

THE HIGH COURT

[2015 2829 P]

BETWEEN

PHILIP O'BRIEN

PLAINTIFF

AND

IAN ROBERT WOHLMAN, ALAN TAPNACK, KEVIN MCKENNA, DAVID MILLAR, PEREGRINE KENNETH OUGHTON CROSTHWAITE, DAVID FRIEDLAND, HARUKO FUKUDA OBE, BERNARD KANTOR, STEPHEN KOSEFF, FANNI TITI, DAVID MICHAEL VAN DER WALT, ALLEN ZIMBLER, INVESTEC BANK PLC, MICHAEL CULLEN, DOLORES GEANEY, INVESTEC BANK PLC, NOEL CUNNINGHAM, FRANK GREENE, GERRY VAHEY, SIMON COYLE, VINCENT DOWNES AND MAZARS

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 21st day of May, 2019

1. This is the defendants' application for an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts, or in the alternative pursuant to the inherent jurisdiction of the court, striking out the plaintiff's claim for damages for assault and battery on the basis that it is unsustainable, frivolous and /or vexatious. Further or in the alternative, the defendants claim that the plaintiff's claim discloses no reasonable cause of action, is an abuse of process and is bound to fail. This application is grounded on the affidavit of Alan Sullivan, solicitor for the defendants.
2. The decision in this case should be read in conjunction with the court's earlier decision delivered on 4th March, 2016, on applications brought on behalf of Simon Coyle, a receiver appointed by Investec Bank plc, seeking various interlocutory reliefs relating to possession of mortgaged properties at Poleberry, Co. Waterford, and Duncormick, Co. Wexford. Both of those properties had been mortgaged by this plaintiff to Investec Bank (UK) Limited (Irish Branch). On the same date, the court gave its decision on applications made on behalf of numerous defendants, broadly connected to Investec Bank plc and Mazars Ireland, striking out two sets of proceedings issued by the plaintiff, Philip O'Brien, either pursuant to O. 19, r. 28 of the Rules of the Superior Courts, or on the alternative basis of the court's inherent jurisdiction.
3. At the root of all of the applications before the court on that occasion were two mortgages granted by Philip O'Brien, the plaintiff, to Investec Bank (UK) Limited (Irish Branch), over a mixed commercial and residential property at 84 Poleberry in Co. Waterford, and a mortgage of freehold lands in Duncormick, Co. Wexford. Following that hearing, the court granted certain interlocutory relief to Simon Coyle, the receiver of the properties, and dismissed two out of three plenary proceedings brought by Philip O'Brien against a multiplicity of defendants, arising out of the receivership. In these proceedings, the plaintiff, Mr O'Brien, claims damages for an alleged assault and battery, arising from an incident at the Poleberry property on 26th April, 2014.
4. The incident on the evidence, arose in the following circumstances. Mr Simon Coyle, the twentieth named defendant, had been appointed receiver by Investec Bank plc of the plaintiff's property at 84 Poleberry, on 16th February, 2011. Following the appointment of Mr Coyle as receiver the plaintiff, Philip O'Brien, ceded possession of the property to him. In early July, 2012, the receiver retained a company known as Book a Room The Accommodation Company Limited, which is a company providing agency and management services in connection with the provision of rented accommodation, particularly in the Waterford area. That company undertook to rent and manage the property on behalf of the receiver. Tenants were secured for the residential portion of the property, and the income therefrom was remitted to the receiver.
5. More than three years after he had ceded possession of the Poleberry property to the receiver, the plaintiff began to reassert ownership of the property, by demanding that the tenants pay rent to him rather than to the receiver. The uncontroverted evidence before the court was that the tenants who had an 11 year old child, felt intimidated by Mr O'Brien's behaviour and in fact, moved out of the property within a matter of weeks. Security was arranged, and locks were changed. The evidence is that the Poleberry property was let to a Mr Durojaiye on a caretaker arrangement, at a significantly reduced rent of €200 per month. The tenancy was arranged by Book a Room The Accommodation Company Limited, at the request of the receiver. The caretaker tenant, Mr Durojaiye, was an employee of Crystal Contract Services, a security company regularly used by Book a Room The Accommodation Company Limited, and the caretaker tenant was known to the directors of Book a Room The Accommodation Company Limited. The intention in granting a caretaker tenancy to Mr Durojaiye, was to prevent further trespass on the property by the plaintiff, Mr O'Brien.
6. There were incidents at the property on the 24th and 25th April, 2014, involving Mr O'Brien and the caretaker tenant, resulting in the gardaí being called. On 26th April, 2014, on his own admission, Mr O'Brien broke down the door of the residential unit to gain entry to the property, at a time when he knew there was a person in occupation. Mr O'Brien alleges that in the course of resisting his incursion on the property, he was assaulted by the tenant, Mr Durojaiye. The plaintiff was subsequently arrested and charged before the District Court. It appears that the charges were dismissed on the grounds that the District Court Judge was not satisfied as to the ownership of the Poleberry property. The receiver has averred that he was not asked to give evidence in that prosecution, but that he did give the gardaí copies of his deed of appointment as receiver.
7. On 13th April, 2015, the plaintiff, Mr O'Brien, issued these proceedings in which he claims damages for assault against twenty-two defendants, including senior executives of Investec Bank plc and each of the partners of Mazars. Mr O'Brien seeks:-

