THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2019/76
High Court Record No. 2018/5971 P
Neutral Citation No. [2022] IECA 218

NO REDACTION NEEDED

Woulfe J.
Murray J.
Ní Raifeartaigh J.

CASTLETOWN FOUNDATION LIMITED

RESPONDENT/PLAINTIFF

- AND -

GEORGE MAGAN

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Murray delivered on the 6th of October 2022

Issues

1. The background to these proceedings is detailed in the comprehensive judgment of Haughton J. giving rise to this appeal ([2018] IEHC 653). I will not rehearse the context here save and insofar as necessary to address the matters now before this court. Those issues arise from the defendant's contention that the High Court erred in (a) refusing to accede to the defendant's application to dismiss or stay parts of the plaintiff's claim and/or (b) in granting summary judgment against the defendant in the sum of €571,893.00. Shortly before the hearing of the appeal the defendant issued a motion the object of which was to enable the introduction into the appeal of further evidence. He sought to make new arguments on foot of that evidence. Those further arguments dovetailed with some propositions advanced for the first time in the defendant's legal submissions to this court. I will deal first with those grounds of appeal that reflect the arguments made to the High Court, and then with the new arguments and evidence. The former reduce themselves to two broad headings.

Defendant's application to dismiss

2. As to the first, the plaintiff was the owner of Castletown House (also known as Castletown Cox) Co. Kilkenny ('*Castletown'*). The plaintiff was at the time of the High Court proceedings itself owned and controlled by Yew Tree Trustees Ltd. (formerly DW Trustees Ltd.), the trustee of the Eaglehill Trust. Two of the defendant's three children are the beneficiaries of the Eaglehill Trust. The trust is administered in Jersey.

3. The defendant had been a tenant in Castletown. The plaintiff had purported to terminate the lease first because of an intention to sell the property, and thereafter because of the failure of the defendant to pay rent. The defendant then took steps to assert a right to a new tenancy. The plaintiff instituted these proceedings and included in the relief sought

(a) a declaration that the tenancy agreement with the defendant was validly terminated because of the failure of the defendant to pay rent due and owing, and (b) a declaration that the defendant was not entitled to seek a new tenancy or other relief pursuant to Part II of the Landlord and Tenant (Amendment) Act 1980 ('*the 1980 Act'*).

4. The defendant's application for an order dismissing, or placing a permanent stay on, these parts of the proceedings was made pursuant to the inherent jurisdiction of the court and/or pursuant to Order 19 Rule 28 of the Rules of the Superior Courts. Those reliefs were dependent on the plaintiff's claims being frivolous or vexatious or an abuse of process and bound to fail.

5. The defendant had based his argument that the claims were bound to fail on the propositions that (a) the issue as to the validity of the termination notice had been referred to the Residential Tenancies Board ('*RTB*') and that having regard to the provisions of the Residential Tenancies Act 2004, as amended ('*the 2004 Act'*) it was exclusively a matter for the RTB to decide that question and (b) the Circuit Court had exclusive jurisdiction to determine the defendant's entitlement to a new tenancy pursuant to the 1980 Act.

Effect of reference to the RTB

6. As to the first of these claims, the trial judge concluded that because the defendant had applied to the Circuit Court for relief pursuant to the provisions of the Landlord and Tenant Acts by reason of being a business user, it was arguable that the 2004 Act was disapplied and, to that extent, that the court should not strike out claims which might otherwise have fallen within the exclusive jurisdiction of the RTB. This, it appears to me, must be correct. Section 3(2) of the 2004 Act identifies those tenancies to which the legislation does not apply. One of these, under s. 3(2)(i) is '*a dwelling ... which is*

the subject of an application made under section 21 of the Landlord and Tenant (Amendment) Act 1980 and the court has yet to make its determination in the matter'. The language used in this ousting section is arguably consistent with its operating whenever an undecided application has been brought under the 1980 Act.

7. Here, the defendant instituted proceedings by Landlord and Tenant Civil Bill dated 19 July 2018 seeking an order declaring that the plaintiff was entitled to a new tenancy in the property and fixing the terms of same. That application was pending when the motion to dismiss was brought. There was, accordingly, no error by the trial judge in concluding that he should not strike out this claim having regard to the high burden placed on a party seeking to dismiss proceedings pursuant to the court's inherent jurisdiction and/or under Order 19 Rule 28. Once the claim was arguable, it would have been inappropriate to dismiss it on foot of an application of this kind.

Circuit Court jurisdiction

8. As to the second part of the motion to dismiss, the defendant's application in the Landlord and Tenant Civil Bill was for a new business tenancy said to arise under s. 13(1)(a) of the 1980 Act. In its proceedings, the plaintiff had sought a declaration that the defendant was not entitled to seek a new tenancy because the letting agreement had been terminated for non-payment of rent and breach of contract (s. 17 of the 1980 Act excluding a tenant from a new tenancy in these circumstances).

