacated until the defendants prove their title.

8. Separately, it seems to be argued that Pepper is a legal fiction that cannot own property or maintain any claim superior to any living man, and that it can't be registered as the legal owner of the Property.

9. The Summons seeks orders that Pepper's charge be vacated and that Pepper not sell the Property or trespass thereon. It also seeks a declaration as to the plaintiff's [sic] natural right to use a promissory note to discharge the charge. No explanation of what this type of promissory not is, has been provided.

10. The Statement of Claim delivered on 6 December 2022 seeks somewhat different, more limited, relief. It is explained in the Statement of Claim, in apparent explanation of Mr Allen's involvement in the proceedings, that in 2013 Mr Jacob placed the Property in a "private irrevocable family trust", with Mr Allen as trustee, to facilitate the successional planning of Mr Jacob's estate. No evidence of the trust has been furnished. Notably, Mr Jacob doesn't appear to have referred to it in the course of the Possession proceedings despite its alleged creation in 2013. Mr Allen's role as trustee of this purported trust appears to be his only interest in the proceedings.

11. The Statement of Claim then asserts that the plaintiffs are seeking production "*by way of original wet inked documentary proof from the Defendants*" of a list of documents that the defendants are relying on to make their claim. Failing production of the documents, the plaintiffs seek immediate vacation of the charge on the Property and damages for the defendants' malicious claim. Notably, the Statement of Claim concludes with the following:

> *"We both, the Plaintiffs are of the opinion, that had all of the above referenced information requested, been provided, it would have made a substantive, material difference to the determination of the honourable David Ian Jacob's earlier Circuit Court and subsequent High Court proceedings."*

Motion to Strike Out

12. The defendants issued a motion on 9 June 2023 seeking to strike out the plaintiffs' claim on the basis, in substance, that the plaintiffs were seeking to look behind the High Court order of 6 October 2022.

13. In response to the motion to strike out, the plaintiffs each delivered almost identical affidavits sworn on 19 July 2023. The height of what is asserted in these affidavits is that the plaintiffs had brought the proceedings in a bid to determine to whom the first plaintiff was obligated, claiming that there was confusion as to which entity actually has beneficial interest in and entitlement to settlement of the charge.

14. A further affidavit sworn on 15 January 2024 was delivered by the second plaintiff. In this affidavit, Mr Allen avers that the proceedings were not taken against the various court orders and that the plaintiffs do not seek to challenge them. However, the affidavit goes on to assert that the defendants have never provided sufficient documentary evidence to prove their claim.

15. At the hearing of the defendants' motion on 19 January 2024, only Mr Allen appeared, notwithstanding that I was satisfied on the evidence before me that Mr Jacob was aware of the hearing date, as confirmed by Mr Allen. Mr Allen confined his submissions to reading aloud his affidavits, notwithstanding that counsel for the defendants had already opened Mr Jacob's almost identical affidavit in full, and I made clear that I had, in any event, read all the affidavits prior to the hearing commencing.

The High Court Judgment

16. In his judgment in **Shoreline v Jacob**, Barr J reached a number of conclusions relevant to this application. At paragraph 43, he rejected an argument that Pepper hadn't established an entitlement to the order for possession:

> *"To deal firstly with the issue of locus standi, the court is satisfied that the plaintiffs have locus standi to seek an order for possession of the property. From the affidavits sworn by Mr. Johnston, Ms. Loftus, Mr. Dowling and Mr. Broderick, and the documents exhibited thereto, the court is satisfied that the original loan, which belonged to INBS, was transferred to Anglo/IBRC; thence to the first named plaintiff and thereafter was transferred by the first named plaintiff to the second named plaintiff."*

17. And at paragraph 57:

"Having regard to the matters that must be established by a mortgagee in order to obtain an order for possession of property pursuant to s. 62(7) of the 1964 Act, and having regard to the evidence contained in the affidavits and in the documents exhibited thereto, as outlined above, the court is satisfied that in the present case, the first named plaintiff was entitled to an order for possession of the property at the time that it was granted same by order of the Circuit Court on 26th February 2019. The court is further satisfied that having regard to the matters set out in the affidavits sworn by Ms. Loftus and Mr. Dowling, the loan the subject matter of the proceedings herein and the mortgage which secured same, were transferred by the first named plaintiff to the second named plaintiff. Accordingly, the court is satisfied that the second named plaintiff has established that it is entitled to an order for possession of the property."

