Neutral Citation: [2014] IEHC 475

THE HIGH COURT

[2014 No. 7937 P]

BETWEEN

GERALDINE BYRNE AND GERARD BYRNE

PLAINTIFFS/APPLICANTS

AND

SIMON COYLE

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 14th of October 2014

Introduction
1. This is an application by the owners of two mortgaged properties ("the applicants") for an interlocutory injunction restraining a receiver ("the respondent") from taking any steps in relation to those properties until the determination of a complaint that the applicants have made to the Financial Services Ombudsman ("the FSO") against the mortgagee bank ("the bank").

The proceedings
2. In the underlying proceedings, the applicants seek (as the only substantive relief claimed) an injunction in precisely the same terms. The plenary summons claiming that relief issued on the 11th September 2014. While an appearance was entered on behalf of the receiver on the 16th September 2014, no statement of claim has yet been delivered.

The background
3. The following facts are asserted in the affidavits sworn by the applicants' solicitor on their behalf. The two properties concerned, one in West Cork and one in North County Dublin, were mortgaged by the applicants, who were then married and living together, in 2006. The West Cork property was then the applicants' holiday home, having once been the wife's childhood family home. The applicants separated in 2008, since which time their financial circumstances have significantly deteriorated. The husband is currently living in the West Cork property on a temporary basis. The wife continues to reside in the marital family home in Dublin (which, it appears, is not mortgaged to the bank) but would hope to retire to the West Cork property eventually. The North County Dublin property is an apartment that was purchased as an investment.

4. While the averments made on the applicants' behalf are terse and the documentation exhibited is, at best, an incomplete record of the interactions between the applicants and the bank, it would seem that the applicants began to experience difficulty in repaying the relevant loans in 2009. There appears to have been an extensive correspondence between the applicants and the bank since then concerning the possible restructuring of the applicant's indebtedness to the bank. Some parts of that correspondence are exhibited to the grounding affidavit of the applicants' solicitor. From that patchy record, it appears that the applicants and their solicitor take the view that the bank has not provided all of the documentation and information sought from it on the applicants' behalf for the purpose of that process, whereas the bank takes the view that it has responded to all of the queries raised with it by, or on behalf of, the applicants. The bank has acknowledged that there was a delay on its part in dealing with certain queries and has apologised for that delay.

5. The applicants' solicitor avers that he filed a complaint with the FSO on the applicants' behalf on the 13th August 2014 and exhibits the relevant letter. That letter states, in relevant part:

> "I would be obliged if you would investigate the issue of the [bank's] failure to:
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> 1. Provide satisfactory response to my client's communications dating as far back as 2009; and
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> 2. Failure to provide requested documentation."

6. Counsel for the applicants submits that, contrary to what is averred by the applicants' solicitor, the letter concerned does not contain the applicants' complaint to the FSO but is, rather, in the nature of a preliminary step in the complaints process.

7. The applicants' solicitor swore a further affidavit on their behalf on the 3rd October 2014. At paragraph 3 he avers as follows:

> "I say that the Applicants' complaints to the [FSO] include, but may not be restricted to, complaints that by failing to respond adequately to the Applicants' correspondence the bank is in breach of the Consumer Protection Code 2012 ("the Code")(by which it has conceded it is governed in relation to the properties in question)- in particular in relation to [Provision] 8.3 of the Code which states "Where an account is in arrears, a regulated entity must seek to agree an approach (whether with a personal consumer or through a third party nominated by the personal consumer in accordance with Provision 8.5) that will assist the personal consumer in resolving the arrears." Further that the bank has refused and/or failed to provide the Applicants with repeatedly requested documentation that would enable the Applicants' solicitors to examine terms and conditions by which the bank claims the Applicants are bound. Further, that the inordinate delays by the bank, since acknowledged by the bank, in dealing with the Applicants' proposals for repayment of the relevant mortgages resulted in a worsening of the Applicants' financial situation and their ability to repay the mortgages."