9. Section 3 of the 1980 Act vests jurisdiction in the Circuit Court to determine the right to a new tenancy. Normally, therefore, it is to that court that such application should be brought. However, there are authorities suggesting that the High Court retains a residual jurisdiction to determine applications under that Act in exceptional circumstances (*Walpoles (Ireland) Ltd. v. Dixon* (1935) 69 ILTR 232, *Kenny Homes*

Co. Ltd. v. Leonard and Lecorn Ltd. Unreported, Supreme Court, Lynch J., 18 June 1998). Haughton J. deduced from these cases (themselves rooted in the jurisdiction of the High Court prescribed by Article 34.3.1° of the Constitution), the proposition that the High Court retained jurisdiction in an appropriate case to determine issues related to conditions that must be satisfied for a tenant to have an entitlement to claim a new tenancy (at para. 107). It followed that it was arguable that the High Court was not excluded in an appropriate case from determining whether a tenant is disentitled to a new tenancy by virtue of the provisions of s. 17 of the 1980 Act. This jurisdiction, Haughton J. found, could be exercised in circumstances of urgency - although he found that on the evidence before the court, circumstances of urgency had not been established by the plaintiff.

10. On this basis, the High Court decided to stay but not to strike out this part of the plaintiff's claim. Haughton J.'s legal analysis and resolution of the issue was, in my view, correct. The cases show that it was arguable as a matter of law that that court retained a residual jurisdiction to entertain such a claim, so it would not have been appropriate to resolve that issue of jurisdiction in an application of this kind. As to the facts, while finding that urgency had not been established by the plaintiff, it was right to conclude that the plaintiff should not be precluded from litigating s. 17 issues in the High Court if, before a trial was reached in the Circuit Court, there was a genuine and supervening urgency that justified the High Court exercising its jurisdiction.

11. As it happens, Haughton J.'s approach was also proven by subsequent events to have been most prudent as it did become necessary for the High Court to exercise that jurisdiction in respect of the landlord and tenant claims in what the plaintiff claimed were circumstances of urgency. In an *ex tempore* judgment of Hunt J. of 10 September

2019, the High Court concluded that the tenancy was validly terminated, that the defendant was not entitled to relief against forfeiture, that the defendant was not entitled to a new tenancy and that there was no other basis on which the defendant was entitled to possession or occupation of the property. This court dismissed an appeal against that decision ([2020] IECA 363). The moment, as it were, has passed.

Appeal against summary judgment

12. To address the appeal against the grant of summary judgment, it is necessary to say a little more about the facts. The defendant had originally occupied Castletown on foot of a letting agreement of 15 December 2010. That agreement provided for a rent of €100,000.00 per annum together with VAT, payable by monthly instalments. The agreement expired in December 2013, and the defendant continued in occupation under its terms. As of the date of the institution of the proceedings, the last rental instalment had been paid in July 2012. A notice of termination was served by the plaintiff in December 2017 on the basis that the plaintiff intended to enter into a binding agreement to sell the property within three months, and a second notice of termination served in April 2018 on the ground of the failure of the defendant to pay rent. In the evidence submitted by him in response to the plaintiff's application for summary judgment for that outstanding rent, the defendant denied neither the letting agreement nor liability for rent under it, and he did not dispute the amounts claimed. Instead, he contended that he had a *bona fide* defence by way of counterclaim and entitlement to equitable set off such that the application for summary judgment should be refused.

13. Insofar as it was pursued before the High Court, the counterclaim relied upon had two elements – (a) a claim on foot of an alleged agreement for the upkeep and maintenance of Castletown House reached in 2005 arising from which the defendant contended he

had expended €361,167.72 in the period from June 2017 to the date of the proceedings, and (b) claims for damages, including aggravated/exemplary damages, for trespass and alleged forcible entry on and since 23 May 2018. The latter claim was said to arise from the fact that the plaintiff had obtained possession of the property at a point in time after the defendant had referred a dispute between the parties to the RTB (on 10 May 2018) - proceedings of which the plaintiff was not given notice and of which it said it was unaware at the time of the re-entry.