18. At paragraphs 65 and 66, he addressed the questions over the documentation relied on by Pepper:

"The third ground of complaint raised by the defendant, was to the effect that he had not been given access to the original unredacted documentation on foot of which the plaintiffs brought their claim. For two reasons the court does not regard this as a valid defence to the plaintiffs' application. Firstly, when the matter was before the Circuit Court, the defendant brought a motion seeking access to a very large amount of documentation as set out at para. 17 of his affidavit, which appears to have been sworn on 9th March 2018. By order dated 10th April 2018, the Circuit Court gave the defendant four weeks within which to make an appointment with the first named plaintiff in order to view the documents, as listed at para. 3 of his notice of motion in respect of the documents at subparas. (a), (b), (c), (e) and (g) thereof. It is not known whether the defendant exercised his rights pursuant to that order. However, it is clear that he did not appeal the order. Therefore, he cannot now complain in relation to lack of sight of the other original documentation sought in his notice of motion. If he was dissatisfied with the terms of the Circuit Court order, his remedy was to appeal that order at that time. He did not do that."

66. Insofar as the defendant complains that he has been furnished with redacted copies of various documents showing the transfer of the loan account and mortgage from INBS to Anglo and on to the first named plaintiff and thence to the second named plaintiff,

the court is satisfied that, while the transfer documentation has been heavily redacted, the relevant parts which relate to the interests of the defendant, have not been redacted. Therefore, his rights and his ability to defend himself in this application have not been adversely affected by the redaction of the material."

19. Finally, at paragraphs 72 and 73, he addressed the question of Pepper's reliance on hearsay evidence:

"Finally, the defendant submitted that the court should not grant an order for possession to the plaintiffs, as their case was based on hearsay evidence, relying on documentation that emanated from the INBS in relation to creation of the original loan account and execution of the mortgage. The defendant does not challenge the fact that he signed the letter of loan offer; nor that he received the amount of the loan; nor that he executed the subsequent indenture of mortgage with the benefit of advice from his solicitor; in short, he does not challenge any of the documentation that has been put forward by the plaintiffs as the basis of their claim. 73. If the defendant wished to challenge the letter of loan offer, or the acceptance thereof, or the indenture of mortgage, he could have challenged same in his many affidavits. He did not do so. Furthermore, if he wished to challenge the evidence of any of the deponents, who had sworn affidavits on behalf of the plaintiffs, he could have served notices to cross – examine on them. He did not do so. In such circumstance, he cannot realistically challenge the evidence on which the plaintiffs have brought their application herein. The court is entitled to act on the documentary evidence that has been put before it by the plaintiffs, as that documentary evidence was not specifically challenged by the defendant."

20. The Supreme Court Determination on Mr Jacob's application for leave to appeal (**[2022] IESCDET 38**) is also of relevance:

"10. The Court is satisfied that none of the issues raised by the applicant in the proceedings amount to matters of general public importance within the meaning of the constitutional criteria. The High Court applied well-settled case law, and this Court cannot see that any complaint of unfair procedures is made out.

11. However, the Court was concerned that the applicant might, in the foregoing circumstances, have somehow been denied his right to the redeem the mortgage. It therefore communicated with the parties, through the Registrar, to enquire whether the applicant still maintained the offer to pay the full amount due on foot of the mortgage, and whether the respondents were prepared to accept payment. The respondent simply stated that it had received no payment. The applicant confirmed that he was willing to discharge the charge on the folio by way of a negotiable instrument, but stated that his facility provider was not available until the end of February. He hoped to be able to expedite matters quickly thereafter. The Court accordingly adjourned consideration of the matter, on the basis that the applicant would have until the 14th March 2022 to discharge his liability in a manner and an amount satisfactory to the respondent.

12. Thereafter the applicant engaged in increasingly combative and inappropriate correspondence with the Office of the Court, in which he denied having made an offer to "pay", appeared to consider that the Court was denying him the right to employ particular means of discharging his liability, and further appeared to consider that the Court and Office were somehow obliged to facilitate him in some 5 entirely unclear manner. Most recently, he has said that he is prepared to settle the debt by a "promissory note" with no indication as to what is intended.

13. The respondent has, since the 14th March 2022, confirmed that it has received no payment from the applicant.

14. In the circumstances the Court does not consider that any right of the applicant has been interfered with, and is satisfied that the interests of justice are not engaged. Accordingly, leave to appeal will be refused."

