

THE HIGH COURT

[2015] 5544 P

BETWEEN

THOMAS KEARNEY

PLAINTIFF

AND

ALLSOP IRELAND, DNG GILLESPIE LOWE, AND JOHN GILLESPIE

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan on the 15th day of March, 2016.

1. The first and third named defendants in these proceedings seek an order pursuant to Order 19, rule 18 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the Court striking out the plaintiff's claim on the grounds that the pleadings disclose no reasonable cause of action and that the proceedings are frivolous, vexatious, and bound to fail.

2. The background to the within proceedings is that the plaintiff was advanced sums of money by IIB Bank Ireland Limited (later IIB Bank Ireland, and, following a transfer of business, KBC Bank Ireland plc) and, as security for same, granted legal charges over seven residential properties. The third defendant was appointed by KBC Bank Ireland plc as receiver over the seven properties pursuant to two deeds of appointment of a receiver dated the 28th September, 2012.

3. The first named defendant carries on its principal business as an independent property consultancy carrying out residential and commercial auctions on behalf of its clients. On or about the 5th June, 2015, the first named defendant was engaged by the third named defendant to carry out a public auction for the sale of the seven residential properties, the details of which are set out in the grounding affidavit of Darren Doyle, Head of Legal of the first named defendant, dated the 12th January, 2016.

4. In his statement of claim, the plaintiff has alleged against the first named defendants misrepresentation and deceit, professional negligence, breach of fiduciary duty, economic loss, a common law duty of care, trespass, and the wrongful interference with articles 40.4 and 43 of Bunreacht na hEireann. The plaintiff alleges that the appointment of the third named defendant as receiver over the properties is invalid and that, when notified of the allegation of invalidity, the first named defendants misrepresented the position by not accepting the alleged invalidity of the appointment of the third named defendant and instead proceeded to attempt to sell the receivership properties.

5. The plaintiff submits that the first named defendants had notice of the plaintiff's intention to issue proceedings and they progressed with the sale of the properties, and that they duly "conspired" with the third named defendant to dispose of the plaintiff's assets, as set out in the plaintiff's replying affidavit, dated the 25th January, 2016.

6. In relation to the reliefs as sought against the third named defendant, in his statement of claim the plaintiff seeks, *inter alia*, a declaration that the receivership is invalid and void, an order setting aside the receivership in addition to a claim for damages for misrepresentation, deceit, negligence, breach of fiduciary duty, economic loss, duty of care, trespass, and wrongful interference with constitutional rights.

7. The plaintiff takes issue with the re-registration of IIB Homeloans Ltd into an unlimited company, IIB Homeloans, by special resolution dated the 30th September, 2008, which re-registration is reflected in a certificate of incorporation from the CRO dated the 16th October, 2008. IIB Homeloans then changed its corporate name to KBC Mortgage Bank, by special resolution dated the 2nd October, 2008, which change in name was the subject of a certificate of incorporation from the CRO dated 24th October, 2008. KBC Mortgage Bank then transferred its entire banking business to KBC Bank Ireland plc on 26th June, 2009, by way of Statutory Instrument No. 125 of 2009, constituting approval for same by the Minister for Finance under section 33 of the Central Bank Act 1971. The plaintiff alleges that due to the failure to register the security in the receiver properties to the name of IIB Homeloans, on the re-registration of IIB Homeloans as an unlimited company, the interest of IIB Homeloans Limited in the security in the receivership properties never passed to IIB Homeloans.

8. The plaintiff bases this argument on section 64(2) of the Registration of Title Act, 1964. Section 64 provides as follows:

"64.—(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge.

(2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, or in such other form as may appear to the Registrar to be sufficient to transfer the charge, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge.

(3) The Registrar shall deliver to the registered transferee a certificate of charge in the prescribed form.

(4) On registration of the transferee of a charge, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts, and the transferee shall—

(a) have the same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration, as the case may be; and

(b) have for enforcing his charge the same rights and powers in respect of the land as if the charge had been originally created in his favour."

