Neutral Citation: [2014] IEHC 81

THE HIGH COURT

[2012 No. 331 SP]

BETWEEN

PERMANENT TSB PLC. TRADING AS PERMANENT TSB

PLAINTIFF

AND

JERRY BEADES

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 25th day of February 2014

1. This is an application for an order for possession of the premises set out in the Schedule in the special endorsement of claim. The properties are situated at Nos. 2, 3 and 4, Fairview Avenue in the city of Dublin. The plaintiff claims that it is entitled to possession of the premises as an event of default has taken place under loan agreements between the predecessor in title of the plaintiff, of the one part, and the defendant of the other part. The defendant has raised a number of technical defences to the plaintiff's claim but, significantly, he does not deny that the sums claimed, or a substantial part thereof, are due and owing.

2. At the commencement of the hearing, I dealt with a number of preliminary issues which I will record in this judgment. The first was a technical objection raised by the defendant that the summons should have been re-served on him. It was not quite clear whether this objection was based on the fact that amendments had been allowed to the description of the properties in the Schedule in the summons or whether it was based on the amendment of the title. The first of those orders was made by the Master of the High Court. At the end of his order, it was specifically recorded that he dispensed with re-service of the summons when amended in accordance with his order of 19th December, 2012. On 16th December, 2013, I made an order which provided, *inter alia*, that the title of the proceedings be amended by deleting the reference to "Irish Life and Permanent plc. trading as Permanent TSB Plaintiff" and substituting "Permanent TSB plc. trading as Permanent TSB Plaintiff" *in lieu* thereof. That order was made having heard counsel for the plaintiff and having heard the defendant who appeared in person. On that occasion, I did not make an order dispensing with re-service of the summons when the title was amended. The defendant maintains that the summons ought to have been re-served. Having regard to the fact that the defendant was in court when the order was made and when the matter came before me again on 11th February, 2014, I decided to dispense with the necessity for re-service as I could see no possible prejudice to the defendant who was at all times aware that the order was made. In any event, it was merely an order affecting the title of the action, having regard to a change of name of the plaintiff. If there was any want of form in failing to re-serve the summons, the matter was capable of rectification by an order dispensing with re-service made in accordance with O.124, r.1 of the Rules of the Superior Courts, 1986 (the "Rules").

3. In his affidavit, the defendant sought that that the plaintiff's application be dismissed, relying upon the judgment of Hardiman J in *Sandy Lane Hotel Ltd. v. Times Newspapers Ltd.* [2011] 3 IR 334, wherein it was held that the incorrect designation of a party to those proceedings on the facts of the case did not constitute a "*clerical error*" such as may be amended by the Master of the High Court, pursuant to O.63, r.1(15) of the Rules. This case does not assist the defendant, however, not least for the reason that the order amending the title of these proceedings was not one granted by the Master pursuant to O.63, r.1(15), but rather was an order summarily made by me pursuant O.15, r.14 to reflect the change of name of the plaintiff company.

4. The defendant sought an order directing that Mr. Leo Gallagher and Ms. Margaret Ferns attend for cross-examination on affidavits sworn by them in connection with these proceedings. The affidavit grounding that application was sworn on 16th December, 2013, which was the date of the last hearing of this matter before me and on which date I adjourned the hearing to 11th February, 2014, as the matter was not suitable to be dealt with in a special summons list on a Monday. In that affidavit, the defendant raises a number of technical points. With regard to Mr. Gallagher's affidavit, he claims that it is not sworn in the correct format in keeping with the provisions of the Bankers' Books Evidence Act 1879 (as amended) (the "Act of 1879"), and he also claims that the affidavit of Mr. Gallagher sworn on 28th August, 2012, has not been amended to reflect the changes directed by the Master of the High Court made on 20th December, 2012. In addition, the defendant denies that he received the demand letters which are exhibits "LG6" and "LG7" in Mr. Gallagher's affidavit.