"An order in the amount of €6,500,000,00 Six Million Five Hundred Thousand Euro for assault and damages resulting in ongoing Injuries, Mental Stress and Post Traumatic Stress Disorder as a consequence of assault and battery on the plaintiff by the defendants and all of them singularly, collectively and vicariously on the plaintiff by defendants at 84 Poleberry, Waterford in the county of Waterford".
8. In his proceedings, the plaintiff has not sued his alleged assailant, the tenant/security man who was in occupation of the property, nor has he sued Book a Room The Accommodation Company Limited, nor has he sued Crystal Contract Services with whom the tenant worked as a security man. In fact, at the commencement of the multiple applications heard by the court in February, 2016, and dealt with by the court in its judgment of 4th March, 2016, this plaintiff specifically conceded that all of his claims against Book a Room The Accommodation Company Limited and its directors, could be struck out on the grounds that they were frivolous and/or vexatious.
9. These proceedings are being maintained against twenty-two defendants, all of whom appear to be connected to either Investec

Bank plc or Mazars (the firm in which Mr Coyle the receiver is a partner), and none of whom is the alleged perpetrator of the alleged assault. It is clear that none of the defendants were anywhere near 84 Poleberry, Co. Waterford at the time of the alleged assault, so that unless the plaintiff can establish that somehow each of the twenty-two named defendants is vicariously liable for the alleged assault on him by the tenant, Mr Durojaiye, then the plaintiff's claim is bound to fail, is an abuse of the process of the court, and should be dismissed.

10. It appears on the evidence, that the alleged perpetrator was an employee of a security company who had been placed in the property, at the request of the receiver, because of Mr O'Brien's alleged interferences with tenants and with the property. The tenant's presence on the property was for the specific purpose of preventing trespass. As the only potential basis upon which any of the defendants could possibly be found liable to the plaintiff was on the basis of vicarious liability, the court gave the parties an opportunity to address it further on that issue.

Submissions of the plaintiff

11. The plaintiff's submissions singularly fail to engage with any of the evidence in the case and solely advance a theoretical basis on which the defendants could be found vicariously liable to the plaintiff. The theory essentially depends on Mr O'Brien being successful in having the appointment of Mr Coyle as receiver being declared invalid. The plaintiff's submissions at least implicitly, concede that the issue of vicarious liability between a receiver and a mortgagor is complicated by the fact that the law presumes that a receiver is the agent of the mortgagor. If successful in invalidating the receivership, he would then seek to establish that Mr. Durojaiye was an employee or agent of Mr. Coyle. He asserts that an employer may be liable for the acts of its agents and employees, acting in the course of their agency or employment. This is clearly so, but the plaintiff's submissions fail to engage with the facts in this particular case. The plaintiff has suggested that the tenant, Mr Durojaiye, was a security officer employed/retained by the receiver. That is not currently the evidence in the case. The evidence in the case is that he was a tenant, a caretaker tenant, who was given the tenancy because of his experience as a security officer employed by Crystal Contract Services, a security firm regularly retained on a contractual basis by Book a Room The Accommodation Company Limited.

12. On the question of the bank's liability, and that of the individual bankers, the plaintiff's counsel cited *American Express International Banking Corporation v. Hurley* [1985] 3 All ER 564 as establishing that where a mortgagee directed or interfered with a receiver's activities, the receiver was deemed to be the mortgagee's agent, so that the mortgagee was liable for his acts. The court is at a loss to understand how that principle applies to the facts of this case. There is absolutely no evidence to suggest that the bank, or any individual banker, or any individual partner in Mazars, intermeddled or interfered or acted in any respect, in relation to this receivership.