Relevant principles

14. The basis on which the trial judge was required to approach the application for summary judgment on foot of these claims is clear. The power to grant summary judgment should be exercised with caution. The focus is upon whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence to the claim. In addressing that question, it will not be sufficient for the defendant to merely assert a given situation as forming the basis of a defence: the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory (*IBRC Ltd. v. McCaughey* [2014] 1 IR 749). At the same time, judgment ought not be entered where there are credible issues of fact between the parties which, if resolved in favour of the defendant, will disclose a fair and reasonable probability of a defence (*Harrisrange Limited v. Duncan* [2003] 4 IR 1 at p. 7 to 8). Such a defence may be constituted by either a clear and defined legal principle, or a proposition of law contended for by the defendant which cannot be resolved without fuller argument and greater thought: the procedure is properly limited in its application

to those cases in which there are no issues or issues that are easily determinable (*Harrisrange* at p. 7 to 8, *AIB plc v. Griffin* [2020] IECA 221 at para. 15). In many cases, the process can be reduced to a single question, as was put by Hardiman J. in *Aer Rianta* (at p. 623): is it '*very clear'* that the defendant has no case? In resolving that issue, it should be emphasised, the court must assess the overall credibility of the case advanced by the defendant having regard *inter alia* to any uncontested documentary evidence tendered in support of the plaintiff's application. It must also be borne in mind that a defence is not incredible simply because the judge is not inclined to believe the defendant (per Clarke J. in *IBRC Ltd v McCaughey* [2014] IR 749 at p. 759). A defendant's evidence must set out in a clear way why the sum claimed is said not to be due and owing to a plaintiff (*Ulster Bank (Ireland) Limited v. O'Brien* [2015] IESC 96, [2015] 2 IR 656 at para. 3).

15. In a case such as this one in which the defendant denied neither the fact nor quantum of the debt for which judgment is sought but instead sought to resist the plaintiff's application on the basis of an alleged liability of the plaintiff to the defendant, the distinction between a claim that gives rise to a set off, and one that generates only a counterclaim is critical. If the claim can be set off, and if it equals or exceeds in value the plaintiff's claim, it will be appropriate to remit the proceedings to plenary hearing. If, on the other hand, the claim is but a counterclaim, the court should enter judgement and from there consider whether – in its discretion – it should stay execution of the judgment (conditionally or unconditionally) pending the determination of some or all of that counterclaim.

16. In *McGrath v O'Driscoll* [2007] 1 ILRM 203, Clarke J. (as he then was) explained the distinction between counterclaim and set off for this purpose in terms that '*where a*

counterclaim arises out of circumstances which are sufficiently connected to a claim, a set off in equity arises because it would be inequitable to allow the plaintiff's claim without taking the defendant's cross claim into account'. The case law was summarised by this court (Whelan J, with whom Ní Raifeartaigh and Power JJ. agreed) in *Fabri Clad v. Stuart* [2020] IECA 247. Whelan J. explained (at para. 103):

> *'Whether the counterclaim contended for could amount to a defence by way of set-off was considered by Clarke J. in Moohan v. S. & R. Motors (Donegal) Ltd. at para. 9. He observed that the court had a "wider discretion" depending on whether or not the counterclaim arises from an independent set of circumstances. As was observed by Clarke J., when the nature of a defence put forward amounts to a form of cross-claim on the part of the defendant against the plaintiff "then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity to the proceedings." The answer to that question derives from the decision of Kingsmill Moore J. in Prendergast v. Biddle (Unreported, Supreme Court, 31 July 1957), as Clarke J. noted: -*
>
> > *"...the test as to whether a cross-claim gives rise to a defence in equity depends on whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be made out."*
>
> *As Clarke J. continues at para. 10:–*

> *"On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part be set against the claim."'*

17. There are, essentially, two components of any claim based upon an equitable set off: the first is a formal one and requires that there be a close connection between the claim and asserted cross claim. The second depends on a functional test – whether it would be '*unjust'* to allow a claim to be enforced without taking into account the cross claim (*Geldof Metaalconstructie NV v. Simon Carvess Ltd.* [2010] EWCA Civ. 667, [2010] 4 All ER 847, at para. 43). To generate an equitable set off, a claim must meet both of these requirements. However, an important feature of the inquiry into whether a claim does or does not give rise to such a set off will lie in how the parties have chosen to arrange their own legal and commercial relations. If the parties have agreed that there will be no set off, the court should give effect to that choice. So, in *Moohan v S.& R. Motors (Donegal) Ltd* [2008] 3 IR 650, Clarke J. at para 5.6 observed '*the overall test is as to whether, as a matter of construction of the contract taken as whole, it can properly be said that the parties have agreed that there can be no set off.*'

Decision of the trial judge

18. There were various difficulties identified by the trial judge with the manner in which these defences had been attested to by the defendant. These were as follows:

(i) While there was evidence to support the existence of an agreement that both the plaintiff and a company controlled by the defendant (Castletown Estates

Limited) would contribute to Castletown Estates Limited for the upkeep and maintenance of the property, the plaintiff's evidence was that there was never any suggestion that the plaintiff was obliged to reimburse the defendant in relation to this contribution. The defendant failed to deliver affidavits showing that he, rather than Castletown Estates Limited, had any counterclaim.

