Neutral Citation Number: [2016] IEHC 307

THE HIGH COURT

COMMERCIAL

[2016 No. 1704 P.]

BETWEEN

PATRICK O'CONNOR

PLAINTIFF

AND

SHERRY FITZGERALD LIMITED AND RONAN DALY JERMYN

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 8th day of June, 2016

1. The defendants have brought an application in these proceedings for the following relief:-

(i) an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts:-

(a) adding Michael Cotter and Luke Charleton as defendants to the proceedings; and,

(b) striking out the named defendants as defendants to the proceedings;

(ii) an order dismissing the proceedings on the grounds that they are an abuse of process as the plaintiff seeks to re-litigate a matter, namely, the validity of the appointment of joint receivers, that has already been decided by a court of competent jurisdiction in other proceedings;

(iii) further or alternatively, an order dismissing the within proceedings on the grounds that the plaintiff is precluded, under the rule in *Henderson v. Henderson*, from litigating one or more issues that have not previously been decided which could have been canvassed in previous proceedings; and,

(iv) an order restraining the plaintiff from instituting any proceedings without leave of the court (to be sought on not less than four clear days notice to them) against any or all of:-

(a) Michael Cotter and Luke Charleton;

(b) Sherry FitzGerald Limited;

(c) Ronan Daly Jermyn; and,

(d) any servant(s) or agent(s) of, or any consultant or other party assisting Michael Cotter and/or Luke Charleton in relation to any matter involving or relating to the receivership, the subject of proceedings bearing High Court record number [2012 12108 P] between Patrick O'Connor (plaintiff) and Bank of Scotland (Ireland) Limited & Ors (defendants) or proceedings bearing High Court record number [2012 4449 S] between Bank of Scotland plc (plaintiff) and Patrick O'Connor (defendant) or any act of them or any of them in the course thereof.

2. Although the notice of motion bringing this matter before the court seeks other reliefs, the above issues are the only ones which were pursued at this stage by the defendants. The plaintiff has also brought a motion before the court wherein he has sought injunctive relief against the defendants concerning the property which is the subject of the within proceedings; namely, 16 Amberley Heights, Douglas, Co. Cork ("*the property*"). That motion has been adjourned until the determination of this motion brought by the defendants.

3. By order of Cregan J. dated 6th March, 2015, judgment was entered against Patrick O'Connor (the plaintiff in these proceedings), in the sum of €7,683,999.96, in proceedings bearing record number [2012 No. 4449 S] and entitled *Bank of Scotland v. Patrick O'Connor* ("*the judgment proceedings*"). By further order of Cregan J. dated 6th March, 2015, the learned judge vacated the *lis pendens* which the plaintiff had registered over lands, the subject of the within proceedings, in proceedings bearing record number [2012 No. 12108 P] and entitled *Patrick O'Connor v. Bank of Scotland (Ireland) Limited & Ors* ("the *lis pendens* proceedings").

4. Bank of Scotland plc appointed Messrs Michael Cotter and Luke Charleton as joint receivers over the property situate at 16 Amberley Heights, Douglas, Co. Cork, and their appointment has been confirmed as valid by the judgment of Cregan J. in the *lis pendens* proceedings. In further proceedings bearing High Court record number [2015 No. 2002 P] and entitled *Patrick O'Connor v. Michael Cotter & Luke Charleton*, the plaintiff in the within proceedings sought to further challenge the appointment of the joint receivers and their entitlement to sell the property situate at Douglas, Co. Cork ("the *receiver proceedings*"). By order of Haughton J. dated 30th July, 2015, those proceedings were dismissed under the rule in *Henderson v. Henderson* on the basis that the plaintiff was attempting to litigate one or more issues that had not previously been decided but that could have been canvassed in previous proceedings, namely, in the *judgment proceedings* and also in the *lis pendens* proceedings.

5. In the *judgment proceedings*, Cregan J. made an order on 6th March, 2015, granting judgment to the Bank in the sum of €7,683,999.36, and dismissed the plaintiff's counterclaim but granted a stay on the execution of the judgment and costs pending the lodging of an appeal and in the event of such an appeal being lodged, execution was to be further stayed until the final determination of such appeal. The plaintiff appealed the judgment of Cregan J. and a decision is awaited on the appeal. Cregan J. declined to put a stay on his order in the *lis pendens* proceedings and accordingly, the *lis pendens* stands vacated.

6. In the *receiver proceedings*, Haughton J. refused an application for a stay upon his order and again the plaintiff in the within proceedings appealed that judgment and the result of that appeal is awaited.