Applicable Principles

21. In **Scotchstone Capital Fund Ltd v Ireland [2022] IECA 23**, the Court of Appeal summarised the principles applicable to applications to strike out proceedings (at para. 290):

"In essence these are:

a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;
b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;
c) The burden of proof is on the defendant;
d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;
e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;
f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;
g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;
h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;
i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;
j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;
k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;
l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and
m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

22. In **<u>Mullaney v Ireland</u> [2023] IECA 195**, the Court of Appeal (Costello J) noted that it is impermissible to bring proceedings for the purpose of challenging final orders made in earlier proceedings (at para. 8):

> *"It is an abuse of process to bring proceedings whose purpose and effect is to launch impermissible collateral attacks on valid, final, un-appealed Orders of the High Court. The Bank is entitled to the benefit of those final Orders."*

23. The High Court (Roberts J) applied those principles in a decision which has particular relevance to these proceedings, **<u>Allen and Anor v Bank of Ireland Group plc and Ors</u> [2023] IEHC 428**. In that case, the court struck out separate proceedings taken by the second plaintiff in these proceedings in strikingly similar circumstances to this case. As here, the property in question had purportedly been placed in an irrevocable trust, possession proceedings had been brought by the defendants and finally determined, and an Order for Possession had been made. As here, the main relief seemed to relate to a claim to be entitled to a "formal letter of redemption", the absence of which prevented the plaintiffs from settling matters. As noted by Roberts J, it is unclear to what a formal letter of redemption refers. In that case, Mr Allen confirmed that it didn't mean a redemption figure, rather it was a letter, apparently, which would declare all contractual obligations of the defendant and under what authority they were holding absolute beneficial title to the property at issue in those proceedings.

24. Roberts J was scathing about the pleadings in that case which she described variously as "incomprehensible" and "entirely incoherent", and she struck out the plaintiffs' claim in that case. Many of reliefs claimed in that case are identical to those pursued in these proceedings, including claims relating to a so-called formal letter of redemption, promissory notes and damages for malicious claims.

Application to the Plaintiffs' case

25. It is abundantly clear that, whether considered pursuant to Order 19, Rule 28 or the inherent jurisdiction of the Court, the plaintiffs can only be regarded as an abuse of process which is bound to fail. The plaintiffs are seeking to pursue matters which have already been

conclusively determined by the High Court in these proceedings or rejected as unstateable in previous proceedings involving the second plaintiff. This is apparent from any analysis of the plaintiffs' pleadings, not least the final paragraph of the Statement of Claim quoted above. It becomes all the more apparent from the affidavits filed by each plaintiff. As in **Mullaney**, it is clear that the plaintiffs intention in bringing the proceedings is to mount a challenge to the validity of the order for possession made in the earlier proceedings. This, they are simply not permitted to do.

26. The height of the plaintiffs' claim appears to be that there is some confusion about the party entitled to the benefit of the charge on the Property. The only confusion is that created by the plaintiffs' obscure and repetitive pleadings. The High Court judgment has already determined that Pepper is entitled to the benefit of the charge in concluding that it was entitled to the order for possession.

27. Insofar as there was any debate about the quality of the evidence relied on by Pepper, that is an argument which was assessed and rejected in the earlier proceedings.

28. It would clearly be an abuse of process to permit the plaintiffs to pursue those arguments in fresh proceedings; any such claim can only be regarded as an attempt to look behind the High Court Order, notwithstanding the plaintiffs' protestations to the contrary. The issues are manifestly *res judicata*.

29. Insofar as the plaintiffs seek more fanciful reliefs, e.g. in relation to the use of a promissory note, in relation to a so-called formal letter of redemption, damages for malicious claims, "wet ink" copies of documents, or in relation to the existence of the purported trust (although it is far from clear whether any relief is sought on this basis), Roberts J has already made clear that there is no basis for such reliefs. I note for completeness that Pepper has provided, on request, redemption figures. Indeed, it had done so when the matter was pending before the Supreme Court. Thus, there can have been no doubt in the plaintiffs' minds how to invoke Mr Jacob's equity of redemption.

30. In her judgment, Roberts J deprecated in the strongest terms the practice of Mr Allen in providing "*a template of hopelessly misconceived "*irrevocable private trusts*" ... to unrepresented litigants, apparently for reward*", describing it as "*a most unsatisfactory*

position". I can only echo that concern, which is heightened by these proceedings in which, it would appear, almost identical and wholly unstateable arguments have been pursued by the plaintiffs in circumstances where, Mr Allen in particular, can have had no realistic expectation that they would have any prospect of success. All that has been achieved is delay and additional expense for the parties involved, which will, no doubt, ultimately be laid at the door of Mr Jacob when Pepper comes to realise its security.

31. I will strike out the proceedings both pursuant to Order 19, Rule 28 and the inherent jurisdiction of the Court. The pleadings disclose no stateable cause of action, and there is no amendment or further step in the proceedings capable of addressing that deficiency. More broadly, the proceedings are clearly an attempt to re-try issues which have already been determined and are, therefore, *res judicata*.

32. I will list the matter on 15 March 2024 to deal with any ancillary matters and costs.