13. The plaintiff's counsel also raised a contingent argument, to the effect that in the event that the plaintiff was successful in having the receivership declared invalid, the receiver would no longer be the mortgagor's agent, and would instead be the agent of the bank. In that scenario, the bank would be vicariously liable for all wrongs committed by the receiver's employees or agents. In such a scenario, the bank would also be liable to the plaintiff in trespass. That latter submission ignores completely the fact that the plaintiff's claim against each of the twenty-two defendants, is a claim for damages for assault and battery. The defendant's submissions also fail to address the basis upon which individual partners in Mazars could be responsible for an assault and battery perpetrated against the plaintiff.

Submissions of the defendants

14. The defendants to the proceedings maintain in their submissions that there is no possible circumstance in which the first twelve named defendants, who are current and former members of the executive board of Investec Bank plc, could be vicariously liable for an alleged assault perpetrated on Mr O'Brien by Mr Durojaiye, in the course of resisting a violent incursion by the plaintiff, Mr O'Brien, into the property. He makes a similar submission in relation to all of the other defendants who appear to be partners in Mazars, other than Mr Simon Coyle, the receiver. The defendants submit on behalf of the receiver, that the alleged assailant, Mr Durojaiye, was never an employee of the receiver, either actual or ostensible. His presence at the Poleberry property was as a paying tenant. The defendants submit that there is no authority to support the proposition that a landlord can be vicariously liable for the wrongs of his/her tenants. The very essence of a relationship of landlord and tenant, is that the landlord cannot control the actions of the tenant.

15. Furthermore, it is submitted on behalf of the receiver, that he never exercised, nor could he exercise a sufficient degree of control over Mr Durojaiye, sufficient to make him, the receiver, vicariously liable for any wrongful acts of Mr Durojaiye. It is submitted on behalf of the receiver that this absence of control is fatal to the plaintiff's claim against the receiver.

16. The relationship between Mr Coyle and Mr Durojaiye does not according to the defendant, fall into any of the normal relationships which could give rise to vicarious liability, i.e. employer/employee, agent/firm. The plaintiff according to the defendants' submission, would have to call in aid the principles established in *Moynihan v. Moynihan* [1975] IR 192, where *de facto* service was held to give rise to vicarious liability. The receiver defendant maintains that in the circumstances of Mr Durojaiye's occupation of the premises, the receiver did not exercise control over him, such as would make him a *de facto* employee. The defendant receiver cites the following passage from McMahon & Binchy, *Law of Torts*, 4th Ed. (Bloomsbury Professional, 2013), at para. 43.08:-

"...if the control element is high, then, even in the absence of other features, the subordinate may be considered a de facto employee, and, provided the 'controlled person's' acts related to the 'controller's' business the latter will be vicariously liable for injury caused to third persons by such acts."

On the uncontroverted evidence before the court, Mr Durojaiye, the alleged assaulter, was given a tenancy of the property by Book a Room The Accommodation Company Limited for the specific purpose of preventing trespass by the plaintiff, Mr O'Brien. He was chosen as a caretaker tenant on preferential terms because he did work for Crystal Contract Services, a security company with which Book a Room The Accommodation Company Limited did regular business. While the receiver requested Book a Room to source an appropriate tenant, this according to his counsel, did not amount to a relationship of employer and employee, nor does it give rise to the element of control, such as would make Mr Durojaiye a *de facto* employee of the receiver.

17. The tenancy was, according to the receiver, arranged by Book a Room The Accommodation Company Limited, a firm against whom the plaintiff withdrew all claims at the hearing of the various applications. Book a Room The Accommodation Company Limited chose Mr Durojaiye, an employee of a security firm, Crystal Contract Services, to occupy the premises at a reduced rent on a caretaker basis. The defendant receiver therefore states that at the time of the alleged assault, Mr Durojaiye was either an employee of Crystal Contract Services, or alternatively an independent contractor, occupying the premises for the specific purpose of preventing trespass.

18. Alternatively, the receiver contends that even were the court to consider that the receiver exercised a sufficient degree of control over Mr Durojaiye, to give rise to the possibility of vicarious liability being imposed, he submits that the alleged wrongful acts

(being an assault) were outside the scope of Mr Durojaiye's assessable employment. He submits that even if the plaintiff's account of the incident complained of is accepted, it cannot reasonably be suggested that such conduct on the part of Mr Durojaiye, was "impliedly authorised" by the employer. Counsel for the receiver relied on the finding in *Reilly v. Ryan* [1991] 2 IR 247, where the claim of vicarious liability was rejected on the scope of employment test. The actions of Mr Durojaiye (if the plaintiff's account is accepted) "was a wholly unreasonable and excessive means of dealing with the emergency", and thus is outside the scope of employment. The receiver submits that it cannot be said that the acts of the controlled person (in this case Mr Durojaiye) relate to the business of the controller (in this case allegedly the receiver). The receiver's business is to carry out the powers conferred upon him by the relevant mortgage or charge. The receiver submits that it cannot reasonably be said that such actions as would constitute an assault, could have been done to further the employer's business, and/or could fairly and reasonably be regarded as incidental to the task. The receiver submits that the alleged wrongful acts were outside the scope of Mr Durojaiye's employment and therefore, his "employer" (whether actual or ostensible) cannot be vicariously liable for his wrongful actions.