5. The defendant makes no reference in that affidavit to Ms. Margaret Ferns. However, at the hearing of the motion before me he claims that she was not an officer of the plaintiff within the meaning of the Act of 1879, and she was therefore not competent to swear the affidavit sworn by her on 8th November, 2013.

6. On 16th December, 2013, I directed that the defendant do serve and file any replying affidavit by close of business on Friday, 31st January, 2013, and that the plaintiff do serve and file any replying affidavit by close of business on Thursday, 6th February, 2014. The last affidavit (apart from that dealing with the application for Kelly J. to recuse himself) was sworn by the defendant on 16th December, 2013, and no further affidavits were filed by either party. Notices to cross-examine dated 5th February, 2014, were served by the defendant on Mr. Leo Gallagher and Ms. Margaret Ferns and further notices dated 9th February, 2014, were served on them as there was some confusion about the return date for the hearing of the application.

7. Order 36 of the Rules deals with the appropriate procedures in a hearing of a proceeding commenced by Special Summons. Rule 3 thereof states:-

> *"Save in so far as the Court shall otherwise order, proceedings commenced by special summons shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court."*

8. The procedure governing the service of a notice for cross-examination as referred to in O.36, r.3 is set out in O.40, r. 31 of the Rules, which states:-

> *"When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court... The notice shall be in the Form No. 21 in Appendix C."*

9. The defendant acknowledged the applicability of the provisions of O.40 r.31, but urged upon the court that the rule should be interpreted as allowing for a period of fourteen days beyond the last possible nominal date of filing of the final affidavit in the proceedings. I do not accept that argument. Under O. 40, r. 31, the defendant had 14 days from *" … the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint …"* within which to serve notice to cross-examine. The only affidavit sworn by the defendant in answer to the plaintiff's claim, and the affidavits of Mr. Gallagher and Ms. Ferns, was that of 16th December, 2013. There was no further affidavit filed in reply within the meaning of O.41, r.31. Therefore, the fourteen day period in which the defendant was entitled to serve a notice to cross-examine expired on 31st December, 2013, but, having regard to the provisions of O.122 of the Rules, the last date for service was 2nd January, 2014.

10. While the defendant did swear an affidavit on 11th February, 2014, that was merely for the purpose of seeking that Kelly J. would recuse himself from hearing this matter, and the plaintiffs did not file any further affidavits. I was, and remain, quite satisfied that the notices were not served within the time permitted under O.40 r.31 nor did they take the form required by that rule, as set out at Form 21 Appendix C of the Rules, nor had they been issued from the High Court Central Office prior to their being served.

11. In circumstances where the defendant's service of the notice to cross-examine deponents was not in compliance with the rules, he is not entitled to rely upon same. However, I was also conscious, in considering the matter, that the defendant, as a litigant in person, is at a disadvantage as to his knowledge of the procedure of this court, and accordingly I made enquiries as to whether the circumstances of the case warranted derogation from the strict application of the Rules in the interests of justice.

12. Save for the averment that he did not receive exhibits "LG6" and "LG7", the points he raises are matters for legal argument and do not require the attendance of the deponents to be cross-examined. So far as the two exhibits are concerned, the defendant said he did not receive these as exhibits to the affidavit of Mr. Gallagher and has no recollection of having received them from the bank or having received any demand letter at his last known address which was advised to the bank as No. 162, Richmond Road, Fairview, Dublin 3. The evidence before the court showed that the defendant has been moving from one address to another and is currently residing at an address in Northern Ireland. This evidence establishes that the defendant has been trying to make it as difficult as possible for the plaintiff to serve documents on him.

13. An affidavit was sworn on 12th October, 2012, by Mr. James Cowley, averring that he personally served papers on the defendant, including the Affidavit of Leo Gallagher, *"together with exhibits 'LG1' to 'LG7'"*. Clearly, the appropriate party to be cross-examined in relation to this matter would have been Mr. Cowley, as the question of the service of the exhibits is entirely within his knowledge.