8. The applicants' solicitor does not exhibit a copy of the more extensive complaint to the FSO just described, nor does he state when that more extensive complaint was made.

9. It seems that, for the purpose of the present interlocutory application, the Court is being invited to conclude that the applicants have raised a real or *bona fide* issue concerning whether, as they contend, the bank has failed to seek to agree an approach that will assist them as personal consumers in resolving their arrears, contrary to Provision 8.3 of the 2012 Consumer Protection Code.

10. However, as already noted, the applicants have exhibited only a portion of the correspondence evidencing the extensive interaction that they have had with the bank. Although the applicants have exhibited a lengthy letter that the bank wrote to their solicitor on the 10th June 2014, they have not exhibited substantial parts of the prior correspondence referred to in that letter. For example, the letter recites that it is written in response to an undated letter from the applicants' solicitor, received on the 10th January 2014, which, it would appear, has not been exhibited. Perhaps more significantly, the letter contains a summary or recital of the extensive prior correspondence between the applicants and the bank, including: a letter that the applicants' solicitor wrote to the bank on the 4th August 2013, putting forward a proposal in respect of the restructuring of the applicants' indebtedness to the bank; the bank's reply of the 5th September 2013, outlining the information it would require from the applicants to allow it to assess that proposal; a letter from the bank to the first named applicant, dated the 26th September 2013, warning her of the consequences of not cooperating with the bank's requests for a proposal and supporting financial documentation in respect of the relevant loan accounts; and a letter from the bank of the 29th October 2013 demanding full repayment of three of the four loan accounts associated with the two properties at issue. None of this documentation is exhibited, despite its obvious materiality to the case that the applicants make *i.e.* that the bank has failed to seek to agree an approach that will assist them as personal consumers in resolving their arrears, contrary to Provision 8.3 of the Consumer Protection Code.

11. Moreover, for reasons that are entirely unclear, the applicants have elected not to make the bank a party to these proceedings. Instead, they seek relief solely against the respondent and the sole relief that they seek in the proceedings, as well as in the present application, is an injunction restraining the respondent from taking any steps in relation to those properties until the determination of the applicants' complaint to the FSO against the bank Yet the applicants accept, as their solicitor has averred, that they do not query the validity of the respondent's appointment as receiver. Indeed, the respondent has sworn an affidavit on the 25th September 2014, to which he has exhibited a copy of his deeds of appointment by the bank in respect of the relevant properties, each of which is dated the 20th August 2014.

12. The incongruity of this situation is nowhere better illustrated than in the following averment of the applicants' solicitor:

> "I say that, at this juncture, the [a]pplicants ask only to be allowed to engage with the bank in a meaningful way and would be willing to engage in mediation with the bank should it be recommended by the FSO."

13. It is evident from the foregoing averment that the applicants' real dispute is with the bank and that the real remedy they seek is some form of further engagement with the bank in search of a resolution of their loan arrears more acceptable to them than the present receivership. However, there seems to be some misunderstanding on the applicants' part concerning the nature of the mediation process in the context of a complaint to the FSO.

14. Under s. 57BK of the Central Bank and Financial Services Authority of Ireland Act 2004 ("the 2004 Act"), the principal function of the FSO is to deal with complaints "by mediation and, where necessary, by investigation and adjudication." Under s. 57CA of the 2004 Act the FSO is required, on receiving a complaint, to try to resolve it by mediation. Accordingly, an invitation to mediate is a component part of the statutory complaints process, rather than a discretionary recommendation on the part of the FSO. Moreover, it is the complaint that is to be the subject of the relevant mediation- in this instance, primarily the allegation that the bank failed to seek to agree an approach to assist the applicants in resolving their arrears, contrary to Provision 8.3 of the Consumer Protection Code. It is no part of the statutory role or function of the FSO to seek to mediate an agreement between the applicants and the bank concerning the applicants' loan arrears.