(ii) That while the plaintiff had delivered affidavit evidence purporting to show that it had made substantial contributions to those providing services to Castletown and that the defendant had made contributions that were significantly less than that sum, the defendant had not controverted that evidence.

(iii) In those circumstances, the court felt, the absence of any real response by the defendant to the plaintiff's evidence meant the court '*was left with uncontested evidence of contributions by the plaintiff towards maintenance that far exceed those that may have been made by the defendant over time.'*

(iv) Haughton J. thus concluded (at para. 60):

> '*In the absence of any meaningful response by the defendant the averments in his affidavit as to his contributions carry little weight and are reduced to the point of being 'mere assertions'. Thus, while it is arguable the defendant could rely on a collateral contract as the legal basis for a counterclaim against the plaintiff (as opposed to CEL or the trustee), I am not satisfied that there is any evidential basis for any bona fide defence or counterclaim under this heading'*.

19. If the judge was correct in this conclusion – and I believe he was - it follows that he was correct to grant judgment. It is, as the judge acknowledged, undesirable that applications for summary judgment be converted into 'mini-trials', and parties should be encouraged to deliver affidavits that are focussed on the specific issues. Litigants are entitled to assume in that context that having laid out the basis for their claims or defences and supported these with relevant evidence, they do not have to dispute everything their opponent says. Normally, a defendant in complying with Order 37 Rule 3 merely has to show a credible defence that might succeed and does not have to negate everything the plaintiff chooses to say on affidavit.

20. However, in responding to the application for summary judgment the defendant was himself asserting a positive case, and it was incumbent upon him to lay the evidential foundation for his necessary contention that the claim he wished to advance was of sufficient substance to justify the court in refusing the plaintiff the judgment to which it was otherwise entitled. In that context, the judge was entitled to find that it was not enough for him to assert that defence and then, when presented with averments by the plaintiff which (if correct) would have negated that claim, to refuse to deal with those averments and, instead, to fall back on his original assertions.

Clause 2.7 of the Letting Agreement

21. But even if this is wrong, the next point made by the judge was – in my view – dispositive of the argument. The claim to arrears of rent, he said, arose under the letting agreement entered into by the parties in 2010. The counterclaim for maintenance and upkeep arise under an entirely separate agreement alleged by the defendant to have been entered into in 2005. The uncontested affidavit evidence was that this agreement was not between the plaintiff and the defendant, but between the defendant and Castletown

Estates Ltd. This meant that there was a significant distance between both agreements, to the extent that they could not be said to be '*closely connected'* for the purposes of a claim in equitable set off.

22. Following from this, the judge considered the effect of clause 2.7 of the letting agreement. This provided that the tenant agreed with the landlord '*[n]ot to reduce any payment of rent by making any deductions from it or by setting any sum off against it'.* He explained (at para. 67):

> *'In my view the words "by setting any sum off against it" in clause 2.7 by their plain and ordinary meaning clearly refer to any set–off, and are unambiguous. In this context I cannot discern any material difference between a set-off that a defendant is entitled to make at law e.g. under an express contract term, and a right to equitable set-off arising from a cross-claim. If they are to be differentiated it may be said that the defendant with a contractual right to set off should be in a stronger position than the defendant relying on an equitable set – off. Moreover, use of the word "any" shows the intention of the parties was that the tenant would not be entitled to rely on any set – off, regardless of the basis for such set – off. It must therefore be concluded that clause 2.7 precludes the defendant from equitable set off in respect of his cross-claim for maintenance/upkeep contributions.'*

23. In the course of his judgment, Haughton J. considered various authorities opened by the defendant in which it had been concluded that if a clause of this kind referred to '*deductions'* this did not necessarily exclude a right of set off: *Irish Life Assurance Plc. v Quinn* [2009] IEHC 153; *Westpark Investments Limited v Leisureworld Limited* [2012] IEHC 343; *Connaught Restaurants Limited v Indoor Leisure Limited* [1994] 4

All ER 934 and *Sheridan Millennium Limited v Village Theatres Limited* [2008] NI Ch 9. Having reviewed all but one of those authorities, Haughton J. observed that each case was concerned with clauses that precluded '*deductions'*, not an express preclusion of set off which, Haughton J. found, was quite different (at para. 65).

24. This conclusion was, in my view, correct and, indeed, reflects a well-established distinction in the authorities. The clear and literal terms of the clause meant that the defendant was not entitled to advance the alleged maintenance shortfall (or any other alleged debt) as against a claim for rent. Nothing in the factual matrix has been identified that would cause a court of trial to deviate from that meaning. Certainly, there is no legal preclusion of such clauses, and no basis on which it can be argued that the provision in issue here should be limited in its operation to legal, as opposed to equitable, set off (see *Caterpillar NI Ltd v. FG Wilson (Engineering) Ltd.* [2013] EWCA Civ. 1232, [2014] 1 WLR 2365). It is also clear that a provision of this kind can be used to preclude the use of a set off as a basis for resisting summary judgment (see *AMC III Purple BV v. Amethyst Radiotherapy Ltd.* [2019] EWHC 1503 (Comm.) at para. 22).