14. It appears from his submissions that the defendant's primary purpose in seeking to cross-examine Mr. Gallagher and Ms. Ferns was in the hope of advancing of an argument grounded upon the Act of 1879. At s.3 of the Act, the well established position with regard to banking records is recited, being that:-

> *"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded".*

Section 4 of the Act states:-

> *"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.*
>
> *Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."*

15. It has long been held that a witness is entitled to give evidence of the bank's records showing the amount due by a customer of the bank and that the records of the bank provide prima facie evidence of the liability. In *Moorview Developments Ltd. v. First Active Plc* [2010] IEHC 275, Clarke J stated at para 4.8:-

> *"As pointed out in Volume 1 of the 1st Edition of Hallsbury's Laws of England at para. 1301, the main object of the Bankers Books Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a subpoena duces tecum. The purpose of the Acts is not, therefore, to facilitate banks in proving matters. The purpose is to enable evidence to be given of the contents of other parties' bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However, in this case a representative of the bank did attend and gave evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them. In those circumstances there is no need for the relevant records to conform with the Bankers Books Evidence Acts. That legislation is irrelevant to a case where the contents of the banks books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books."*

16. In the recent case of The Governor & Company of the *Bank of Ireland v. Paul Keehan* (Unreported, High Court, 16th September, 2013), having considered the judgment of Clarke J in *Moorview* and the judgment of Finlay Geoghegan J in *Bank of Scotland v. Fergus* [2012] IEHC 131, Ryan J held at para 24:-

> *"The judgments of Clarke J and Finlay Geoghegan J reflect an acknowledgment that courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life. Companies maintain computer records that are cited and exhibited in summary proceedings as evidence of debt. Similarly with banks. The records are prima facie evidence that the defendant owes the money to the plaintiff. If the defendant contests the liability in whole or in part, the evidence required to prove the case depends on the issues raised. If a matter is not disputed, there is no need of*

proof. Where a party chooses to stay silent in face of a claim, prima facie proof is sufficient."

17. The defendant relies on the decision of Peart J. in *Bank of Scotland Plc v. Stapleton* [2012] IEHC 549. That case can be distinguished from the present case because the issue before the court arose out of the fact that Bank of Scotland had no physical presence in the State following the transfer of the assets and liabilities of BOSI to BOS as and from 1st January, 2011, and had outsourced the management of its loan portfolio in the State to an independent service company called 'Certus'. It had not transferred its loans to Certus nor was Certus the same bank trading under a new name. Peart J. held that the Act of 1879 did not remove the necessity for a copy document to be proved and that while s. 3 of the Act provides that a copy of an entry shall be received as *prima facie* evidence "*. . . section 4 makes it abundantly clear that this is permissible only where it has first been proved, and this proof must be provided by a partner or officer of the bank*". But the learned judge went on to say at para. 16 of his judgment, "*Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank– in other words an employee of the bank itself, and not some person employed by some other company to whom the task of collecting the debt has been outsourced for whatever reason*." The case can clearly be distinguished from the circumstances before me and is of no comfort to the defendant.

18. The defendant has not averred that the deponents were not officers of the plaintiff bank and were therefore were not entitled to prove the bank's records. Indeed, when invited to make a submission on the point, the defendant merely stated that he didn't know who the deponents were and that there was no evidence before the court as to their capacity. This submission is clearly unsustainable. At the first paragraph of their respective affidavits, Mr. Gallagher and Ms. Ferns plainly and unambiguously state their status as officers of the plaintiff bank, and adequately set out their sources of knowledge. Mr. Gallagher stated that:-

> *"I am a manager in the commercial department of in the Plaintiff's bank and I am duly authorised by the Plaintiff to make this affidavit on its behalf and I do so from facts within my own knowledge and from a perusal of the books, documents and records of the Plaintiff bank save where otherwise appears and where so otherwise appearing I believe same to be true".*

19. Ms. Ferns' averment is identical in its terms, save that she identifies herself as a "*solicitor in the Legal Department of the Plaintiff's bank*". This sworn evidence has not been rebutted. Indeed, in the case of Mr. Gallagher, the defendant seems to tacitly have acknowledged the deponent's standing as an officer of the plaintiff, as he sought to advance an alternative argument that the deponent had taken up a different position with the plaintiff bank since the swearing of the affidavit, which fact, in the defendant's submission, should in some way negate or undermine his sworn evidence. Clearly, this submission was also entirely devoid of merit.