The arguments

15. In seeking an interlocutory injunction against the receiver, rather than the bank, on the basis of the bank's alleged breach of the 2012 Consumer Protection Code, the argument put forward on behalf of the applicants is necessarily more elaborate than it otherwise might be. Instead of the argument that the terms of the 2012 Consumer Protection Code are justiciable and enforceable as between the applicants and the bank, the applicants rely on the argument that they are entitled to an order restraining any other party (in this instance, the receiver) from engaging in any action capable of rendering nugatory any redress that the applicants might ultimately be granted in respect of their complaint against the bank to the FSO.

16. The applicants rely on a number of disparate propositions in support of that argument. The first is that any breach of a code of conduct promulgated under s. 117 of the Central Bank Act 1989 may prevent a financial institution from taking possession of a property, where it is otherwise entitled to do so: *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, applying *Stepstone Mortgage Funding Ltd. v. Fitzell* [2012] IEHC 142; *cf Zurich Bank v. McConnon* [2011] IEHC 75. Of course, both *Duff* and *Fitzell* concerned breaches of the quite separate *Code of Conduct on Mortgage Arrears*. Both of those cases involved a finding (rather than an allegation) that the code had been breached. In both of those cases, the breach concerned was relied on in defence of an application for possession, rather than as the basis of a separate claim against a party not governed by the code. And in both of those cases the financial institution that was alleged to be in breach of the code concerned was a party to the relevant proceedings.

17. The second proposition relied on by the applicants is that, as receiver of their mortgaged properties, the respondent is their agent. That proposition is entirely uncontroversial and is not in dispute. Section 24(2) of the Conveyancing Act 1881 expressly provides that a receiver appointed under a mortgage deed "shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." In this case, each of the relevant mortgage deeds contains a clause that "any receiver appointed by the [m]ortgagee under the power to appoint a receiver shall be deemed to be the agent of the [m]ortgagor and the [m]ortgagor shall be solely responsible for the acts, omissions or defaults of such receiver...."

18. In *Bula Ltd v. Crowley* [2003] 2 ILRM 401 (at p. 424), Denham J. adopted the following statement of the law by Fox LJ in *Gomba Holdings (UK) Ltd v. Minories Finance Ltd* [1989] BCLC 115 Fox LJ (at p. 117):

> "The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder, on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver, since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership."

19. Against the background of the legal framework just described, the basis upon which the applicants assert that the status of the respondent as their agent informs or assists the claim that they seek to make against him has not been clarified. Insofar as the applicants contend that the discharge by the receiver of his obligations as such *vis a vis* the bank (as mortgagee) could, or would, amount to the breach of some duty of care owed by the respondent to the applicants, it is difficult to see the connection between that issue and the device by which the respondent, as receiver, is deemed to be the agent of the applicants, as mortgagors.

20. In response to the applicants' arguments, the respondent contends that the plenary summons in the proceedings discloses no cause of action against him and, in consequence, not only that the present application should be refused but also that the proceedings should be struck out as manifestly ill conceived and bound to fail.

The test

21. The applicants submit that their application is governed by the *Campus Oil* guidelines and that what they must establish is, in the words of O'Higgins C.J. in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 (at 107), that they have raised a "fair *bona fide* question"; that an award of damages would be inadequate to compensate them for any loss they might suffer if an injunction is not granted; and that the balance of convenience favours granting an injunction.

22. Even if that were so, the Court would have a number of concerns. In assessing whether the applicants have raised a fair *bona fide* question to be tried, I cannot ignore the fact hat the applicants have disclosed only a portion of the correspondence that they have had with the bank. Nor can I ignore the fact that the bank is not a party to these proceedings and has not been given an opportunity to be heard in the matter. Either the applicants are arguing that the mere fact that they have made a complaint to the FSO entitles them to injunctive relief against a party other than the bank without any consideration whatsoever of whether their complaint raises a fair or *bona fide* issue concerning the bank's compliance with the 2012 Consumer Protection Code, or they are arguing that this Court should address that question at the interlocutory stage without affording the bank an opportunity to be heard. Neither argument is especially attractive.