Claim for unliquidated damages

25. The second claim advanced by the defendant was for unliquidated damages (including, he said, aggravated and exemplary damages for trespass) arising from what the defendant described as the '*forcible entry'* of Castletown on May 23 2018. In this regard the defendant relied on the fact that pursuant to s. 86(1)(c) of the 2004 Act, a termination of a tenancy may not be effected when a dispute has been referred to the RTB and falls within its jurisdiction. For the same reasons I have just identified in the context of the maintenance claim, there was no version of these claims that could have

given rise to a set off, and therefore no basis on which they provided a defence to the application for summary judgment *per se.* However, they remained relevant insofar as the court could have considered exercising its jurisdiction to stay entry and execution of the judgment pending the trial of the counterclaim (see *Moohan v S.& R. Motors (Donegal) Ltd* at para 4.6 (c)).

26. Haughton J. made that point, and three others in dealing with these claims. First, he noted that at the time the plaintiff entered the property it was not on notice of the making of the claim to the RTB. Second, he stressed that the counterclaim had never been quantified. He noted that this might have been unsurprising given that none of the defendant's family were in occupation at the time of repossession and that the defendant had a residence in London. Finally, he observed that the defendant had failed to take up an offer to remain at the property until August 3 2018 on terms. Had he done so, Haughton J. noted, acceptance of this would have minimised the defendant's losses (if any) and arguably would not have prevented or prejudiced the claim subsequently made by him for a new tenancy under the 1980 Act.

27. The principles by reference to which the court may decide to stay judgment pending the outcome of an asserted counterclaim were summarised by Kingsmill Moore J. in the course his judgment in *Prendergast v. Biddle* (Unreported, Supreme Court, 31 July 1957) as follows:

> *'... a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed*

circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counter claim had been heard, for the plaintiff having received payment by dues the monies to pay his debts or otherwise dissipated so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion'.

28. The quotation shows the breadth of the discretion vested in the court, and affords some indication of the types of factors that might be considered in exercising it. Here, in relation to both the claim insofar as based upon outstanding maintenance obligations, and the claims for damages for trespass, the trial judge was in my view correct to reach the conclusion he did for the reasons he gave. The plaintiff's claim was for €571,893.00 for rent, on foot of an agreement which contained an express ouster of set off. The debt was not disputed. The claims mounted in response to it lacked specificity – on the evidence the defendant chose to put before the court – and were (as regards the claim in trespass) unquantified, and (as regards the claim for maintenance and unlawful entry) admitted of potentially good defences. I can see no reason to interfere with this exercise of the judge's discretion to grant judgment notwithstanding these claims. And, of course it is to be stressed (subject to any issues arising from his intervening bankruptcy, which were not the subject of any discussion before this court), the defendant remains free to maintain these claims on foot of the counterclaim he has already brought.

29. Finally, insofar as this aspect of the case is concerned, it is to be noted that while I have dealt with it on its merits, this appeal presents a quite unusual scenario in that the defendant had by the time the appeal came on for hearing, already paid to the plaintiff

the sum ordered by Haughton J. (the monies were paid over on 8 January 2019). Whilst the notice of appeal alleges that the trial judge erred in his grant of summary judgment, when questioned in the oral hearing it was unclear as to what the remedy was that the defendant sought on appeal. In his reply in the oral hearing, he asked the court to allow an independent accountant, who is subject to no conflict of interest, to examine and review the plaintiff's accounts. That is most certainly outside of the scope of this appeal.

New arguments and new evidence

30. While this disposes of the appeal insofar as it reflects arguments that were advanced before the High Court, there are – as I noted at the commencement of this judgment - a number of new arguments that appear for the first time in the defendant's submissions or affidavits. These were closely related to, and entirely dependent upon, the fresh evidence the defendant sought to adduce in this appeal. It is convenient to deal with the new arguments, and this evidence, together.

31. Prior to the hearing of the appeal, the defendant delivered a very detailed and lengthy legal submission. He also issued a motion seeking liberty to file and serve what were described as '*submissions'*. The relevant document, in fact, comprised a chronology itself grounded on almost five hundred pages of evidence, none of which was before the High Court when dealing with the two motions giving rise to the appeal. It is clear that the defendant was assisted by his son in the preparation of these documents. I am treating the application as one to admit new evidence, and to advance new grounds of appeal.