The Receiver Proceedings

7. In the course of his judgment, given on 30th July, 2015, Haughton J. examined the proceedings which came before Cregan J. in November 2014, and in particular, the issue regarding the appointment of the receivers and the validity of the said appointment. It is unnecessary for this Court to, again, enter into that same analysis. However, it is relevant to note that Haughton J. was satisfied that, while having pleaded claims regarding the invalidity of the appointment of the receivers, the plaintiff had confirmed to Cregan J. that he was confining his challenge to the receivers' appointment to issues regarding an allegedly incorrect map. It is worth quoting from the transcript of the *lis pendens* proceedings [2012 No. 12108 P] at day 4 and at page 41 thereof. Commencing at line 6 of that page, the following exchange took place:-

> "***Mr. Justice Cregan:*** *Very good. Do you understand that Mr. Murphy? In other words I understand Mr. O'Connor to be saying that the only argument he is making in relation to the unlawful appointment of receivers relates to the issue about the incorrect map, the incorrect common areas.*
>
> ***Mr. Murphy:*** *Very good. If Mr. O'Connor confirms that that is the only point he is making then I will withdraw any further objection to the pleadings.*
>
> ***Mr. Justice Cregan:*** *Can you confirm that?*
>
> ***Mr. O'Connor:*** *I can confirm that judge."*

8. The "map" referred to in that exchange is the map attached to what is referred to on p. 37 of the same transcript as the *"Lindville mortgage"*. That is not the property at issue in the within proceedings. The incorrect map referred to in the *receiver proceedings* as forming the basis of a challenge to the receiver's appointment related to the Lindville housing estate which is a separate property from 16 Amberley Heights. Haughton J. was also satisfied that the *receiver proceedings* primarily existed to question the validity of the appointment of the receivers over the property at issue in the within proceedings, an issue which the plaintiff had pleaded but abandoned during the course of the *lis pendens* proceedings before Cregan J. He rejected the arguments put forward by Mr. O'Connor and dismissed the proceedings under the rule in *Henderson v. Henderson*.

The Rule in *Henderson v. Henderson*

9. The defendant submits that the plaintiff is seeking to re-litigate matters which have been decided by a judge of the High Court in previous proceedings and that he does so relying upon issues which could and should have been canvassed before that same court in the previous proceedings. The rule in *Henderson v. Henderson* (1843) 3 Hare 100 has been approved in this jurisdiction by the Supreme Court. In *A.A. v. Medical Council* [2003] 4 I.R. 302, where Hardiman J. at 316, approved the following passage of the judgment of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1, at p. 21:-

> *"Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party…"*

The *Isaac Wunder* Order

10. The defendants have sought orders from the court which would seek to restrain the plaintiff from initiating proceedings against certain identified parties and their servants or agents. They do so relying upon the inherent jurisdiction of the court to make such an order: see *Wunder v. Irish Hospitals Trust (1940) Limited* (Unreported, Supreme Court, 24th January, 1967); and, *Riordan v. Ireland* [2001] 3 I.R. 365, where Keane C.J. stated at 370:-

> *"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their rights to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."*

11. In the decision of *O'Malley v. Irish Nationwide Building Society* (Unreported, High Court, Costello J., 21st January, 1994), the learned judge indicated that the court may only make such orders in *"very rare circumstances"*. In the case of *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, Ó Caoimh J. outlined the basis upon which an *Isaac Wunder* Order shall be made, at 465:-

> *"Where the court is satisfied that a person has habitually or persistently instituted vexatious or frivolous civil proceedings it may make an order restraining the institution of further proceedings against parties to those earlier proceedings without prior leave of the court. In assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings are vexatious to consider*

whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground."

12. The jurisdiction of the court to grant such an order can only be used sparingly and must be balanced against the rights of the plaintiff to access justice. The exercise of this balance by the courts was recently considered in the context of abuse of process by the Supreme Court in *Tracey t/a Engineering Design and Management v. Burton* [2016] IESC 16, where MacMenamin J. stated at para 45:-

> *"As Denham J. pointed out in O'Reilly McCabe v. Minister for Justice & Patrick Cusack Smith & Co (Agents of Thomas McCabe, Ward of Court & Minor) [2009] IESC 52 at par. 33, the constitutional right of access to the courts, while an important right, is not an absolute one. As a corollary of that right, a court must also protect the rights of opposing parties; the principle of finality of litigation; the resources of the courts; and the right to fair procedures which accrue to each party to litigation, as well as plaintiffs. It is an injustice that defendants or plaintiffs be exposed to repeated and vexatious litigation, in which either party incurs unnecessary legal costs which may not easily be recoverable against an offending party. The public have a right to a court system which operates effectively and expeditiously in the public interest, while ensuring that justice is administered as the Constitution requires. Finality is necessary in the interest of justice. It must be clearly understood that one adverse ruling, or even a series of adverse rulings, by a court is not, without significantly more, to be regarded as grounds for claiming either subjective or objective bias."*