23. Assuming, *arguendo*, that the applicants have raised a "fair *bona fide* question" in the circumstances just described, under the *Campus Oil* guidelines the Court would next have to consider whether an award of damages would be an adequate remedy for either party. It is plain that damages would be an adequate remedy for the applicants in respect of any loss or damage occasioned by any action of the receiver in relation to their North Dublin investment property. In respect of the West Cork property, they contend that it has an irreplaceable sentimental value for the first named applicant and is currently being used as temporary accommodation by the second named applicant, such that damages would not be an adequate remedy, were the receiver to sell it.

24. On the other hand, the applicants have not offered any undertaking as to damage. Even if they were to proffer such an undertaking at this stage, the applicants' professed inability to service each of the loan agreements now at issue in accordance with its terms, makes it impossible to conclude that any undertaking as to damages given by the applicants would be likely to adequately compensate the respondent, if the applicants do not succeed in the substantive action. I pause here to note that it is unsatisfactory that there is no evidence before me from the applicants themselves concerning their personal or financial circumstances that would allow the Court to properly assess the position.

25. Were the Court to apply the *Campus Oil* guidelines in the usual way, it would next have to consider the balance of convenience. For all of the reasons set out in the preceding paragraphs, it would be difficult to avoid the conclusion that the balance of convenience does not favour the grant of an injunction in the terms sought.

26. However, in this case it is clear that the grant of an interlocutory injunction would have the practical effect of determining the proceedings as a whole because the applicants would then have obtained in advance of trial the very relief that they are seeking at the trial of the action.

27. As I recently had occasion to point out in *Rogers v. An Post* [2014] IEHC 412, in *Jacob v. Irish Amateur Rowing Union Ltd* [2008] 4 I.R. 731, Laffoy J. addressed a broadly analogous situation. The plaintiff sought an order Ireland in the single scull class at the 2008 Olympic Games. The plaintiff argued that he had three separate causes of action against the defendant: a public law claim of legitimate expectation; a private law claim for breach of contract; and a constitutional claim that he had been deprived of his constitutional right to fair procedures. The defendant submitted that the ordinary principles in relation to interlocutory relief did not apply where the grant of interlocutory relief would effectively resolve the matter in favour of the plaintiff.

28. Laffoy J. noted that in *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396, the starting point for Lord Diplock's analysis of the principles applicable to the determination of an application for an interlocutory injunction was that the grant of an interlocutory injunction is both temporary and discretionary

29. Laffoy J. next pointed to the following observations with which O'Higgins C.J. prefaced his analysis in *Campus Oil v. Minister for Industry (No.2), supra*, of the principles applicable for an interlocutory injunction (at pp. 105-106 of the report):

> "Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *status quo* until the hearing, The application for an interlocutory injunction is often treated by the parties as the trial of the action. When that happens the rights of the parties are finally determined on the interlocutory motion. In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the court must exercise its discretion (to grant interlocutory relief) with due regard to certain well-established principles."

30. Laffoy J. had particular regard to the judgment of the English Court of Appeal in *Cayne v. Global Natural Resources plc* [1984] 1 All E.R. 225. In that case the plaintiff shareholders applied for an interlocutory injunction to restrain the defendant company from implementing a merger agreement (and from proceeding with the associated allotment of shares) prior to the company's impending A.G.M. The plaintiff shareholders contended that the merger agreement had been concluded specifically to dilute the votes of the existing shareholders rather than in pursuit of any legitimate commercial goal of the company, with the aim of defeating a motion to remove the company's directors at the A.G.M. If the injunction were granted, the balance of power in the company would remain the same until after the crucial vote was taken at the A.G.M. and the plaintiffs would therefore obtain the result they sought in the proceedings. Kerr L.J. began his speech by considering the scope of application of the test set out in *American Cyanamid*, *supra*, stating (at 235): "The test for the application of *Cyanamid* is therefore whether the case is one where the court can see that it is likely to go to trial at the instance of the plaintiffs, and whether the grant of an injunction is therefore appropriate or not, as a way of holding the situation in the interim." He continued (at 236):

"[T]he overriding test for present purposes is that, if an injunction is granted, the effective contest between the parties is likely to have been finally decided summarily in favour of the plaintiffs."