The reality of the situation is, however, that section 64(1) provides that the registered owner of a charge may transfer a charge and that, where an effective transfer occurs, the transferee shall be registered as owner. Section 64(2) does not create any obligation upon a company to transfer a charge in the event of re-registration as an unlimited company.

9. Further, section 52 of the Companies (Amendment) Act, 1983, governs the re-registration of a limited company as unlimited and section 52(7) provides that "the re-registration of a limited company as an unlimited company pursuant to this Act shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status." This statutory provision reflects the intention of the Oireachtas that a valid re-registration does not create a new corporate entity and has no effect upon the rights and obligations of the company.

10. Further, as counsel for the third named defendant, Ms. Hill, submits, as can be seen from the deeds of appointment of the receiver dated the 28th September, 2012, the third named defendant was appointed pursuant to the powers contained in the Deeds of Mortgage dated the 24th December, 2004, and the 20th April, 2005. The power of the Bank to appoint a receiver to the mortgaged property is provided for in Clause 11(viii) (b) of the Mortgage, which provides that, at any time after the execution of the Mortgage, the Bank may, without any further consent from or notice to the borrower or any other person, appoint a receiver to collect and receive the rents and profits of the mortgaged premises. The business of KBC Mortgage Bank was transferred to the Bank pursuant to Statutory Instrument No. 125 of 2009 and therefore the Bank was entitled to rely on the powers in the Deeds of Mortgage to appoint the receiver. This is set out in the affidavit of the third named defendant, John Gillespie, dated the 26th January, 2016.

11. The plaintiff has already raised the issue of the validity of the appointment of the third named defendant in proceedings against KBC Bank entitled *Thomas Kearney v KBC Bank Ireland plc and John Reynolds* [2014] IEHC 260 and bearing Record Number 2012/9180 P ("The 2012 Proceedings") and is the subject matter of a judgment of this Court (Birmingham J.) as delivered on the 16th day of May, 2014, in which the Court concluded that "the proceedings [were] unmeritorious, so unmeritorious indeed as to amount to an abuse of process and are bound to fail." This decision was appealed by the plaintiff and is currently awaiting a hearing in the Court of Appeal. The plaintiff now wishes to adduce new evidence before the Court of Appeal directly in his submission to this Court touching on the validity of the appointment of the third named defendant herein and it appears the plaintiff will bring a motion before the Court of Appeal in this regard in default of agreement with the solicitor to KBC Bank, a defendant in those proceedings.

12. It is not appropriate for this Court to consider any determination on this application or the validity or otherwise of the appointment of the receiver as that issue is currently the subject matter of the decision of Birmingham J. in the 2012 proceedings which is currently under appeal to the Court of Appeal, however, the submissions by counsel for the third named defendant in relation to the appointment of the receiver are relevant in the context of the present application to strike out the plaintiff's proceedings as against him.

13. Whilst the plaintiff did not, in his 2012 proceedings with KBC Bank Ireland plc and John Reynolds, raise the precise issue now raised as regards the invalidity of the appointment of the receiver, he did undoubtedly challenge the appointment of the third named defendant as receiver by the Bank, who are a party in the 2012 proceedings but not to the present proceedings which were only commenced following the judgment of Birmingham J. as handed down on the 16th day of May, 2014. Neither the first nor third named defendants herein were defendants to the 2012 proceedings which were prosecuted against KBC Bank Ireland plc and its former Chief Executive.

14. Counsel on behalf of the third named defendant submits that the rule in *Henderson v Henderson* [1843] 3 Hare 100 should apply here, and that the plaintiff's approach in seeking to have the same issue re-litigated upon different grounds that were available to him in his earlier proceedings is an abuse of the court's process. The rule in *Henderson v Henderson* states that:

"[Where] a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

15. While the defendants are different in the present proceedings from those in the 2012 proceedings, counsel submits that in *Re Vantive Holdings* [2009] IESC 340, the Supreme Court held that while the rule in *Henderson v Henderson* ordinarily applies to successive proceedings between the same parties, there still remained "the inherent jurisdiction of the court to protect the integrity of the due process of the administration of justice and the finality, in principle, of a judicial decision."