20. The defendant did raise an averment to the effect that Mr. Gallagher had failed in his affidavit to comply with the requirements of the Act of 1879, having failed to provide, "*proof that the book is a banker's book",* and that his evidence should be held to be inadmissible on that basis. However, at the first paragraph of the affidavit, set out in full at para. 18 supra, Mr. Gallagher states that he made his affidavit based on "*a perusal of the books, documents and records of the Plaintiff bank save where otherwise appears*". Section 9(2) of the Act of 1879, (as amended by the s.2 of the Bankers' Book Evidence (Amendment) Act 1959 and s.131 of the Central Bank Act 1989) defines "bankers' books" as follows:-

> *"Expressions in this Act relating to "bankers' books"—*
>
> *(a) include any records used in the ordinary business of a bank, or used in the transfer department of a bank acting as registrar of securities, whether—*
>
> *(i) comprised in bound volume, loose-leaf binders or other loose-leaf filing systems, loose-leaf ledger sheets, pages, folios or cards, or*
>
> *(ii) kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form, and*
>
> *(b) cover documents in manuscript, documents which are typed, printed, stencilled or created by any other mechanical or partly mechanical process in use from time to time and documents which are produced by any photographic or photostatic process."*

21. It is abundantly clear that the deponent's averment encompasses all of the classes of documents necessary to satisfy the requirements of the Act of 1879. The defendant has offered no basis for this court to hold that "*books, documents and records of the Plaintiff bank*" are not "*bankers' books*" for the purposes of the Act of 1879.

22. For the foregoing reasons, I do not accept that the defendant has made out a sustainable defence at law based on the Act of 1879. Furthermore, it is impossible to envisage how the defendant's case may be supported by the cross-examination of Mr. Gallagher and Ms. Ferns, in the absence of a scintilla of evidence to support the proposition that the deponents are not officers of the plaintiff bank, nor evidence of any other factual disputes on which they would be competent to testify. While I was quite prepared to make the requisite orders curing the procedural defects in the defendant's application, having heard his submissions, I reached the view that the justice of the case did not require the cross-examination of Mr. Gallagher and Ms. Ferns, and I did not see fit to make such order.

23. If I am in error in my interpretation of O.41, r.3 of the Rules, I am satisfied, for the foregoing reasons, that this is an appropriate case in which to grant special leave for the affidavits of Mr. Gallagher and Ms. Ferns to be admitted in the absence of cross-examination, pursuant to O.36, r.3 and O.40, r. 31.

24. I am satisfied on the evidence that a letter of offer made by the plaintiff (or its predecessor) for €1.2million, Reference 38447273, was accepted by the defendant on 20th December, 2002. The loan was drawn down on 20th December, 2002. The terms of the loan required the defendant to mortgage the properties at Nos. 2, 3 and 4, Lower Fairview Avenue, Fairview, Dublin 3 and on 23rd December, 2002, the defendant duly executed the mortgage which was registered in the Registry of Deeds on 6th February, 2003. The land was unregistered land. This is of some relevance because in the course of the hearing, the defendant sought to rely on the judgment of Dunne J. in *Start Mortgages Ltd. v. Gunn & Anor.* [2011] IEHC 275. But it is clear that that judgment only affected registered land and the consequences of the repeal of s. 62(7) of the Registration of Title Act 1964, by virtue of the provisions of the Land and Conveyancing Law Reform Act 2009. This legislation has no bearing on unregistered land and cannot afford a defence to the plaintiff's claim. In any event, the defendant only raised this point at the hearing and it is not raised by reference to any averment of fact on affidavit which sets out a defence.