Decision

19. The court stayed these proceedings and gave liberty to the parties to furnish further submissions, as to the basis upon which any of the twenty-two defendants could be held vicariously liable for an alleged assault on the plaintiff, perpetrated on him by a caretaker tenant on 26th April, 2014, at 84 Poleberry, Co. Waterford. The plaintiff has sued twenty-two defendants for €6.5 million for assault and damages resulting from alleged injuries, mental stress, and post-traumatic stress disorder, as a consequence of an alleged assault and battery on the plaintiff by the defendants, and all of them singularly, collectively, and vicariously. The first twelve named defendants are current and former members of the executive board of Investec Bank plc. The fourteenth and fifteenth named defendants are the chief executive and head of compliance of Investec Bank plc (Irish Branch) respectively. The seventeenth to twenty-second named defendants are partners and directors of Mazars Ireland, the professional services and accountancy firm. The twentieth named defendant, Simon Coyle, was on 16th February, 2011, appointed by Investec Bank plc as receiver over the Poleberry property.

20. The plaintiff alleges that he was assaulted by Mr Ayodeji Tunde Durojaiye at the Poleberry property when, on his own admission, he broke in the door of the property to gain access thereto. On the evidence before the court, Mr Durojaiye was a caretaker tenant of the property at a preferential rent of €200 per month. The circumstances in which that tenancy was created was that Mr O'Brien, the plaintiff, having ceded control and possession of the property to Mr Coyle in 2011, began to reassert ownership by demanding that the tenants pay rent to him, rather than to the receiver. The evidence shows that by reason of his interference with tenants, one group of tenants moved out of the property. When that occurred, Mr Vincent Downes, the twenty-first named defendant, inquired on behalf of the receiver Simon Coyle, of Book a Room The Accommodation Company Limited, whether they had anyone on their books who would be prepared to move into the property once the tenants moved out, on a caretaker's agreement, i.e. minimal rent on a month to month basis. Mr Downes explained "I need to ensure that we keep the borrower away from the property whilst vacant". Book a Room The Accommodation Company Limited chose Mr Durojaiye as the caretaker tenant because of his experience as a security man with Crystal Contract Services, a company with which Book a Room The Accommodation Company Limited did regular business. The receiver, Simon Coyle, knew of and consented to, the arrangement with Mr Durojaiye. The expressed purpose of the caretaker's tenancy was to prevent further trespass by the plaintiff, Mr O'Brien.

21. On his own admission, Mr O'Brien broke in the door of the premises on 26th April, 2014, and the basis of his alleged claim of assault and battery is that Mr Durojaiye used excessive force in repelling his incursion.

22. The plaintiff has chosen not to sue the alleged assaulter, Mr Durojaiye, nor his employers, Crystal Contracts Services, nor Book a Room The Accommodation Company Limited. The plaintiff did sue Book a Room The Accommodation Company Limited and Crystal Contracts Services in other proceedings related to this receivership, but when those matters came before the court, the plaintiff conceded that those proceedings be struck out on the basis that they were frivolous and/or vexatious. The plaintiff having chosen not to proceed against the parties most directly connected to the events of 26th April, 2014, has decided instead to sue fifteen bankers and six accountants, including the receiver, Simon Coyle, for damages for assault and battery.

23. The plaintiff has advanced no sustainable basis as to why the fifteen bankers, two banks and the five partners and/or directors of Mazars Ireland Limited could be liable for an assault allegedly perpetrated by the caretaker tenant, Mr Durojaiye. The submissions filed by the plaintiff do not even address the basis upon which vicarious liability might attach to the partners and/or directors of Mazars.

24. In relation to the banks and the bankers, the plaintiff advanced a hypothetical situation that liability might attach to a mortgagee, where that mortgagee has directed the actions of the receiver. *American Express International Banking Corporation v. Hurley* was cited, in which Mann J. held that where a mortgagee directed or interfered with the receiver's activities, the receiver will be deemed to be the mortgagee's agent, so that the mortgagee would become liable for the receiver's acts. There is not a shred of evidence in this case that any of the bankers named, directed the actions of the receiver, Simon Coyle. The court has no hesitation in holding that the plaintiff's claim for damages for assault against all of the parties other than Simon Coyle, the receiver, be struck out pursuant to O. 19, r. 28 of the Rules of the Superior Courts, on the grounds that the proceedings are frivolous and/or vexatious; disclose no reasonable cause of action; are an abuse of process; and are bound to fail. The only defendant against whom vicarious liability might possibly be established is the receiver, Simon Coyle.