13. In the *receiver proceedings*, having rejected the argument put forward by the plaintiff and acceded to the defendant's application to dismiss the action, Haughton J. made the following observation which I feel is pertinent to the within application:-

> *"I note that no Isaac Wunder order is being sought in these proceedings. I would, however, sound a word of caution to Mr. O'Connor. It seems to me that that was a concession fairly made by the defendants in these proceedings and one that was sensible and perhaps compassionate. Perhaps also bear in mind that this is only the second, as it were, set of proceedings that has been brought by Mr O'Connor. However, there is a developing pattern and Mr O'Connor should be aware that the courts can and often do grant orders of this nature…"*

14. Having received an adverse judgment from Haughton J. in those proceedings, the plaintiff then went on to initiate this action. The court was also made aware of other proceedings between the plaintiff and his son which has given rise to a further *lis pendens* being registered against the property at issue in these proceedings. Apart from being informed by Mr. O'Connor that he is in litigation with his son, Mr. Cathal O'Connor, who is claiming architects fees in respect of work done in connection with the property, the court was not given sufficient information on those proceedings to enable it to form a view as to whether there is a genuine dispute between the plaintiff and his son or whether the proceedings are a device to facilitate the registration of a further *lis pendens*. It is, however, worthy of note that in the *lis pendens* proceedings before Cregan J., the plaintiff in the within action sought to call his son, Mr. Cathal O'Connor, as an expert witness and objection was taken to this by Bank of Scotland (Ireland) Limited and the other defendants in those proceedings.

Decision

15. At the hearing of the motion, I made an order adding the receivers, Mr. Michael Cotter and Mr. Luke Charlton as defendants to the proceedings. I declined to strike out the named defendants from the proceedings. As the plaintiff, in these proceedings, seeks to restrain the sale of the property, the receivers should be joined in the proceedings.

16. Having considered the evidence adduced before the court on this motion and the submissions made by the parties, I have no doubt whatsoever but that these proceedings are an abuse of process as they seek to re-litigate matters which have already been determined by the courts. They are clearly an attempt by the plaintiff to frustrate the sale of the property, 16 Amberley Heights, Douglas, Co. Cork, even though he did not join the receivers in the action. Judgment in the sum of €7,683,999.96 has been obtained by Bank of Scotland against the plaintiff on 6th March, 2015. The plaintiff has withdrawn his challenge to the appointment of the receivers so far as this property is concerned and has confirmed that to Cregan J. in the *lis pendens* proceedings referred to at para. 7 above. In the *receiver proceedings*, Haughton J. has made an order dismissing the plaintiff's claim under the rule in *Henderson v. Henderson*. The commencement of these proceedings shortly afterwards is nothing but an attempt to circumvent previous orders made and frustrate the receivers in their attempt to dispose of the property in the light of the earlier decisions made by Cregan and Haughton JJ. That is an abuse of process. The defendants are entitled to an order dismissing these proceedings on the basis that they constitute an abuse of process. They are also entitled to such an order under the rule in *Henderson v. Henderson*. In *the receiver proceedings* the plaintiff challenged the authority of the receivers to deal with a number of properties including 16 Amberley Heights, Grange, Douglas Co. Cork. While these proceedings are concerned only with 16 Amberley Heights, in many other respects the same relief is sought by the plaintiff save that on this occasion the relief is sought against the receivers' selling agents and solicitors. Where new matter or argument has been introduced it could, and should, have been introduced in the earlier proceedings.

17. I am also satisfied that the defendants in these proceedings are entitled to an *Isaac Wunder* order in the terms of para. 6 of the notice of motion. Having been cautioned by Haughton J. in the *receiver proceedings* about a developing pattern of litigation, the plaintiff immediately commenced these proceedings having had his claim against the receivers rejected by Haughton J.

18. The plaintiff is currently awaiting the results of appeals against the orders of Cregan and Haughton JJ. If he is successful in any of those appeals, he will have whatever entitlements accrued to him as a result of the judgment of the Court of Appeal. But so far as further proceedings are concerned relating to this property and the entitlement of the receivers to dispose of same, the plaintiff has, I fear, come to the end of the road. Every time the plaintiff fails in a court action to prevent the sale of the property he commences yet further proceedings and this is likely to continue unless he is restrained by the courts.

19. The defendants are entitled to an order under para 3(A), 4, 5; and, 6 of the notice of motion.