32. The evidence grounding the new claims is extensive and detailed. When reading the summary of that evidence that follows it must be borne in mind that - entirely

understandably - the plaintiff (which vigorously objected to any attempt to admit this material into evidence on this appeal) has not responded to the new evidence or allegations made on foot of it. The material relied upon derives in part from information secured in the course of proceedings before the courts in Jersey arising from the management of the trust and from 175 boxes of documents obtained by the defendant from Castletown. Permission to use the material from the Jersey proceedings was obtained shortly before the hearing in this court, while the documents were retrieved from Castletown in February 2021.

33. As Mr. Edward Magan[1] explained in the course of his oral submissions to the court, the defendant's basic proposition is that the evidence he seeks to adduce is relevant as it shows why the plaintiff acted as it did, and why it took what he referred to as '*such a risk in repossessing the property'.* The material he now puts before the court, in his view, shows that the trustees of the various trusts holding assets that had previously belonged to the defendant and had been vested there by him had engaged in serious wrongdoing. The wrongdoing is alleged to include borrowing monies at very high rates of interest (at one point stated to be 96%) for which Castletown and some €40M of chattels located in it were used as security, engaging in tax evasion, undertaking complex inter-trust loans in breach of stipulations in the deeds of trust and effecting fire sales of chattels held at the house. Access to the house was required to obtain the chattels, and these were needed to complete the purchase, part of which involved the

[1] At the time of the application before Haughton J. the defendant was represented by two leading senior counsel, junior counsel and solicitors (and indeed he was represented by solicitors at the time of the delivery of the notice of appeal). By the time of the appeal hearing, the defendant had been declared bankrupt, was in poor health and he was not legally represented. His son, Edward (who is one of the two beneficiaries of the Yew Tree Trust) sought to appear at the appeal on his behalf. Having regard to the defendant's poor health the court – most exceptionally – permitted Edward Magan to represent the defendant. While Edward Magan is not a lawyer, his oral submissions were delivered – I should acknowledge – in a most effective, courteous and professional manner.

sale of the assets at an undervalue. The argument is that various actors involved in the trusts and in the plaintiff created their own financial strain, and then sought to alleviate it by selling Castletown and its contents which, in turn, required the ejection of the defendant from the property. He says that they did this because they wished to reduce their indebtedness knowing that if they did not do so the lenders would enforce their security: as Mr. Edward Magan put the matter in his submissions '*if an insolvency practitioner got a look in and saw what they had been up to, their reputations would have been very badly damaged'.* To avoid this, the defendant avers in the affidavit grounding the motion to admit this evidence '*the Plaintiff bound the sale of the House to the sale of the Chattels, and ensnared in a chronic series of conflicts, committed the series of trespass with a pre-meditated intent to defraud the beneficiaries of the trusts'.* The combination of house and chattel sale – it is said – was effected to entice the eventual purchaser into the transaction which would generate the monies to refinance four separate related trusts, which had been managed incompetently and negligently by *inter alia* a director of the plaintiff.

34. The end point of the extremely detailed evidence in the defendant's affidavit is said to be that a fine art collection with a value of STG£34M, and Castletown (with a value, he says, of €30M) were sold to the purchaser for €27M in return for a loan of US$23M by the purchaser, the loan being for the purpose of refinancing the '*ruinously expensive debt the Plaintiff had forced on the trusts'*. So, the plaintiff had, the defendant now says, an unlawful ulterior motive in taking the steps that led to the proceedings.

35. This, Mr. Magan says, was relevant to the proceedings before Haughton J. The repossession, he argues, was manifestly unlawful. If the trial judge had known the real

reason why the plaintiff took the risk it did, he would have '*looked into this matter with a great deal more … sympathy or forensic technical evaluation of what was actually going on …'*. If the defendant's counsel had known before the High Court hearing of what was going on, he would – Mr. Edward Magan says - have had a better chance to argue the case. The defendant stresses the fact that Haughton J. had observed in his judgment that although the plaintiff may have been acting at points in part for an ulterior motive, this was immaterial if that motive was lawful. He says that the evidence shows that it was not lawful. Furthermore, on his case, the information he had now obtained would enable him to quantify the losses. He puts, for example, evidence before the court showing very significant expenditure by his father on what he terms '*landlord's improvements'*, to which he attributes a sum in the region of €8M.

New evidence and new arguments: principles

36. So framed, all of this presents an initial and obvious difficulty. This is an appellate court, and it is concerned with the correctness of the decision of the High Court the subject of the appeal. Usually, it cannot be said that a trial court will have acted in error if it reaches a proper decision on the basis of the evidence and arguments advanced to it. Scrutinising such a decision by reference to arguments and evidence it never considered is not an exercise in appellate supervision but a *de novo* hearing. So, an appeal dependent upon new evidence and new arguments should not, generally, be entertained. This is why leave of the court is required to adduce fresh evidence in appeals from final decisions, and why the governing rule (Order 86A Rule 4(c) RSC) requires that such evidence in appeals against final decisions be admitted only on special grounds. Different rules exist for interlocutory appeals, of which the application for summary judgment is not one.