25. On the evidence, Mr Durojaiye, was at all material times a caretaker tenant of the property. Undoubtedly, he was chosen as the tenant because of his experience as a security man employed by Crystal Contracts Services, who would have expertise in preventing trespass by Mr O'Brien, the plaintiff. That does not in the court's view, necessarily make him an employee or an agent of the receiver. The tenant was not on the current state of the evidence, under the control of the receiver, so as to bring into play the *Moynihán* principles. The most that can be said is that Mr Coyle, the receiver, had requested a suitable tenant and had knowledge of, and consented to the tenancy agreement. Mr Coyle did not control the manner in which the tenancy was to be exercised.

26. Even if the fact of the reduced rent in return for the service of preventing trespass was considered to create a contractual type relationship, then on current state of the evidence it appears that the nature of the relationship created was that of an independent contractor performing a service. Again, on the current evidence, the receiver had no contact with or control over, the manner in which the tenant, Mr Durojaiye, performed the service of preventing trespass. There is no evidence that Mr Coyle controlled the service offered by Mr Durojaiye in any respect. As McMahon & Binchy have noted:-

"Generally speaking, an independent contractor is a person who undertakes to carry out a specific task for another. Normally the independent contractor will undertake to deliver a result, will be paid a fixed sum on completion of the task and reserves control over the means which he or she will use to achieve this end."

27. McMahon & Binchy summarised the position with the following example:-

"Thus, if I hire a taxi and the driver negligently injures a third person I am not liable to the third person, whereas if my chauffeur negligently does the same thing I am liable."

28. The court accepts the receiver's submissions that Mr Durojaiye was present for the specified purpose of preventing trespass. There is at present, no evidence whatsoever to suggest that the receiver exercised any control over the manner in which Mr Durojaiye was to perform this function. Mr Durojaiye enjoyed exclusive control over how he prevented trespass, without any interference from any other party. On the other hand, it has to be acknowledged that the function of preventing trespass foreseeably involves physical restraint.

29. The court is conscious that on this application, it has no affidavit from Mr Coyle on this particular issue, and it has not had sight of the tenancy agreement in place at the time of the incident on 26th April, 2014. In due course, evidence might emerge in the substantive proceedings between the receiver and Mr O'Brien, which casts further light on the relationship between the receiver and Mr Durojaiye, such as might establish a level of control sufficient to make Mr Durojaiye a *de facto* employee or agent of the receiver. His purpose in being in the premises was to prevent trespass. In the course of preventing a trespass, this alleged assault occurred.

30. As matters stand, the court simply does not have sufficient evidence to allow it to conclude that the action against the receiver is unstateable, or an abuse of process, or frivolous and/or vexatious. There is a high threshold when considering an application to dismiss. The court must read the plaintiff's claim at its high water mark, and the burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. The court has no evidence from Mr Coyle as to his relationship or absence of relationship, with the tenant, Mr Durojaiye. The court has no evidence as to whether or not instructions were given by him in relation to the caretaker tenancy. In an application to dismiss pursuant to O. 19, r. 28 of the Rules of the Superior Courts, or pursuant to the court's inherent jurisdiction, the burden of proof lies on the defendant to establish that the plaintiff's claim is frivolous and/or vexatious and/or an abuse of process and/or bound to fail. While on the facts, the plaintiff's claim appears to be unmeritorious and on the current state of the evidence is a claim which is far more likely to fail than succeed, in the absence of evidence from Mr Coyle, the receiver, it is not possible for the court to adjudicate that it is a claim which is bound to fail.

31. Depending on how the evidence falls, on the relationship between the receiver, Book a Room The Accommodation Company Limited and Crystal Contract Services, it is certainly conceivable that Mr Durojaiye might be deemed to have been an agent of the receiver. While that possibility subsists, and taking the plaintiff's claim at its high water mark, it cannot be said that the allegation of vicarious liability against the receiver is a claim that in the instant case, is frivolous and/or vexatious, and/or an abuse of the process of the court. While the claim at first glance does appear to be particularly unmeritorious, the court will not dismiss the plaintiff's claim against the twentieth named defendant, Simon Coyle. The court does however, dismiss the claims against all other defendants named by the plaintiff, on the grounds that the claim for assault against each of them is unstateable and is bound to fail.