25. At the hearing of the application, the defendant raised a number of further submissions which he said gave him a defence to the proceedings. He claimed that the letter of demand was not in the proper format and was sent to the wrong address. I have already stated earlier in this judgment that there is evidence to show that the defendant was moving from one address to another and has moved to an address in Northern Ireland, which, I am satisfied, was for the purpose of trying to make it difficult for the plaintiff or any other creditor to serve him. He also raises issues about the family home and says that at least one of the properties sought to be possessed in these proceedings is a family home. There is no evidence before the court that any of the properties were a family home at the time when the monies were lent and it seems clear on the face of the documents that the monies were lent in respect of a bed and breakfast business which was carried out at the premises concerned. There was also evidence given to the court that the defendant is a separated man. I found no defect in the letters of demand.

26. The defendant also says that the site of each property described in the proceedings is not properly defined and not properly described in the affidavit grounding the proceedings. In his replying affidavit, the defendant claims that "*the affidavit of Leo Gallagher has not been amended as directed the Master of the High Court or reflect [sic] the Master's Order of 20 [sic] Day of December 2012*". Regarding this matter, the defendant appears to be operating under a misapprehension as to the fact that an affidavit cannot be amended once it has been sworn and filed, but rather the error or amendment should be enumerated in a supplemental affidavit. Notwithstanding his understandable confusion as to these procedural matters, the point raised does not offer a defence as it is quite clear from the pleadings and affidavits what properties came within the ambit of the proceedings.

27. The amendments to the summons at issue for the purposes of this argument consisted of the substitution of the phrase "*property*" for the phrase "*dwellinghouse and property*", and the removal of the words "*more particularly described as number 2 Fairview Avenue, Clontarf, situate in the parish of Clontarf and City of Dublin*", following the description of the first property in these proceedings, which was set out as being "*No. 2 Fairview Avenue, Fairview in the City of Dublin*". A similar amendment was made in relation to the third property in these proceedings, No. 4 Fairview Avenue. A booklet of title was exhibited to Mr. Gallagher's affidavit, further evidencing the position, the veracity of which was not disputed by the defendant. I am satisfied that the errors which were corrected by these amendments are of the nature of "*clerical errors*", as considered by the Supreme Court in *Sandy Lane Hotel Ltd. v. Times Newspapers Ltd.* [2011] 3 IR 334, and that in the circumstances of the case it was not necessary for the plaintiff to file a supplemental affidavit, given that the identity of the properties to which these proceedings refer is entirely clear in both the summons and affidavit.

28. The defendant, in his submissions, also questioned whether the entire sum claimed is due and owing. It is of significance that the defendant did not file any affidavit denying that he entered into the loan agreement and that he mortgaged the properties. Nor has he put in an affidavit denying the sums due. In an order made by this Court on 16th December, 2013, I directed that the defendant do serve and file any replying affidavit by close of business on Friday, 31st January, 2013, and that the plaintiff do serve and file any replying affidavit by close of business on Thursday, 6th February, 2014. The defendant complains that the plaintiff did not put in any further affidavits. But it did not do so simply because the defendant himself failed to file any further affidavit in reply to the plaintiff's case following my order on 16th December, 2013, and there is therefore no affidavit before the court which puts the agreement or the sum claimed in dispute. While the defendant raised the various points I have referred to above, in the course of the hearing he produced no evidence in support of these contentions. If he is disputing that the entire sum is due and owing then he should have put in an affidavit saying what amount of the debt (if any) was disputed. But he has failed to do so. I am satisfied on the evidence that the plaintiff entered into the loans, that the properties set out in the special summons were duly mortgaged as security for the loan, and that the loan is in default. The plaintiff therefore is entitled to an order for possession of the properties described in the Schedule set out in the special summons. If the defendant wishes to dispute part of the debt he can take whatever steps he thinks necessary for that purpose in due course. But he has not raised any defence to the plaintiff's claim for possession in this case.

29. I therefore grant the plaintiff an order for possession of the lands and premises set out in the Schedule to the special summons and I will hear the parties with regard to any ancillary orders required and whether or not a stay should be granted on the order.