37. Of course, it follows from this rule that the court has the power, exceptionally, to entertain new arguments and evidence and it also has the power to remit for re-hearing cases in which new evidence comes to its attention which merits this course of action. However, it can only do so within the constraints of well-established principle: fairness is a road with two lanes, and while appellants seeking to admit new evidence often pray in aid the injustice of allowing an order stand in the light of new evidence or argument, a respondent who has incurred the cost and expense of obtaining a lower court ruling in its favour is entitled to expect that that order will stand unless shown to be erroneous having regard to the matters that were considered by the High Court judge. This is *a fortiori* the case in a situation such as that under consideration here where the plaintiff has actually recovered payment on foot of the judgment it obtained. And, needless to say, there is an overhanging public interest: judicial resources are scarce, and the rules of procedure must be operated in such a way as to ensure that litigants bring all their claims, evidence and argument forward at the one time.

38. The courts tend to be more amenable to new argument than to new evidence. The closer a new argument is to one that was in fact raised at the original hearing the more likely it is to be entertained, while the more dependent such an argument is on new evidence altogether, the harder it will be for the appellant to have it decided (*Lough Swilly Shellfish Growers Co-op Society v. Bradley* [2013] 1 IR 227). The admission of new evidence, in turn, will be guided by three factors (*Murphy v. Minister for Defence* [1991] 2 IR 161 (at p. 164))

(i) The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

(ii) The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;

(iii) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible.

Application of Murphy test

39. Even if, viewing the matter most favourably from the defendant's perspective, it is to be assumed that the first and third of these criteria are met, the second poses immense difficulties for the defendant here. Much of the evidence he seeks to adduce bears no relationship to the specific grounds on which the High Court judge decided the case as he did. Putting the best construction on it from the vantage of the defendant's case, it might be said that it is relevant in four ways:

(i) That it showed that the plaintiff's motive in evicting the defendant and proceeding to seek judgment was unlawful;

(ii) That the information would have allowed the quantification of the trespass claim;

(iii) That the new evidence would have shown that the defendant's contribution to maintenance of the property was greater than understood by the trial judge;

(iv) That, if the evidence discloses what the defendant says it discloses, it is possible that the defendant and, perhaps, the beneficiaries of the trust, would have

various other claims and counterclaims against the plaintiff or persons associated with it.

40. From the defendant's point of view, the difficulty is that none of this would operate to vitiate the Orders made by the trial judge having regard to the reasons he decided the two motions before him as he did.

41. First, his refusal to strike out those parts of the plaintiff's claim the subject of the defendant's application is entirely unaffected by this evidence. Even if everything the defendant says is true (and I must again stress that neither the plaintiff nor the various individuals the subject of the very serious allegations made by the defendant have told their side of the story) the plaintiff was still entitled to *make* the claims it did to the effect that the tenancy was validly terminated and it was still entitled to assert that the High Court had jurisdiction to entertain the application under the Landlord and Tenant Act 1980. Of course, the defendant would say that this evidence would require that these claims should have been ultimately determined differently, but that is a wholly distinct matter. This appeal is not concerned with the correctness of the conclusion ultimately reached by Hunt J. and by this court: we are engaged only in a consideration of the legal correctness of the Orders made by Haughton J. None of the evidence affects the Order made on the defendant's strike out application.

42. Second, it will be recalled that central to the High Court's decision to grant judgment were the conclusions that the various arguments advanced by the defendant gave rise not to a set off, but to a counterclaim. None of the evidence the defendant now wishes to adduce changes that conclusion which was correct as a matter of law.

43. Third, also central to his conclusion was the view of the High Court that clause 2.7 of the letting agreement prevented the invocation of a set off so as to mandate the refusal of judgment on that ground. That was also a determination on the law, and it is not altered by the evidence.

44. Fourth, the defendant's strongest point may well be that the new evidence shows (he would say) that his counterclaims were more robust than they might have appeared when the matter was argued before the trial judge and that, accordingly, in exercising the discretion envisaged by *Prendergast v. Biddle* the High Court might have been more inclined to stay the entry and execution of the judgment had it been aware of the nature and extent of the malfeasance now alleged and (the defendant would say) the strength of the evidence subtending those claims. Here, the fact that the defendant claims that this evidence was in part concealed from him and/or the beneficiaries of the trust is of some significance.