16. Counsel for the third named defendant also referred the Court to the Supreme Court decision of *McAuley v McDermot* [1997] 2 ILRM where, in the context of a road traffic accident, the doctrine of *res judicata* was explored. In his judgment, Keane J. stated that

"[the Courts] are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of *res judicata* where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. *Res judicata* must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a law suit which has already been decided."

Counsel submits that the plaintiff in the within proceedings is merely attempting to escape from the findings as found by Birmingham J. which are binding upon him unless and until the Court of Appeal determines otherwise.

17. It should be noted that during the hearing of this application, the plaintiff canvassed his allegations in relation to the re-registration of IIB Homeloans Ltd as IIB Homeloans, and the change by IIB Homeloans of its name to KBC Mortgage Bank. The Court informed the plaintiff that these issues were not relevant to the present application because KBC Bank is not a defendant in these proceedings, and if he wished to raise these new legal arguments then that is all a matter for the Court of Appeal in the 2012 proceedings. In a letter from Arthur Cox, solicitors for KBC Bank (in the 2012 Proceedings), dated the 21st January, 2016, the plaintiff was informed that if he wishes to advance an entirely new argument in relation to the re-registration issue then he should issue a motion seeking leave to admit new evidence before the Court of Appeal. While it is correct that this Court has the jurisdiction to allow the plaintiff to amend his statement of claim in the present proceedings, I do not consider these issues to be relevant to the within

proceedings for the reasons as outlined, principally because the Bank is not a defendant.

18. It is the view of this Court that, in the present case, the first named defendant was merely fulfilling its professional obligations to the third named defendant by putting for sale by auction the seven properties the subject matter of the receivership. It should also be noted that notwithstanding what has been submitted to the Court by counsel for the first named defendant with regard to the validity or otherwise of the appointment of the third named defendant as receiver, that really has no bearing on the proceedings as between the plaintiff and the first named defendants. The plaintiff contends that the first named defendant was legally bound to withdraw the properties from auction once it received notice from the plaintiff of his intention to bring proceedings, this allegation is of no legal merit as the first named defendant was merely an agent of the third named defendant and was carrying out its duty to its client. As a result, the various allegations levelled against the first named defendant are bound to fail.

19. In *Farley v Ireland*, unreported, Supreme Court, 1 May, 1997, Barron J. stated that if a plaintiff "has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious." Having regard to the statement of claim in the within proceedings and the submissions of both the plaintiff herein and the first named defendant, it is clear that the plaintiff's claim as against the first named defendant has no reasonable chance of succeeding and is therefore frivolous. The hardship on the first named defendant, in defending a frivolous action, renders the proceedings vexatious.

20. Further, the proceedings as against the third named defendant are an abuse of process because, as set out herein, the plaintiff has previously sought to litigate the issue of the validity of the appointment of the third named defendant in the 2012 proceedings, in which proceedings the plaintiff had every opportunity to canvass any issue he wished directly with the Bank as regards the appointment of the third named defendant in these proceedings as receiver over the seven properties. A plaintiff is not entitled to litigate in a second set of proceedings matters which have previously been a cause of action and litigated and determined in previous proceedings. While the defendants are different in the instant proceedings, I am satisfied, having considered the Supreme Court decisions in *Re Vantive Holdings* and *McAuley v McDermot* as opened to the Court, that insofar as the plaintiff seeks to challenge the validity of the appointment of the third named defendant as receiver, in these proceedings, such a cause of action represents an abuse of process where the same cause of action is the subject matter of a judgment of this Court and is the subject matter of an appeal to the Court of Appeal.

21. I therefore accede to the application of the first named defendants to strike out the plaintiff's proceedings as against them, pursuant to Order 19 Rule 18 of the Rules of the Superior Courts and the inherent jurisdiction of the Court, for being frivolous, vexatious, and bound to fail. I further accede to the application of the third named defendant to strike out the plaintiff's proceedings pursuant to the Court's inherent jurisdiction as they represent an abuse of process.