31. Laffoy J. went on to quote the following passage from the judgment of May L.J. (at p. 238):

> "With these considerations in mind, I do not think that in cases such as the present, whatever the strengths of either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the court can legitimately, nor is it bound, to apply the *Cyanamid* guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.
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> It may well be that the same ultimate consideration that the court has in mind, namely the question whether it is likely to do an injustice.
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> Where a plaintiff brings an application for an injunction, I think that it is, in general, an injustice to grant one at the interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined at a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional."

32. Applying the principles summarised above to the facts in *Jacob*, Laffoy J. concluded that it was not possible, in view of the conflicts of evidence between the parties to reach a meaningful conclusion of the relative strengths and weaknesses of the case put forward by the plaintiff and the defendant. The best that the court could do was to consider the question suggested by May L.J. in *Cayne v. Global Natural Resources plc*, *supra*: whether the plaintiff's case on the evidence is so strong that to refuse an injunction would constitute an injustice. Laffoy J. concluded that the plaintiff's case was not as strong as that and, consequently, refused to grant an injunction.

Conclusion

33. Addressing the circumstances of this case by reference to the foregoing principles, I have come to the following conclusions:

> (a) An injunction is an equitable remedy and, as such, the grant of an injunction is discretionary. Where the applicants' real complaint is against the bank and where the ultimate goal of the applicants' proceedings is "meaningful engagement with the bank", in the context of the applicants' assertion that no such engagement has so far occurred, I am satisfied that it would be entirely inequitable to grant the interlocutory relief that the applicants now seek against a validly appointed receiver rather than the bank in an application, and in proceedings, to which the bank is not a party.
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> (b) In this case, the temporal scope of the interlocutory injunction sought is that the respondent should be restrained from taking any steps on foot of his appointment as receiver pending the determination of the applicants' complaint against the bank to the FSO. It is not an injunction pending trial. That fact illustrates what the papers in the case confirm; that the injunction now sought on an interlocutory basis is in precisely the same terms as the injunction that forms the principal substantive relief sought at trial. That in tum suggests very strongly that the case is not one that is likely to go to trial at the instance of the plaintiffs, should they obtain the relief that they seek in these proceedings on an interlocutory basis in advance of the trial of their claim to that relief.
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> (c) It follows that the grant of an interlocutory injunction is not appropriate in this case as a means of maintaining the *status quo* pending such trial, since, if the injunction sought is granted, the effective contest between the parties is likely to have been finally decided summarily in favour of the applicants.
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> (d) In the premises, it would be an injustice to grant the injunction now sought at the interlocutory stage, as there is a very great likelihood that this would effectively preclude the respondent from the opportunity of having his rights determined at trial.
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> (e) I am unable to conclude that this is an exceptional case in which the plaintiff's evidence is so strong that to refuse an injunction and allow the case to go to trial would be an unnecessary waste of time and expense, or that it would do an overwhelming injustice to the plaintiff. It is not possible for the court to reach a meaningful conclusion on the strength or weakness of the applicants' case in view of the partial record relied upon by the applicants for the purpose of the present application and the fact that the bank has not been afforded an opportunity to be heard in response to the applicants' claims.
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> (f) In light of the conclusions that I have reached and in view of the fact that a complaint is pending before the FSO, it is important to emphasise that I have not purported to finally decide any factual or legal aspects of the applicants' claim. I fully appreciate that, as Hardiman J. observed in *Dunne v. Dun Laoghaire Rathdown Co Council* [2003] 1 I.R. 567 (at 581), it would not be appropriate to do so when, at trial, the evidence may be different and more ample and the law will be debated at greater length.