Disposition of application to admit new evidence and argument

45. I have given very careful consideration to this aspect of the case but have concluded that, in all the circumstances, it would not be right to allow the defendant to rely upon this evidence as a basis for allowing the appeal. I have reached that conclusion having regard to the cumulative effect of the following factors:

(i) The only purpose to admitting the evidence would be to enable the vacating of the judgment and the remittal of the motion to the High Court to decide again whether to enter judgment in the light of the evidence and the plaintiff's response to it. For this court to elicit replying evidence from the plaintiff and to then decide the appeal based upon the new evidence would be to exercise a

de novo jurisdiction which, having regard to the volume and detail of the material, would not be appropriate in the circumstances of this case.

(ii) The nature of the evidence and object of its admission are diffuse. The defendant is (as the plaintiff's counsel correctly described it in his submissions) seeking to introduce and open up a wide-ranging inquiry into – at least in part – a set of issues which are distinct from the specific questions addressed by the trial judge, and which have their own evidential history. The defendant is not seeking to simply recalibrate or adjust submissions made to the High Court, but to present a case that is radically different in many respects than that argued before that court.

(iii) The judgment in question is in respect of monies that were admitted to be due, the liability arose from an agreement in which the parties expressly agreed that there should be no set off, and those monies have been paid. This is a case in which the court should be most reluctant to now unscramble that judgment on the basis of complex new evidence and arguments that were not considered by the trial judge in a context in which that evidence and those arguments would (even at their height) not negate the liability, but at most trigger a discretionary power to stay its enforcement.

(iv) Much of the evidence is directed not to the propriety of granting summary judgment on foot of rent admitted to be due, but is actually directed to the legality of the defendant's ejectment from Castletown. Indeed, it is a significant part of the case made that had the evidence now discovered been available, then the defendant would not have lost the landlord and tenant case. This faces the

insurmountable hurdle, as mentioned above, that those issues have already been decided by the High Court and Court of Appeal in separate applications. These matters are simply not before this court.

(v) In so concluding, the court will not be preventing the defendant from agitating these issues at plenary hearing. He remains entitled now to pursue these claims in his counterclaim. In stating this, I must underline, I am not saying that the defendant has good legal claims, nor am I saying that the Irish courts have jurisdiction to entertain the claims. The point is that the judgment does not impede him from making whatever case he wishes to make and can make within ordinary legal parameters. This – as I have alluded to earlier – is without expressing any view as to the implication of the defendant's intervening bankruptcy.

(vi) Even looking at the case without the benefit of replying evidence, it is obvious that the defendant would face significant legal hurdles in seeking to advance it. Many of the complaints are directed to the management of trusts subject to the laws of other jurisdictions. The Royal Court of Jersey has affirmed the trustee's decision to sell Castletown and rejected the defendant's complaints. The plaintiff is not a trustee but a vehicle used by the trust to hold the property. Thus, there are going to be substantial issues around (a) whether the defendant has an entitlement as settlor of the trust to advance some or all of these claims, (b) his ability to make some of them against this plaintiff, (c) the jurisdiction of the Irish courts to entertain some of the claims – having regard to *inter alia* prior determinations of the Royal Court of Jersey which has been seised of the matter

– and (d) the issues that would arise around reconstituting the proceedings so as to ensure that all alleged wrongdoers were before the court.

Conclusion

46. In conclusion, I would observe this. Mr. Edward Magan referred in the course of his submissions to the court to the '*sense of raging injustice'* he felt over the matters giving rise to this appeal. Certainly, his argument was, at points, presented passionately. However – and this is not a criticism – his anger is misdirected. As a matter of law and on the evidence before him, the trial judge was correct to find as he did, to grant liberty to enter judgment, and to reject the attempt to strike out parts of the plaintiff's claim. It would not be appropriate for this court to disrupt those findings now on the basis of the materials the defendant has sought to introduce. However, as was repeatedly pointed out if he has a case against the plaintiff of the kind he has described, he remains free to agitate it. More to the point, in actuality the real grievance the defendant has cannot be with the fact that summary judgment was entered against him (he has, after all, paid it), nor with the fact that parts of the plaintiff's claim were not dismissed (he remains free to defend these on the merits), but with the sale of the property. It would be wholly inappropriate for me to say whether the new materials referred to by the defendant as part of this appeal could be converted into a legal claim arising from that sale, but if it can, that claim does not advance one way or another his position in this appeal. It is clearly a matter for the full hearing.

47. In those circumstances, this appeal must be dismissed. It is a matter for the plaintiff whether it wishes to seek orders for costs of the appeal and/or the High Court. The plaintiff will note that if it is seeking such orders, it will be necessary for it to advise

the court of the status of the defendant's bankruptcy and of whether the relevant bankruptcy official is or ought to be on notice of the claim. The plaintiff should notify the Court of Appeal office within ten days of the delivery of this judgment of its position in this regard, upon which time a hearing will be fixed.

48. Woulfe J. and Ní Raifeartaigh J. agree with this judgment and the order I propose.